# Redistricting in Alabama and the Voting Rights Act

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**[00:00:00] Jeffrey Rosen:** Hello friends. In honor of the 234th Anniversary, the Ratification of the U.S. Constitution, the National Constitution Center is launching a crowdfunded campaign. Every dollar you give to We the People, will be doubled with a generous one-to-one match. We're currently at 533 donations from all 50 States in our glorious United States of America. We also have international donations from Switzerland, Israel, Canada, China, Germany, and Hungary.

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**[00:01:09]** Now onto today's show. 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. Last week, the Supreme Court issued an order in important voting right case in Alabama, and here to discuss it are two of America's leading voting rights experts who have positions on both sides of the case.

**[00:01:47]** Rick Hasen is Chancellor's Professor of Law and Political Science at the University of California, Irvine and Co-Director of the Fair Elections and Free Speech Center. His newest book comes out on March 8th and we'll be discussing it here at the NCC. It's called Cheap Speech: How Disinformation Poisons Our Politics. Rick, Welcome back to We the People.

**[00:02:06] Rick Hasen:** It's great to be with you.

**[00:02:07] Jeffrey Rosen:** And Matthew Clark is Executive Director of the Alabama Center for Law and Liberty, the litigation arm of the Alabama Policy Institute. He submitted an Amicus brief on the side of Alabama. Matt, thank you so much for joining us.

**[00:02:20] Matthew Clark:** Well, thank you for having me, Jeff. It's a pleasure to be here and looking forward to this.

**[00:02:24] Jeffrey Rosen:** Wonderful. Rick, let's just begin with the facts of the case, as they say, why did the lower court hold that the Supreme Court's test in Thornburg v. Gingles requires the creation of a second majority-minority voting district in Alabama?

**[00:02:41] Rick Hasen:** Sure. Well, it's complicated as everything is with the Voting Rights Act. So let me just try and lay it out as simply as possible. In, uh, 1982, Congress amended the Voting Rights Act to provide what's, uh, as commonly known as Section 2 of the Voting Rights Act a, uh, requirement that when States or local jurisdictions anywhere in the country have voting rules, those rules have to assure that minority voters have the same opportunity as other voters to participate in the political process and to elect representatives of their choice. Now that's pretty vague language.

**[00:03:20]** The Supreme Court first interpreted it as you mentioned, in the 1986 case called Thornburg versus Gingles, and the court came up with, I, I guess I would call it a two stage test. In stage one, uh, when it comes to a claim that, uh, district lines for drawing legislative districts or congressional districts, they have to be redone after each census. And, uh, the, the claim would be, uh, that a jurisdiction is out of compliance with the Section 2 of the Voting Rights Act if minority voters are large and compact enough, that is they live geographically close enough, they could actually draw a district in which they would have a chance to elect a representative of their choice, uh, and that White voters generally vote in a way that usually defeats the, uh, choices of these minority voters. So this is the threshold three part test in Gingles.

**[00:04:15]** If that test is met, there's a complicated totality. The circumstance test that occurs in the stage two. If there's a finding of liability, then the jurisdiction typically has to draw a district in which minority voters have an opportunity to elect representatives of their choice. In Alabama, in it is congressional districting. Although African American voters make up about a quarter of the population of the State, they only have one congressional district out of, I believe, it's seven. The, uh, three judge district court said, uh, "We've looked at the composition of Alabama and we think it's possible to draw a second majority Black district that would be reasonably compact, there's racially polarized voting in the State. So go ahead forthright and draw those districts."

**[00:05:03]** And what the Supreme Court did in its order, uh, that just happened last week was the court said, "No, don't draw those districts now. We're putting that order on hold. And we're going to have a full hearing on whether or not this second district needs to be drawn." And I think that's likely to happen not this term, but next term. So at least for this upcoming election, it seems pretty clear that it's going to happen under the lines as they were drawn by the Alabama legislature. And it might be for the following election in 2024, if the plaintiffs win, where new lines would have to be drawn.

**[00:05:37] Jeffrey Rosen:** Thank you so much for that. Um, Matthew, do you have anything to add to Rick's description of how the lower court applied Gingles, and then tell us why you think that Gingles should be overruled?

**[00:05:50] Matthew Clark:** Sure. Uh, so first of all, I think Rick described, um, the lower court proceedings and what Gingles requires, pretty accurately. I don't have much to, to add to that. Um, maybe just in terms of some background information for how things have been working in, in Alabama. Um, in 1992, uh, there, there was a, a challenge to how Alabama's congressional districts were, were drawn, and eventually the courts had to step in and say, "Okay, we're gonna draw this for you because you can't get your stuff straight." And they drew a map that's actually pretty similar to the one that, uh, Alabama just had after the 2020 census. It really has not changed much over the last 30 years.

**[00:06:28]** So when Alabama got its, uh, 2020 census results back in, it made a few tweaks here and there to the congressional lines, but really nothing much on the macro level, just the little bit that's needed to reflect population growth. And then all of a sudden, the ACLU came in and sued and said, "Look, we think under the Voting Rights Act, there need to be two, um, majority Black districts." And the, the trial court agreed. Now I, I agree with Rick that this did get complicated. Um, one thing that, that shows how complicated it is, is the, the lower court was comprised of a three judge panel. Um, one of them was appointed by President Clinton, and two of them were appointed by President Trump.

**[00:07:07]** So look, I know people like Chief Justice Roberts say there are no liberal or conservative judges, there are just judges. But, you know, as, as a practical matter, come on, everybody can see that sometimes you get into ideological fights. But here you've got, uh, you know, one Democrat appointee, two Republican appointees, that all kind of agreed saying, "Look, we think under governing Supreme Court precedent, it has to come out this way." So, um, I'm not gonna sit here and, and try to beat up the trial court and just say that this was a, you know, uh, a, a nakedly odd theological decision. It certainly wasn't.

**[00:07:40]** Um, so when it went up to the Supreme Court, I, I spent a couple days, uh, looking at this case trying to figure out whether we should jump in and, and, and try to help. And initially I, I'm gonna be honest, I had reservations, because as I was looking at the trial court's order, I thought, "You know, you know, it, it looks like they may have gotten this right." But more I researched it, the more I came to conclude, "You know what? I think the problem here is that Gingles does not comport with the text of the Voting Rights Act." So it's not necessarily that we can beat up on the trial court, but I think the Supreme Court has been getting it wrong for about 35 years, and we need to go back and, uh, look at the fundamental problem.

**[00:08:17]** So, um, our brief was really based on the arguments that Justice Clarence Thomas, who's, you know, the court's only Black justice, has been making for about 35 years now where he's compared, uh, what Gingles held to the text of the Voting Rights Act and said, "Look, this is not lineup at all. And by the way, uh, this has the unfortunate side effect of kind of reimposing some level of racial segregation. Um, and not only, you know, is that kind of what we've been trying to get away from, but it also hurts ra- race relations because it, it doesn't require Black voters and White voters to come together and try to find a candidate in common that can represent both of them, instead it, it separates them out and, and, you know, prevents building bridges. And then finally just, you know, it does not comport with the text of the law itself."

**[00:09:02]** For, so for all those reasons, we kind of thought, you know, Gingles is a problem here and the court needs to take another look at Gingles. So, so that was the essence of our brief.

**[00:09:11] Jeffrey Rosen:** Thanks so much for that. Rick, Matt says that Gingles does not comport with the text of the Voting Rights Act and invoking an argument Justice Thomas made in 1994, said that it should be limited to, uh, standards, practices and procedures, and shouldn't include vote dilution. Uh, what do you make of that argument?

**[00:09:28] Rick Hasen:** Well, I think it's a ridiculous argument. And it's a ridiculous argument because, uh, among other things, besides the fact that the, the text of, uh, Section 2 is, is vague and leaves room for many interpretations, in 2006, Congress amended the Voting Rights Act, and it added provisions to the Voting Rights Act that specifically addressed how courts should address redistricting. That is, you know, what the standard should be when applying Section 2 to redistricting. So for actually true as a matter of text that Justice Thomas was right back in 1994 in Holder versus Hall, when he said that the Voting Rights Act, um, didn't, Section 2 didn't cover redistricting, there would've been no reason for Congress to have amended it. So I think that completely ends the argument.

**[00:10:12]** And so I was actually kind of shocked when last year, Federal Justice Thomas, but Justice Gorsuch joining Justice Thomas, made the same point without any reference to the 2006 amendments of the Voting Rights Act. So even if you're a pure textualist, you don't wanna look at any legislative history, number one, the text is ambiguous, but number two Congress, uh, it's not that Congress didn't act, we're not relying on the dog that didn't bark. We're relying the actual text of Congress, very clear that Congress intended Section 2 to apply to redistricting claims as indicated by the directions given to how to handle those redistricting claims, uh, in the future.

**[00:10:51] Jeffrey Rosen:** Matt, tell us more about your argument based on Justice Thomas's longstanding arguments that Gingles doesn't comply with the text of the Voting Rights Act. Uh, the justices on the other side say that the legislative history of the act suggests that it was explicitly an attempt to ensure that, uh, the Voting Rights Act applied to vote dilution claims, Congress was trying to resurrect the test, uh, that, uh, the Supreme Court had embraced in a case called White v. Regester, which did apply to, uh, vote dilution claims. So, are, are you saying that we just shouldn't look at that legislative history and purely should construe the act based on its text to achieve a purpose that Congress may not have had?

**[00:11:27] Matthew Clark:** Um, well I think, you know, th- this really gets into the argument of, you know, the, the textual school of thought of statutory interpretation, uh, versus, you know, I, I guess I'll just call it nontexualism. Um, if your listeners are listening to this podcast, my guess is that most people are, are pretty educated on those schools of thoughts. So I'll just briefly say, uh, the textualist school of statutory interpretation, uh, focuses on the words of the text. It says, "What the statute means is what the text says in its context." Um, and you know, Justice Scalia in particular was, was very big on this. He went so far as to say that legislative history is never relevant because the law is meant to be read.

**[00:12:06]** Um, you know, if, if an average person who's not a lawyer, who's, who's not a politician is trying to look up a, you know, uh, the, uh, a statute and, and trying to figure out what

it means, they'll look at the law, they'll, they'll wrestle with what the words mean, and they'll try to make a decision on what to do based off of the words. And Scalia thought that it was really unfair to people to wind up, uh, kind of being ambushed later by legislative history that was not in the text, um, that, uh, you know, that people could not have reasonably been made aware of. So he, he went really far and said, "Legislative history is completely irrelevant." I don't know if I would go completely that far. I'd say I'm about 90% on board with, with Scalia. Um, and so for that reason, I would give, you know, much, much weight to the text and probably only consult legislative history if it's ambiguous.

**[00:12:53]** So with that backdrop in mind, um, the text of the Voting Rights Act, I'll just, you know, read it here since that's what everything turns on. Um, Section 2 of the Voting Rights Act says, "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote based on account of race or color, or in contravention of the guarantees set forth," and, you know, has some cross references from there. Um, so Gingles zeroed in on the words, um, no voting practice or procedure. And, and based on the legislative history like you, like, you talked about, concluded that Congress intended for this to be construed very broadly, uh, to cover even, uh, the drawing of congressional districts.

**[00:13:41]** So Justice Thomas comes along in, uh, 1994 in, uh, in, in the, uh, in, in a separate writing. He looks at this and he says, "Hang on a minute. Look, if we're, if we're sticking with what the words say here, it's very, very hard to get the words standard, practice, or procedure, to apply to, um, uh, the drawing of congressional, uh, the congressional maps." He thought that was a really big stretch of the text, um, and said, "If there is an ambiguity here, the, the, probably the better place to look to determine what it means is to look at what other words in the statute say, because context provides some, some clarification."

**[00:14:16]** So based on the rest of what I just read, Thomas concluded, "It looks to me like Section 2 of the Voting Rights Act is meant to strike down anything that restricts minorities access to the ballot box." And for the record, I mean, I completely agree with that. Um, I, I, I think, you know, if, if the States, you know, are trying to, uh, impose things, like we saw on Jim Crow, like literacy tests and the like, that impede, um, you know, minority voters rights to the access, uh, a- access to the ballot box, then yes, that's not only a violation of the Voting Rights Act, but is patently unconstitutional and, and should be struck down.

**[00:14:50]** Uh, but Thomas looked at this and he said, "Look, I think that is the scope of the statute." And if, if we are, um, you know, if, if Congress meant to stretch it further than that to cover, um, things like the cong- drawing of congressional maps, that's what they should have said, but they didn't. This is what the, the, the entire Congress settled on, and therefore that's what the law on means." And looking at it, you know, I kind of tended to agree. So that's, that's the basic reason why I think Gingles was wrongly decided.

**[00:15:19] Jeffrey Rosen:** Rick, given the fact that you believe that Section 2 clearly applies to vote dilution claims, where did the Supreme Court go wrong, in your view, in the Alabama decision and how should our listeners understand it?

**[00:15:32] Rick Hasen:** Right. So I support and understand that the Supreme Court hasn't issued a final decision in Alabama, right? So it's only issued a stay. And for the majority of the court, there was no explanation for why the court issued a stay. Um, we have a concurring opinion for Justice Kavanaugh. Uh, we have, um, a kind of cryptic vote from the Chief Justice, um, and a brief explanation there, and a dissent from Justice Kagan. So we're kind of reading tea leaves. Um, there are two problems, two main problems with, uh, what the court did in my view.

**[00:16:04]** Number one, the court applied something that I've termed the Purcell principle, which is this idea that a federal court should not make changes to voting rules in the period just before an election, because that can cause voter confusion, uh, and election administrator confusion. The court, so far as I can tell, has never applied this doctrine in the redistricting context. There's not an imminent election. This is for a primary election. The election could have been postponed as is a common practice when there is voting rights redistricting litigation. And so the idea that the court had to act now and put a stay and, and, and stop this before it could adjudicate this further, um, because of timing, s- seems to me to be quite suspect, you know, as someone who's deeply studied this question about, uh, the Purcell principle and timing.

**[00:16:51]** And then on the merits, I thought Chief, what Chief Justice Roberts had to say was the most illuminating part of, of all that happened. Chief Justice Roberts said, "Look, uh, I've looked at what the lower court did, and the lower court faithfully applied Gingles. So I don't think that a stay is appropriate because the court is applying our precedence. But I agree with the five other conservative justices on the court, that Gingles needs to be rethought, that we need to kind of rethink what the standard is for determining when there's a Section 2 violation. And so I'm gonna vote to hear the case along with the other conservatives." So that's a big signal that major change could be coming, and change that I think would make it harder for minority voters to be able to establish the right to have these districts drawn into Section 2.

**[00:17:39]** So there's a really big, uh, potential holding coming, maybe not till a year from June because the court moves very slowly, and it's probably not even gonna hear this case until next fall, and then maybe not issue an opinion for many months later. Uh, but I, I think the, the idea that there's going to be a rethinking of a standard that has done more to assure that we have adequate minority representation in Congress and, and State legislatures and local legislative bodies in places where minority will voters did not have adequate representation in the past, that's very troubling to me.

**[00:18:13] Jeffrey Rosen:** Matt, you also say in your brief that applying Section 2 devote dilution claims violates the constitution, requires the court to make political choices, and deepens racial divides. Tell us more about how it requires the court to make political choices and deepens racial divides.

**[00:18:29] Matthew Clark:** Sure. So as far as political decisions go, um, you know, Justice Thomas has pointed out that, uh, uh, as he was tracing how this, this interpretation of the law

developed, there's really nothing either in the law itself or the constitution, that specifies the way in which, uh, you know, this representation needs to be done, other than the basic requirement of, you know, one person, one vote. And so one option the court had to wrestle with was, "Okay, in, in, in going down this line of reasoning, do we have to, um, guarantee that minorities have meaningful access to vote for the candidate of their choice by doing single member districts or multi-member districts."

**[00:19:08]** And there's nothing really within the, the text of the law, uh, or the constitution itself that answers that question. But the court decided on, on single member districts. And, you know, if there's nothing within the Voting Rights Act or, uh, the constitution itself that requires that result, then that's necessarily a political choice, not a, um, not a legal choice. And so that's the reason why Justice Thomas thought it, uh, it made them engage in, uh, political decisions.

**[00:19:36]** Um, I think to add to that, one, one, one thing that has, has made this more clear over the last few years is that the Supreme Court a few years ago held that it's, it's not the role of the courts to strike down, uh, congressional districts based on political gerrymandering, um, because that, that is inherently a political question. So, you know, political gerrymandering obviously happens when the party that's in power comes in and draws lines in a way that's designed to help it keep power. And, and, and I think, look, I, I'll concede this, I think we can all agree that sometimes you, you look at the way these, th- these lines are drawn and, and you think, "All right, the, the, there, there's, there's something that feels unfair about this."

**[00:20:16]** Um, heck look, I grew up in Maryland. I was one of, you know, the few conservatives in my congressional district. And, you know, it was kind of sad knowing that when I went to the ballot box, my, my vote for, uh, president, my vote for, for Congressman, my vote for people at the State House probably didn't mean much because the Democrats had, you know, politically gerrymandered the State to help them keep power. Well, Alabama does the same thing when it comes to, you know, the Republicans politically gerrymandering to help them keep power.

**[00:20:40]** Um, but the court, the Supreme Court came along and said, "Look, the problem is if you get the courts into the business of, of trying to redraw, you know, what you've done, the, there, there aren't really fixed standards that help us do that. There, there's nothing that we can really deduce from the constitution that helps us figure out where the line is. And so look, the constitution commits this matter to the State legislatures, and therefore we're gonna let them make the decision. If you think they're being unfair, vote them out and demand that they do better."

**[00:21:08]** So in the same way here, look, it would be one thing if, if you had proof that, um, the, the, the Alabama legislature drew these lines with the intent of, of, uh, trying to suppress the Black vote. If you had that, then absolutely. That, that is, at the very least, an equal protection violation, if, if not a 15th Amendment violation. But if the law's lines were drawn based on, uh, you know, politics instead of race, and, and the record in this case indicates that it was, then trying to get the court to step in and redraw the lines is really more of a political decision than a, uh, th- than a legal decision. So, um, that's, th- that's what the Supreme Court, you know, has,

has been thinking over the last few years. And, and I think that's how that, that reasoning comes down in this case.

**[00:21:53] Jeffrey Rosen:** Thanks so much for that. Rick, you suggested that, uh, the Supreme Court may be open to reconsidering Gingles based on Chief Justice Roberts' concurrence, and might be open to the claim that Gingles requires courts to make politic non-legal choices. If the court were to reconsider Gingles, what alternative might it embrace?

**[00:22:14] Rick Hasen:** One clue about what might happen that was, uh, dropped in Chief Justice Roberts' brief dissenting and concurring opinion, uh, uh, a connection with the State order, was talking about this idea that we might require race-neutral districting principles to apply at the first stage of, uh, the Gingles analysis. And let me just unpack that, 'cause that's, it's kind of an oxymoron, and it's really hard to understand.

**[00:22:40]** So as I said earlier at the top, uh, the three parts threshold test under Gingles, the first question is, um, are my, are already voters, uh, large enough in terms of population and, uh, sufficiently compact, that is they live close enough together that you could actually draw a single member district, say a s- a single member congressional district. And Alabama makes a kind of astounding claim that when you're deciding whether or not the groups are compact enough, you have to look at that in a race-neutral way, and you need to compare, uh, all the kind of race-neutral plans and see if somehow magically a, um, majority-minority district could be created.

**[00:23:19]** This kind of race-neutral districting, as Professor Stephanopoulos has, ha argued, would lead to a diminution in the number of these districts. And Chief Justice Roberts, uh, I believe it was Chief Justice Roberts, cited to this law review article, uh, that Professor Stephanopoulos co-authored, that made this point, but he didn't cite to it as Stephanopoulos, uh, intended f- to criticize the standard, but to potentially embrace the standard. So what it would mean is that there would be many fewer claims under Section 2, where minority voters would be able to meet that first Gingles factor.

**[00:23:55]** In other words, if you're going to say that a statute that was designed to be specifically race-conscious, requires race-neutrality, of course, you're going to end up neutral the statute, and it would be a perversion of the Voting Rights Act. You know, it's an argument that the Voting Rights Act is itself racist. Uh, it's just so absurd to me. I, I can't even express in words, uh, the kind of Humpty Dumpty world that we would be in if the court applied race-neutrality to, uh, the first prong of the Gingles test. But that's, I think, where the court could well be going.

**[00:24:27] Jeffrey Rosen:** Thanks so much for that. Um, Matthew, tell us more about your claim that creating voting districts for the benefit of minorities increases rather than decreases racial divides, uh, since Congress in enacting the law, believed that it was doing the opposite.

**[00:24:41] Matthew Clark:** Well, sure. And look, I have no, you know, I, I have no doubt that when Congress, uh, enacted that, even if that's what it meant for, you know, the, the statute to say, I, I do not dispute that they were, uh, trying to achieve a, a noble goal. Um, but I think as we can all agree too, uh, noble intentions don't always lead to, uh, good results. So, um, you know,

Thomas who, again, he, if, if you know his story, um, i- if you go back to his confirmation hearings for the, the U.S. Supreme Court, when they brought out the Anita Hill allegations, he, he came back and responded and said, "I think we all know what's going on here. We have the wrong Black guy." Um, and because of that, he can't go forward and be on the court. So in the same way here, I, I think part of the problem here, when you necessarily require some level of segregation based on race for how you draw these congressional lines, it, it, it assumes that all minorities think alike.

**[00:25:34]** Um, now, now to the Supreme Court's credit in Gingles, they did try to add some nuance there. They, they did say you have to prove that this minority political group is cohesive. But there is an underlying assumption that if you're Black, you all want the same thing. You all think the same thing. And, you know, because of that, um, we're, we're gonna step in and, and just assume that all of you guys think alike. And so, you know, to Clarence Thomas, that, that to him was very insulting thinking that, you know, because I'm Black, I have to be liberal, I have to vote Democrat. And if I think differently, I have to be opposed.

**[00:26:07]** And so there, there are a lot of Black conservative friends that I have that definitely share that sentiment where, you know, they feel like, um, they, they feel like when people come in and tell them, "Because of your race, you have to behave this way, or you have to think this way, or you have to vote this way." For them, that comes across a lot more, um, you know, insulting than just, you know, being a, a minority voter in a majority White district.

**[00:26:31]** Thomas also explains in, in his writings that there, there may be some virtue to, instead of drawing lines based on, um, based on race. Uh, if, if you have Black voters and, and White voters in the same congressional district, then you force 'em to work together to try to come up with a candidate that represents both of them. Um, and I, I think, I, I think there's something to that that very, very sadly, um, nowadays there, there is this mindset that, um, uh, you know, if, if you're, you're, you're Black, you're gonna vote Democrats, the Republicans don't even try to reach out to them. And, and that's a very sad thing. But if you keep them together in the same congressional district, then you're, you're gonna force 'em to reach out. You're gonna, you're gonna... They'll have to work together. And, and hopefully if they come together and work together, that'll help lessen racial tensions rather than increase it.

**[00:27:24] Jeffrey Rosen:** The National Constitution Center relies on support from listeners like you to provide nonpartisan constitutional education and debate. Every dollar you give will be doubled with a generous one to one match, thanks to the John Templeton foundation. Visit constitution center.org/wethepeople. And thank you for educating yourself about the constitution. That's constitution center.org/wethepeople, all one word, all lower case. Now, back to the show.

**[00:27:54]** Rick, tell us more about how, if the court requires race-neutral districting, it would, in your view, [inaudible 00:28:01] uh, Section 2 of the Voting Rights Act and, and lead to a diminution of majority-minority districts? Uh, would, would any majority-minority districts be created in the future? And, and, and how would voting rights in America change?

**[00:28:14] Rick Hasen:** Well, if I understand Alabama's argument, what they're saying is, you know, you have to look at everything besides race. So the traditional factors that are applied in drawing districts. Things such as keeping city and State boundaries, uh, together, if you can, um, protecting incumbents. Uh, and we know now, thanks to the Rucho case, which we've talked about in the past, the Supreme Court case from a few years ago about partisan gerrymandering, you can take partisanship into accounts. So you can do all of these things so long as, uh, you don't look at race. And then if do all of these things and you happen to be able to draw a majority-minority district, then, uh, you've met the first prong of Gingles.

**[00:28:53]** And the reason I'm saying that that's wrong or perverse is, the whole point is, let's go back to 1980. There was a case called City of Mobile versus Bolden. And it was a case where that... This is in our Alabama, right? The Mobile Alabama has a, uh, I believe it was a city council, and it was about 40% African American voters, 60% White. And they elected all five of those members at large. That is, everyone gets to vote for every member. And under that plan, it was an all White city council because the White majority consistently voted, there's racially polarized voting, consistently voted so that, um, the White majority defeated the choice of minority voters. And the claim in City of Mobile versus Bolden was a claim that was essentially a constitutional claim. And the Supreme Court said, "You can't make a vote dilution claim under the 14th Amendment, under the constitution without proving racially discriminatory intent."

**[00:29:47]** And what Congress did in response to that was create Section 2, that is its respond... And this is another argument as to why the, I think it was the textualist argument of, of Justice Thomas and of, of your other guest is absurd. Uh, the whole point of why Section 2 was created was to deal with a case involving districting. Um, and so, um, if what you had to do in Mobile was say, let's use traditional factors in drawing our five districts. And if it happens to create a majority-minority district, well then, okay, then we're possibly having a Voting Rights Act violation. It would mean many fewer situations where you would draw those districts.

**[00:30:23]** Now, there may be some places with very high concentrations of minority voters where these districts would be created. But according to the study, uh, that I mentioned earlier by Professor Stephanopoulos, there would be many fewer of them, especially in the South, because what do we know? You know, it would be nice to live in a colorblind race-neutral world. Do we know, especially in Alabama of all places, Alabama, we know that White voters and African American voters prefer different candidates. And that if the White majority is able to have the ability to elect candidates of their choice, but African Mo- American voters are not, we're gonna have all White congressional delegations, or we're gonna have all White legislative bodies, except in those pockets where there's such a high concentration of minority voters that the only thing you can do is draw a majority-minority district.

**[00:31:09] Jeffrey Rosen:** Matt, let me ask you about the original understanding of the 14th Amendment. You quote in your brief Justice Harlan's famous statement that the constitution is colorblind and say that the framers of the 14th Amendment would've required colorblindness. But as this second Justice Harlan argued in voting rights cases in the 1960s, the framers of the 14th Amendment did not intended to apply at all to political or voting rights. They thought it

applied only to civil rights, not political rights. Given that, how do you reconcile that history with the claim that the 14th Amendment requires the colorblind voting?

**[00:31:44] Matthew Clark:** Well, I think first of all, I, you know, I don't know if I would agree with the second Justice Harlan's, um, belief about the, the original meaning of the 14th Amendment. Um, you know, even among originalists, probably the, the single, uh, most debated, uh, amendment of the constitution when it comes to original meaning, is the 14th Amendment. Um, the, you know, there, there are some who think that, uh, the privileges and immunities clause was meant to secure everybody's, uh, God-given natural rights. There are others who think it was meant to secure, um, you know, only the positive rights that are, are listed in the constitution. There's still others who think it meant to have a very, very narrow, um, application to just eliminating the Black codes that the South tried to pass, uh, at the end of the Civil War. So there is a lot of debate.

**[00:32:32]** So, you know, for Justice Harlan, um, I, I don't know if I would agree with his interpretation. Instead, the way I read the 14th Amendment, um, I, I, I think, you know, the, the, the framers of, of that amendment, when, when you go back and you read the statements of, uh, you know, John Bingham and, and the others who, who drafted it, they were really trying to take the, the natural rights theory of our Declaration of Independence to its, its logical conclusion. They really thought, as the declaration says, all men are created equal. And because of that, when you read things like the equal protection clause, you gotta read that with that background in mind. So I think, I think the equal protection clause was meant to be a lot more powerful than, uh, probably Justice Harlan thinks.

**[00:33:12]** So, and, and again, there is room for debate on that. But, you know, the, the, the primary thing I think everybody agrees on is that when the 14th Amendment was passed, Congress was, at the very least, trying to eliminate the Black codes that were passed in the South. And that whole thing was based on racial segregation. So as the elder Justice Harlan said, "Our constitution is colorblind. We, we're not gonna, you know, separate our people based on, on race alone. Instead, we're all gonna pre- we're gonna presume they equal under God, under the law. And because of that, we're, we're not gonna come up with a system that treats people, uh, differently, uh, based on race, you know, uh, because that distinction doesn't make any sense."

**[00:33:52] Jeffrey Rosen:** Rick, what do you make of the claim that the 14th Amendment was not intended to apply to political rights at all, it was only into tended to apply to civil rights? That's a claim that was made not only by the second, uh, Justice Harlan, but also by conservative scholars like Michael McConnell, and by people who stood up during the debates over the 14th Amendment and said, "Don't worry, this isn't gonna apply to political rights. It's only gonna apply to civil rights." Are originalists, um, being consistent when they say that the amendment requires colorblind voting?

**[00:34:23] Rick Hasen:** I think this is a pretty damning fact when it comes to originalism, right? So what I found, and we talked about this a few years ago, uh, in connection with my book on Justice Scalia, the justice of contradictions, that, um, originalists are, uh, part-time originalists. They apply originalism, uh, in, in some circumstances, but not in all circumstances. And, you

know, in terms of the original understanding of the 14th Amendment, that doesn't seem to be what is driving this, you know, this, for example, the claim of the colorblind constitution, that seems to be much more ideologically-driven.

**[00:34:57]** Now, if these Justices said, "Look, this is my ideology. This is what I'm doing," that would be fine. But they're hiding behind an argument that the constitution requires this because this was the original understanding of those who passed the 14th Amendment. And that's just empirically not true. Uh, but you know, this is just one of a number of examples where the originalist argument is, is quite thin. Uh, it requires an understanding of history, and it requires doing history well, and whether we're talking about how the First Amendment might apply to campaign finance, or we're talking about the non-delegation doctrine. I mean, there's lots of different issues we could talk about where those so-called originalists either have a very thin understanding of history, or they ignore the history altogether and go really along with their ideological priors.

**[00:35:43]** And I should say, it's not as though I believe that the liberal justices are less ideological than the conservative justices. It's just that the conservative justices, or at least some of them, hide behind, uh, doctrines like originalism to try to mask their political preferences, and make them sound like they are, uh, you know, legally commanded from on high.

**[00:36:03] Jeffrey Rosen:** Matthew, in the Supreme Court case, Justice Kagan noted that Alabama suggested that voting districts should be drawn in a race-neutral way using technology that didn't take race into account. Do you agree that if Gingles is overruled, Alabama should use race-neutral technology, or you just think that it's not required to try to draw new voting districts at all?

**[00:36:29] Matthew Clark:** Um, that's a good, that's a good question. I don't know. My, my understanding is that the maps already were drawn, uh, with race-neutral technology. Um, if... So the, one, one of the issues in this case is that the record was, I think, some 7,000 pages long. It was, it was quite, uh, quite detailed. And of course the parties fought over, you know, the facts and exactly what happened. But from what I read, um, my understanding is that, you know, they drew the maps, you know, mainly based on their understanding of how, you know, which party the, the people were, were voting for.

**[00:37:01]** So is it political gerrymandering? Yes. But, you know, they, they went and, and, and drew the maps based on that. And then finally, once they had the maps in place, it was only then that they took a last minute look on race. And, and that was only because they were trying to make sure they weren't gonna run into problems under, uh, Gingles and, and other precedents like that. So, you know, my understanding is that they, they did try to draw the, um, uh, congressional maps in a race-neutral fashion. And I think they would continue to do that again if Gingles is overruled.

**[00:37:34] Jeffrey Rosen:** Rick, how big a deal would it be if the court says that Section 2 of the Voting Rights Act doesn't apply to vote delusion claims? You suggested that ever since the Mobile case in 1980, and even before that, both the court and Congress have assumed that

there's, uh, both the ability of Congress and in some cases the need to take race into account. If the court holds otherwise, um, h- how much would that change existing law?

**[00:37:57] Rick Hasen:** Well, first of all, it would be a kind of bait and switch, because you may remember, and we've talked about this on the, on, on the podcast as well in Shelby County versus Holder, a 2013 case, uh, the United States Supreme Court, uh, essentially killed Section 5 of the Voting Rights Act. That's a part of the Voting Rights Act that said that jurisdictions for the history of race discrimination and voting had to get approval from federal government before they made changes in their voting laws, and had to show that those changes would not make protected minority voters worse off.

**[00:38:27]** When the court decided that case, we were assured by the conservative justices on the court that, "Don't worry, there's Section 2." In fact, I remember this moment in the oral argument, it, it was either in Shelby County or was in the earlier case, the Nomudno case, where Justice Kenny said, "Well, why can't they just bring a Section 2 case?" You know? And then there was a whole discussion about if you could get an injunction under Section 2, and you can get the courts to move quickly. And it wasn't clear, you know, is, is this going to leave some dent? But we were assured that Section 2 would adequately protect minority voters. This is a kind of bait and switch. Section 2 is fine. No one's challenging Section 2.

**[00:39:00]** Now, all of a sudden, and it's not just Alabama or the Amicus, uh, that, um, misrepresented the other side here, uh, it's also the State of Texas, which is arguing that the Voting Rights Act, if it has any teeth, is unconstitutional. Right? So there's a whole line of cases that say you cannot make race the predominant factor in drawing district lines. These cases go back to a 1993 case called Shaw versus Reno. The claim seems to be that race-conscious districting as required by Section 2 of the Voting Rights Act is itself unconstitutional because it takes race too much account.

**[00:39:35]** Now, the Supreme Court back in the '90s in a case called Bush versus Vera, and there seemed to be five justices that said, "Even if you make race the predominant factor in drawing district lines, if you're doing it because the Voting Rights Act requires it, then that's allowed. That's a compelling interest that would satisfy strict scrutiny." I don't know that there are... In fact, I, I, I'm skeptical that there are five justices who still believe that. And so what we could be heading towards is not necessarily the Supreme Court saying, "We hereby overturn Gingles," or, "Section 2 of the Voting Rights Act is unconstitutional." Because those would be really, uh, major in-your-face precedents that would, you know, galvanize public opinion against the Supreme Court. But we can see, as we've seen in lots of other contexts, the court killing something with a thousand cuts.

**[00:40:22]** So, as the court did, and we talked about this in an earlier podcast this year, the birth of its decision, where the Supreme Court read Section 2 of the Voting Rights Act outside the context of, um, redistricting, to apply to things like voter ID laws. We understood that provision as applying across the board, uh, in, uh, cases where, uh, these election rules make it harder for people to register and vote. And the Supreme Court in Brnovich, didn't strike down Section 2 as

applied in this context, but came up with a test that makes it very, very difficult to win these kinds of cases.

**[00:40:57]** And so I think we'll probably see the same thing, I hope I'm wrong, in this Alabama case when it's ultimately decided, probably about a, a year from June, or maybe a year from now, uh, that the court is going to read the Gingles, redefine Gingles, or do something so that it's going to be much harder for minority voters to be able to elect representatives of their choice. And what's that going to mean? Legislatures and congressional delegations in a lot of places, are gonna look a lot wider, and they're not going to look like what America looks like.

**[00:41:31] Jeffrey Rosen:** Thanks so much for that. Matt, tell us why you think the court should overrule Gingles using the test for overruling precedent that it outlined in the Janus case.

**[00:41:39] Matthew Clark:** Sure. So as an initial matter, I, I gotta say, um, I, I do agree with Justice Thomas that, you know, at the end of the day, the, the judiciary's duty when, when it comes to overruling precedent the, I think the rule is pretty simple. If, if it is demonstrably erroneous in light of what the text of the constitution or statute says, then the court shouldn't follow a precedent. I really do think it, uh, it, it should be that simple.

**[00:42:03]** Um, however, if we're gonna go back to Janus, which it does appear to be, you know, kind of the gold standard now that the court is using for, um, overruling precedence, um, then, you know, we made the case that, uh, that, that, you know, Janus would favor overruling Gingles. Here's some of the factors that Janus considered. First is, how well reasoned it was. And so, um, if you, if you adopt the textualist school of statutory interpretation, then your primary problem with Gingles is gonna be that it, uh, it, it, you know, really took the legislative history, and, and arguably cherry picked the legislative history to control what the statute says instead of going with the statute itself. So that alone is a factor, uh, against, uh, the quality of Gingles' reasoning. Uh, another test is workability.

**[00:42:52]** Um, the subsequent deci- decisions after Gingles have shown that it's not very workable. There have been a number of decisions where the Supreme Court has applied Gingles. And, uh, you know, in, in some of the simpler cases, a lot of the times justices are, are voting nine to zero, or seven to two, or something like that. So that's fine. But when you get into the harder application of Gingles, the, the leading cases have all been very, very fractured. Uh, it's, it, it, it's rare where you can actually get a five justice majority in cases like that, to agree on anything. Instead, you have a plurality decision. You know, in Section 1, that's joined by four justices. In Section 2, that's joined by three. Section 3 that's joined by five. And, and, and around and around it goes. So I think the Supreme Court's own subsequent interpretations of Gingles have shown that it is not very workable.

**[00:43:37]** Um, and then another factor that the court looks at under Janus, uh, is, is whether subsequent decisions in the law have eroded that precedence underpinnings. Well, as I mentioned before, you know, a few years ago, the Supreme Court held that when it comes to political gerrymandering cases, that is not just dishable. The, the court simply can't, uh, make that decision because it's a political decision and not legal one. And as I've argued here, um, the problem, uh, as, as I see Gingles, is it requires the court amount, uh, to engage in a fair amount of

political theory rather than, uh, judicial adjudication. So, um, and under Janice, if, if those three factors are met, then it typically outweighs any, uh, any reliance interests to the contrary. So I don't know. App- applying Janus to the case here, I think Janus would, uh, favor overruling Gingles.

**[00:44:28] Jeffrey Rosen:** Rick, Matt and Justice Thomas have said that the court should clearly overturn Gingles based on the factors outlined in the Janus test. How many other justices do you think, in addition to Justice Thomas, might agree? And, uh, why do you think that the court should not overturn Gingles using the factors in the Janus test?

**[00:44:48] Rick Hasen:** So this is a huge battle. I was just telling my, uh, students in my statutory interpretation class, that all of a sudden liberals have found a huge love for stare decisis, and conservatives have become quite skeptical. And that's because there are a number of liberal precedents that are under threat right now, right? So we're talking about this case, but of course, abortion and affirmative action are cases that are going to be decided soon as well. And, you know, I, I'd like to quote, uh, my former boss, uh, Dean Erwin Chemerinsky, uh, used to be at UC Irvine, now, now at UC Berkeley, who says that the justice view on stare decisis is, "I believe in following precedent, except when I don't."

**[00:45:29]** And so I think that, uh, you know, regardless of whether it's the Janus test or some other test, uh, I would go back to what Chief Justice Roberts said about when precedent should be overruled in his concurring opinion in the 2010 citizens united case which overturned a couple of earlier campaign finance decisions on, uh, corporate, um, rights to spend money in elections, that they're balancing a number of factors, uh, both legal factors, such as whether people have re- relied upon, uh, earlier precedent and, and how consistent it is with prior law, but also political factors.

**[00:46:04]** I think the court recognizes that it has, uh, its political legitimacy on the line, uh, during oral argument in the Dobbs case, which is the, the abortion case at, uh, Mississippi, that the Supreme Court is deciding this term. Uh, Justice Sotomayor made, uh, mention of a possible stench that would come from the Supreme Court deciding to overrule longstanding precedent there. I think there's a recognition that overturning precedent has a political cost, which is one of the reasons why I think Gingles won't be overturned, but it could be severely weakened. Because they're gonna be overturning some other precedents. I expect Row versus Wade is going to fall.

**[00:46:38]** So it's going to be already, uh, the Supreme Court quite in the spotlight. I think if they take the hit on that, if they expand gun rights, as I expect that they're going to do, if they kill affirmative action and education, as I expect they're going to do, they're probably not gonna want to take on the Voting Rights Act, too.

**[00:46:55] Jeffrey Rosen:** Thanks very much for that. Well, it's time for closing arguments in this important discussion. Uh, Matthew, please sum up for We the People listeners, why you believe that the Gingles case should be overruled and the Supreme Court should not apply Section 2 of the Voting Rights Act to vote dilution cases?

**[00:47:12] Matthew Clark:** Sure. So, um, I guess there are two points to summarize my argument. Number one, the constitution is colorblind. And so if it is colorblind, then it is fully appropriate for the courts to step in if you've got proof that, uh, you know, the States are, are intentionally discriminating against people, uh, based on color. And, and if that's what Alabama was doing here, then we certainly would not be supporting the State.

**[00:47:35]** But when the legislature is drawing congressional districts in a race-neutral way, it's not fair to come in on the backside and say, "Okay, now we're going to make race the predominant factor, even though this is something that, you know, didn't even enter your mind as you were drawing these, uh, th- these maps, and we're going to redraw your lines based on race." Um, that seems to, to me to defeat, uh, one of the major purposes, uh, of the reconstruction amendments, which was to stop discrimination on the basis of race.

**[00:48:06]** Um, as far as, uh, Gingles itself goes, my big problem with that is that it does not appear To apport, comport with the text of the Voting Rights Act itself. The text focuses on stopping the States from impeding minorities access to the ballot box. Um, but that is a different matter than how you draw congressional district lines. So, um, again, I, my, my rule is very simple. If a precedent does not comport with what the law actually says, that precedent should be overruled. And I think that's what's going on here.

**[00:48:37] Jeffrey Rosen:** Thanks so much for that. Rick, please tell We the People listeners, why you believe that Section 2 of the Voting Rights Act should apply to vote dilution claims and the court should not overturn the Gingles test.

**[00:48:49] Rick Hasen:** Well, the whole point of Section 2 of the Voting Rights Act as it was initially written, was to deal with the problem of racially-polarized voting and White majority voters outvoting minority voters. We know that because Congress wrote the amended Section 2 in response to the City of Mobile versus Alabama case in, in 1980. The court reaffirmed its belief that Gingles right, and in fact strengthened minority voting rights when it reaffirmed and, uh, renewed parts of the Voting Rights Act in the 2006 amendments to the Voting Rights Act.

**[00:49:20]** So I think as a matter of text, as a matter of history, as a matter of statutory interpretation, the Gingles test is correct. Whether, uh, it was inevitable in 1986, I think not, but subsequent action by Congress has essentially ratified that test. And I think that test is a good one. It doesn't say that minority voters always get proportional representation. In fact, it's part of Section 2 that says there's no right to proportional representation, but it says, "In situations like in Alabama where White voters consistently prefer different voters than minority voters, and those minority voters could easily have their choices outvoted by the White majority. It's important to have actual fair representation. Those voters should be able to elect representatives of their choice."

**[00:50:05]** And so what's at stake in this case is whether or not the Supreme Court is going to listen to what Congress has required, or is going to apply its own values to what it thinks politics should look like in this country in deciding whether or not to actually enforce the words of the Voting Rights Act as Congress wrote them and intended them.

**[00:50:26] Jeffrey Rosen:** Thank you so much, Rick Hasen and Matthew Clark, for a meaningful and engaged discussion about the important issues involving the future of Section 2 of the Voting Rights Act. Rick, Matthew, thank you so much for joining.

**[00:50:42] Rick Hasen:** Thank you.

**[00:50:43] Matthew Clark:** Thank you guys.

**[00:50:47] Jeffrey Rosen:** Today's show was produced by Melanie Roe, and engineered by Greg Sheckler. Research was provided by Kevin Klaus, Ruben Aguirre, Sam Desai, and Lana Ulrick. Please rate reviews and subscribe to We the People on Apple, and recommend the show to friends, colleagues, or anyone anywhere who's eager to hear all sides of the crucially important constitutional debates at the center of American life. And always remember that the National Constitution Center is a private nonprofit. We're in the middle of a crowdfunding campaign and are currently at 533 donations for a total of $74,000.

**[00:51:20]** If you value hearing people of different perspectives, which is so rare in American life, please donate any amount, $5, $10 or more, to support We the People. It is urgently important that all of you continue to do exactly what you're doing, which is to educate yourself by listening to arguments on all sides of the constitutional issues at the center of American life. And that's what We the People is here for. On behalf of the National Constitution Center, I'm Jeffrey Rosen.