



Redistricting in Alabama and the Voting Rights Act—Part 2

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[00:00:00] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

[00:00:21] Jeffrey Rosen: Last week, the Supreme Court heard oral arguments in *Merrill versus Milligan*. The court will decide whether Alabama's 2021 redistricting plan violated Section Two of the Voting Rights Act. Joining me to discuss Section Two and the stakes in this important case are two of America's leading experts in election law. Rick Hasen is Professor of Law and director of the Safeguarding Democracy Project at UCLA. His most recent book is *Cheap Speech: How Disinformation Poisons Our Politics and How to Cure it*. Rick, it is wonderful to have you back on We the People.

[00:00:55] Rick Hasen: It's always great to be with you, Jeff.

[00:00:56] Jeffrey Rosen: And Jason Torchinsky is a partner at Holtzman Vogel, specializing in campaign finance law, election law, and lobbying disclosure. He filed an amicus brief in *Merrill versus Milligan* on the side of Alabama on behalf of the National Republican Redistricting Trust. Jason, it's wonderful to have you back on the show as well.

[00:01:14] Jason Torchinsky: Great. Thanks for having me.

[00:01:16] Jeffrey Rosen: Let us begin with the stakes in this important case. Rick, what are the stakes?

[00:01:21] Rick Hasen: So, the Voting Rights Act and particularly Section Two of the Voting Rights Act has been really instrumental in causing states to draw congressional districts, state legislative districts, and local city council county election districts in a way that assures that minority voters have an opportunity to elect candidates of their choice. And what's at stake if the court rethinks how Section Two of the Voting Rights Act works is a potential diminution in the number of minority preferred candidates that are actually elected to office. So, it's about how much representation on the basis of race in order to make up for racial discrimination in the past the Voting Rights Act is going to allow.

[00:02:09] Jeffrey Rosen: Jason, how would you describe the stakes in the case?

[00:02:12] Jason Torchinsky: I think this case is really important because legislatures and other matters need some guidance between when they consider race too much and when they don't consider race enough. If they don't consider race enough and they violate Section Two, then they have a problem. If they consider race too much when they're not authorized to do so, then they violated the 14th Amendment. And this sort of if I veer too far to the left, I hit that side of the bowling alley. And if I veer too far to the right, I hit the other side of the bowling alley. This has been a challenge for legislatures for about the last 40 years since the Supreme Court came up with the *Gingles* test.

[00:02:50] Jason Torchinsky: Justice Roberts recognized that when he wrote his denial from the grant of the stay in Alabama. And I think this is real opportunity for the court to provide some clarity. Over the last 15 years or so, every time a state has attempted to draw an additional majority minority district, it's been struck down as a 14th Amendment violation. And now Alabama is being told, "well, you guys got it wrong, and you should have drawn an additional majority minority district." So, states are in a real quandary here. And I think this case is an opportunity for the Supreme Court to sort of bring some clarification to those two borders of the bowling alley.

[00:03:28] Jeffrey Rosen: Rick, Jason described this as a case that raises the question when the states consider race too much and when don't they consider race enough, suggesting a tension between the Voting Rights Act and the 14th amendment. Tell us about the history of the Voting Rights Amendments of 1982, how they responded to the Supreme Court's decision in the *Mobile* case and, and the way that they've been interpreted for a long time under the *Gingles* test to help our listeners understand this complicated area of law.

[00:04:01] Rick Hasen: Sure, I'd start by saying I don't agree with Jason's characterization of the tension. But we can get into that a little later. Let me just talk about the history. Let's go back to before 1965. There was tremendous racial discrimination in voting in lots of parts United States, but especially in the South. The rates at which African American voters were able to register to vote was incredibly low. We shouldn't call them voters. They were citizens that were disenfranchised.

[00:04:31] Rick Hasen: And the Voting Rights Act came in 1965 and did a number of things. One of the things it did was provided federal registrars to go down to register people to vote, provided all all kinds of protections against things like literacy tests, which were used in a discriminatory way to frustrate voting and frustrate registration. And it imposed something called preclearance, which said that states with a history of racial discrimination and voting had to get federal approval before they could make changes in their voting rules and have to show that those changes wouldn't make minority voters worse off. That's section five of the Voting Rights Act. That provision was very effective in assuring that there was no backsliding. And that provision was in place until 2013, when the Supreme Court held that it violated the sovereignty of states because there wasn't current evidence that these states that were covered by section five were discriminating in a way that they had in the past.

[00:05:28] Rick Hasen: There was this anti-backsliding provision in the law 1965. And it was very helpful. The registration was very helpful. African American registration rates went up. But one of the things we saw was that let's say you have a city council. And let's say that 60% of the voters are White and 40% of the voters are African American. And all the city council members, let's say five of them are elected at large. Everybody votes for everyone. What we've seen in certain places where Whites tended to prefer one set of candidates and African Americans prefer another is you'd have an all-White city council even though African Americans made up about 40% of the the area. They didn't get to elect representatives of their choice because Whites and Blacks were voting for different people.

[00:06:10] Rick Hasen: There was some constitutional litigation that was brought and litigation brought under the Voting Rights Act, saying that when you have a situation like this, it's unconstitutional. It's illegal. And what the Supreme Court said in the 1980 case called *City of Mobile versus Bolden* is that in order to bring a constitutional claim of vote dilution, that you don't have a chance to elect candidates of your choice. You have to prove that drawing of the district lines or the failure to draw district lines, the creation of an at large district, was done for racially intentionally discriminatory reasons. So, it wasn't enough to show discriminatory effect. It had to show the discriminatory intent.

[00:06:51] Rick Hasen: In response to that, in 1982, Congress amended the Voting Rights Act, and they amended, in particular, Section Two of the Voting Rights Act. And the key language here is that it said that minority voters have the same opportunities as other voters to participate in the political process and to elect representatives of their choice. Pretty vague language, wasn't clear initially exactly how it was going to play out. But we know that's what Congress was trying to do because what they wrote and what was in the accompanying legislative materials, legislative history, is that they were trying to overturn statutorily that *City of Mobile* case from 1980, and imposed what's called an effects test or results test, which means that you don't have to prove racially discriminatory intent, you just have to show that the effect is one where minority voters have less opportunity to participate in the process.

[00:07:40] Rick Hasen: And then in 1986, the Supreme Court decided a case called *Thornburg versus Gingles*. And in that case, the Supreme Court told us what Section Two of the Voting Rights Act means in the context of redistricting. And they basically said, it's a complex analysis. First, there's a three-part test. First, are minority voters large enough in terms of the number of voters and geographically compact enough that you could create a district where minority voters could elect representatives of their choice? Second, are the group of minority voters politically cohesive? Are they supporting the same candidates? And third, are the White voters who are also politically cohesive usually voting to defeat the candidates preferred by minority voters?

[00:08:22] Rick Hasen: If you can get over this so-called threshold test of *Gingles*, these three tests, then you look at a whole bunch of other things like the history of racial discrimination and voting in the area and whether there are racial appeals and elections. And you go through this complex analysis. This is the analysis in the case that's before the court, the *Milton* case, a three-judge court looked at Alabama and said, under this *Gingles* analysis, we think that drawing one is not sufficient. There, a second one should be drawn in an area of Alabama known as the Black

Belt, a group or a string of rural communities in Alabama. They're large enough. They're compact enough. There's still racially polarized voting. There should be another district being drawn.

[00:09:02] Jeffrey Rosen: Thank you very much for that helpful review of the law. Jason, do disagree with anything Rick has said? And, and if not, maybe take us up from *Gingles* and, and tell us whether you think that there is a tension between the *Gingles* factors that Rick identified and the 14th Amendment to the Constitution.

[00:09:22] Jason Torchinsky: Sure. So, let me just go back to Alabama for a second. Alabama has seven congressional districts. One of the seven is a majority-minority district and it was drawn that way beginning in the early 1990s. And when, when Rick said that there isn't tension between Section Two in the 14th Amendment, I disagree with that. Section five, that Rick talked about, resulted in a series of cases in the 1990s in front of the court, where, in the Bush administration, the Justice Department pursued something that they referred to as, I kid you not, the "Black Mac Strategy," where they were denying preclearance to legislative plans if the DOJ could draw an additional Black majority district. And the Supreme Court struck that down and said, no, you can't do that. That's not what section five is intended to do.

[00:10:10] Jason Torchinsky: And then that led to a series of cases called the *Shaw* line of cases where the court looked at a whole bunch of majority-minority districts and said, look, you can't draw these districts where race is your predominant motivating factor. And a series of districts in North Carolina were struck down that were drawn to have race as the predominant factor. This is the famous one where the district traveled down the center of interstate highway to connect to minority areas. The Court struck down a district that had been drawn to connect the Austin area of Texas to the Rio Grande Valley.

[00:10:51] Jason Torchinsky: Fast forward a number of years, it hasn't been since the early '90s, that a federal district court has ordered the creation of a new majority-minority congressional district. And Alabama says, "look, we've had this this way for 30 years. Our population really hasn't shifted. But the only way that you can draw a second majority-minority district in Alabama is to reach a finger down into Mobile County, which has never been split in the history of Alabama's drawing of congressional districts, and grab the African American population that lives in Mobile County, where it is entirely surrounded by White population, and draw a finger down into Mobile in order to configure the state into a second majority-minority district." And by the way, these majority minority districts are barely majority-minority districts. They're like 50.02%, African American population or 50.07% African American population. And the only way they can do that is by drawing this finger down into Mobile County.

[00:11:53] Jason Torchinsky: And if you're a legislator, and you had been like, "hey, why don't I draw a finger down into Mobile County?" Legislative council would likely have told you, no, you can't draw on the purpose of race. And if you draw that finger down in Mobile County, and you carve carefully around African American neighborhoods in Mobile to connect them to African American communities on the far eastern side of the state, some 180 miles away, the only reason you did that was race.

[00:12:20] Jason Torchinsky: And the *Shaw* line of cases would tell you that's unlawful. So, the legislature did this, and didn't draw a second majority minority district. And then they got sued. And the trial court said, "well, of course, you should have known that you needed to draw a finger down into Mobile to literally carve out the Black population from the surrounding White population to try a second majority-minority district." Most legislators, after listening to the court's pronouncements for the last 30 years since the *Shaw* line of cases would say, "if I have to do that, I violate the 14th Amendment by doing it." So, how can a statute, namely Section Two, tell me that that's required? And that's really, I think, where Alabama is facing a real tension here.

[00:13:05] Jeffrey Rosen: Thank you for reminding us that this case arises in Mobile, which was the place that originally gave rise to the Voting Rights Amendments of 1982. Rick, Jason says that based on the Supreme Court's statements in the *Shaw* line of cases, using race as the predominant factor in redistricting violates the 14th Amendment. And he says that to the degree that Section Two of the Voting Rights Act is interpreted to require districters to take race into account, it violates the 14th Amendment. I gather that Justice Thomas has suggested that Section Two of the Voting Rights Act is itself unconstitutional. Is that an accurate statement of Justice Thomas's position and the other justices on the Roberts court share that view?

[00:13:52] Rick Hasen: That's a great question, Jeff. And first, let's talk about Justice Thomas because I think he has very much a minority view on the question. He says, and Justice Gorsuch agrees with him, that Section Two does not, as a matter of statutory interpretation, even apply to redistricting. And although Justice Thomas asked a couple of questions, he wasn't really engaged in the argument.

[00:14:16] Rick Hasen: And Justice Gorsuch, who had concurred with Justice Thomas last time, said that Section Two doesn't apply to redistricting and didn't ask a single question. So, I take it that those two Justices don't think that Alabama violated the Voting Rights Act because they don't think that it has any application to redistricting. And we can talk about whether that's accurate or not, but I don't think any other Justices agree with that. So, there's two votes with Alabama for sure, but not on the same reasoning.

[00:14:43] Rick Hasen: Justice Thomas has suggested in other contexts that the Voting Rights Act itself could be unconstitutional to the extent that it's in the areas where it applies. But I think I fundamentally disagree with Jason on the terms of *Shaw* itself and also, I'm against the whole *Shaw* line of cases. But let me focus on, on the first point.

[00:15:04] Rick Hasen: As Jason said, in 1993, the Supreme Court said that if you make race the predominant factor in redistricting, it's unconstitutional unless the state has a compelling interest in taking race into account. And the Supreme Court has said, for a number of cases, we assume without deciding that if Section Two actually requires the creation of a majority-minority district, that would be a compelling interest that would justify this. Then I believe it was in *Bush versus Vera*, where Justice O'Connor and the former liberal Justices went beyond just assuming that Section Two was compelling and said that it was. All of the cases where the court has found a *Shaw* violation in cases involving Section Two, the way the court has done, it has said, it's true

that Section Two could be a justification if Section Two required the drawing of these districts, but it doesn't require the drawing of the district, for example, because the minority population is too disparate or too spread out.

[00:16:01] Rick Hasen: So, the reason I disagree with Jason on this point, first and foremost, is because I think the Court has recognized that if Section Two actually requires it, that is justified. In line with that, I thought was quite interesting, and this is something, Jeff, I'm sure you're very keen on hearing, that Justice Jackson, the newest Justice on the court referred to the original understanding of the 14th Amendment, the Reconstruction Amendments, the 13th, 14th, and 15th Amendments, and said that race consciousness was permissible. So, she was making an originalist argument that taking race into account in order to deal with past discrimination is appropriate and constitutional, which calls into question the *Shaw* line of cases.

[00:16:42] Rick Hasen: I've always questioned the *Shaw* line of cases. I questioned them with concern to try to use them to attack the creation of more majority-minority districts. I questioned them when people on the left in more recent years have tried to use it. I don't think it really is a cause of action because it's not about vote dilution. It's about the message that is supposedly sent when voters are divided by race and put into a district. But putting that aside, I think on its own terms, *Shaw* is not a problem when it comes to Section Two of the Voting Rights Act. And that's why I disagree with Jason's initial statement that there's this tension. I think there was this tension when we had section five, which, on the one hand, you have this no backsliding provision. On the other hand, you had don't take race too much into account. I think with section five, there was much more of this tension. But I don't think properly interpreted in the *Gingles* case in 1986, that there is this tension, especially given what the court said in *Bush versus Vera*.

[00:17:36] Jeffrey Rosen: Jason, Rick says that there's a disagreement on the court between Justices like Justice Thomas, who suggests that the Voting Rights Amendments themselves may violate the 14th Amendment. And Justices, including Justice O'Connor and a majority of the court in *Bush and Vera*, who said explicitly that compliance with Section Two of the Voting Rights Act was a compelling interest. And I think in *Bush and Vera*, Justice O'Connor wrote a concurrence with her own opinion to make that point.

[00:18:03] Jeffrey Rosen: And then Rick notes that Justice Jackson, during her second day of oral arguments, had a significant intervention where she says, "I don't think we can assume that just because race is taken into account that creates an equal protection problem. When I looked at the history and traditions of the Constitution, what the framers and founders thought about when I drill down to that level of analysis, it became clear to me that the framers themselves adopted the equal protection clause, the 14th Amendment, the 15th Amendment, in a race conscious way."

[00:18:32] Jeffrey Rosen: Jason, what do you make of Justice Jackson's suggestion that, to the degree that Justice Thomas is suggesting that the 14th Amendment prohibits any racial classification in voting any race consciousness in voting, that she's suggesting Justice Thomas is not being faithful to the original understanding the 14th amendment?

[00:18:51] Jason Torchinsky: Well, for the originalists on the court, they're going to have to decide whose view of the original interpretation they want to support. And clearly, Justice Jackson has thrown down a marker, challenging Justice Thomas's view of the original interpretation of the 14th Amendment. And I think we're going to see that play out later this month in the arguments about the affirmative action cases out of Harvard and out of North Carolina. I think you're going to see some of those similar tensions playing out in that argument.

[00:19:18] Jason Torchinsky: But back to the *Gingles* test and the 14th Amendment and the *Shaw* line of cases, it was interesting that it came out at oral argument. A lot of people when they referred to part one of the *Gingles* test, that was reasonably compact. And the Justices pointed out that what they actually said in *Gingles* was reasonably configured, right? And so, the question is, is it reasonable to ask Alabama to, or to require Alabama to draw that finger down into Mobile to carve out Black population to draw a second district or not?

[00:19:53] Jason Torchinsky: And I think that if you listen to the questioning of Justice Alito And Justice Jackson, both of Alabama and of the other two parties that presented at oral argument, the question really is how do you determine what a reasonable configuration of a majority-minority district is?

[00:20:14] Jason Torchinsky: I'm counsel for Louisiana in, essentially, a parallel case called *Robinson* that's been stayed and held in abeyance pending the outcome of *Merrill*. But in *Robinson*, when the plaintiffs in the case came up with their reasonable interpretation, what they did to draw their second majority-minority district was take every major city in the eastern two thirds of Louisiana and divide those cities between their Black neighborhoods and their White neighborhoods, and then said, "oh, that's a wholly reasonable configuration." Well, if the goal of the Voting Rights Act is to reduce discrimination in voting, and plaintiffs these days say, "no, the only way to essentially not discriminate is to discriminate." That's kind of a challenge for the notion that we're not supposed to be discriminating.

[00:21:04] Jason Torchinsky: And I think that's really what Alabama is saying here, which is, look, how am I supposed to not discriminate on the basis of race if I have to go reach fingers down into some counties and reach from the far southwestern corner of the state to the far eastern corner of the state to configure a district that makes a bare majority-minority? And how does that afford an equal opportunity? And how is that a reasonable configuration? And I think that's really what this case is going to turn on.

[00:21:35] Jeffrey Rosen: Rick, Jason has emphasized Justice Alito's language about "was the district reasonably configured." Justice Kagan responded in her questions, there's no indication in *Gingles* or in any of our cases that the court did mean reasonably configured in the way that Justice Alito suggests. Describe the disagreement between Justice Alito and Justice Kagan about the reasonably configured test and why that's important.

[00:21:58] Rick Hasen: I think it's worth backing up for a second before we get there and talk about what Alabama is really arguing. They had essentially two arguments. The first one is that the *Gingles* test is wrong. You have to show intent and we have to rethink what Section Two

means. If you look at the language of Section Two itself, the Supreme Court got it wrong since 1986. That got no purchase on the court. Alabama's Attorney General didn't even defend that position. That was his backup position.

[00:22:32] Rick Hasen: As I was listening to the oral arguments, Alito was making the arguments for Alabama. And to some extent, Justice Jackson and Justice Kagan were making arguments for the challengers. What I think Justice Alito was getting at—remember, I talked about *Gingles* has a three-part threshold test, and then followed by the totality of circumstances.

[00:22:55] Rick Hasen: What I think Alito wants to do is to tweak or alter the first part, which requires that the minority group be large and sufficiently compact that you can draw a district where minority voters could elect representatives of their choice. And that's been a test that's been really easy to apply. Even the Chief Justice Roberts, when he dissented from the state in this case, said, “yep, you apply *Gingles*. It's a no brainer.” The three judge Court unanimously agreed that it was a violation of *Gingles*. In fact, the districts that were drawn by the court were more compact than the districts that Alabama had drawn for itself.

[00:23:34] Rick Hasen: Jason's saying, “nobody knows how to draw these districts.” We know quite well how to draw districts under *Gingles*. This was compact enough as the standards go. So, what Justice Alito seems to be trying to do is to embrace Alabama's backup argument, which is, you don't have to draw a minority opportunity district, this district where minority voters can elect representative their choice, unless, using just race neutral traditional criteria, like protecting incumbents, looking at the lines where the city and county boundaries are, that you would happen to come up with a minority district. It would turn a race conscious statute—one that is deliberately race conscious in order to deal with the problems of past discrimination—into one that's race neutral. It would turn Section Two on its head.

[00:24:20] Rick Hasen: It's very much like what Justice Alito did in the *Brnovich* case, which we talked about on the podcast about a year and a half ago or a little bit over a year ago, where he mangled Section Two of the Voting Rights Act applied outside the country to redistricting. He pretends he's sticking to precedent, but instead, he is not faithful to text or to history or to precedent. It's a radical rewriting of the Voting Rights Act in order to help White Republicans. That's what Justice Alito is doing. It is one of the most nakedly political moves I've seen on this court in quite some time.

[00:24:54] Rick Hasen: And in some ways, in my view, worse than what Justice Thomas is doing. Justice Thomas is at least upfront about his disdain for these race conscious laws, when I think Alito probably shares Justice Thomas's views but not his courage.

[00:25:11] Jeffrey Rosen: Jason, strong words from Rick. He says the Justice Alito was rewriting the first part of the *Gingles* test to replace the requirement that the racial or language minority group is sufficiently large and geographically compact enough to constitute a majority in a single member district to ask district jurors to draw districts using race neutral criteria. And he says that this would be a nakedly political act that is not faithful to text, history, or precedent. Do you agree or disagree? And how do you view Justice Alito's test?

[00:25:43] Jason Torchinsky: I'm back to the tension that legislators face here, right? Keep in mind that Alabama was one of the states that actually lost a 14th Amendment case in the last decade. The Alabama Legislative Black Caucus case came up to the court twice. And the Alabama legislature was told by the US Supreme Court and by a three-judge panel that it was too race conscious when it drew majority-minority districts. So, you take a legislature that has just lost in front of the Supreme Court because they were told that they were too race conscious. They go back and they tried to basically maintain a status quo. And then they're told, oh, nope, when you drew your congressional districts, you shouldn't have maintained the status quo. You should have made a radical change with race at the top of your mind, when we just told you that you were wrong to do that, when you read through your legislative districts last decade. So, the tension that these legislators face is incredible. And I think that's what Alito is trying to wrestle with.

[00:26:39] Jason Torchinsky: If you go back to where the African American population is in Alabama, and you go back to the Alabama Legislative Black Caucus, not the Supreme Court decision, but the last decision on remand from the Supreme Court, when they had to redraw their districts to be less conscious of race, Judge Pryor, who was also the prior Attorney General of Alabama—this is Bill Pryor, not Joe Pryor from the 11th Circuit—was sitting on the three judge panel, described the different minority populations in Alabama and how they're geographically separated from each other. I believe he described five different pockets of minority population. He described geographically where they were in relation to each other and basically said they're really not connected. So, in order to achieve what the Alabama plaintiffs want to do, you're literally trying to come up with creative ways to have computers come up with a configuration that draws together what are, as Judge Pryor described, five different distinct minority population centers, and trying to combine them into, in this case, two districts.

[00:27:47] Jason Torchinsky: I think that's what Alito is trying to wrestle with, which is, how do you tell the legislature when they drew the majority-minority districts, that they drew too many, and they were too majority-minority? But here, they should have known to draw two districts, combining five distinct populations into districts that were barely majority minority, including the kinds of hooks and fingers that the court has previously told legislators they couldn't do. How was the legislature to know that there's a compelling interest here that requires them to draw the hooks and fingers to combine the disparate populations, when drawing what they drew last decade on their legislative maps was not okay? The tension is there.

[00:28:36] Jason Torchinsky: I think Alito gets that tension from a legislator's perspective in some ways more than other members, or more than other current members of the court. Keep in mind when Justice Alito was growing up, his father was the Director of Legislative Services for the state of New Jersey. His dad, in a footnote in *Karcher versus Daggett*, is cited by the Supreme Court in a redistricting case.

[00:29:01] Jason Torchinsky: Justice Alito, from growing up as a kid and being around legislators and his dad working for the legislature, understands the challenges that legislators face in a way that probably no Justice other than Justice O'Connor herself, being a former legislator, actually did. And in these redistricting cases, he asks over and over again, “what's left

for the legislatures here? How are legislators supposed to know what the answers are?” He did it in the political gerrymandering cases, and he's doing it again here in the Section Two context. I think Alito is really a pivotal one to watch here.

[00:29:38] Jason Torchinsky: As Rick noted, Justice Thomas and Justice Gorsuch think that Section Two doesn't apply to redistricting at all. So, that's two votes for Alabama. Obviously, we know where Justice Kagan, Justice Sotomayor, and Justice Jackson are, so that really leaves us to the remaining couple of justices to figure out what the controlling opinion of the court is going to be. And I think Alito is going to play a critical role in that.

[00:30:03] Jeffrey Rosen: Thanks for the fascinating biographical detail and for calling our attention to the *Karcher versus Daggett* case from 1983. And as you say, there is a footnote to the affidavit of Samuel A. Alito, Executive Director of the Office of Legislative Services of the New Jersey legislature.

[00:30:19] Jeffrey Rosen: Rick, Jason says that Justice Alito is grappling with a tension between the 14th Amendment which prohibits in the court's view, or the majority of the court's view, race being a predominant factor and, and the requirements of the Voting Rights Act, and that Justice Alito is trying to reconcile that tension. Do you agree with that charitable reading of Justice Alito's efforts? Tell us in that sense how his proposal of focusing on reasonable compactness differs from Alabama's original proposal, which is that Section Two is only triggered in the face of intentional racial discrimination.

[00:30:56] Rick Hasen: Well, no, I don't think that Justice Alito was being forthcoming in what he thinks. He's shown incredible hostility to the Voting Rights Act. I mentioned the *Brnovich* case from last summer. There was also *Abbott versus Perez*, a Section Two case out of Texas, where Justice Alito did a lot of damage to the Voting Rights Act. I wrote a piece— people listening can Google the Supreme Court's pro partisanship turn—where I analyze how Justice Alito in *Abbott versus Perez* said things that made it easier for White Republicans to maintain as much power as possible in their states.

[00:31:32] Rick Hasen: For example, you have to presume that a state legislature acts in good faith. And given Texas and other states' records when it comes to race, voting rights, and redistricting, I think that presumption should be turned on its head. He has been uniformly hostile.

[00:31:51] Rick Hasen: We're going back in history. Jason talks about Alito remembering his dad working on drawing districts. We can go back to his application to work at the Justice Department, where he talked about the Warren Courts, “one person, one vote” cases is one of the things he was really opposed to. This is a Justice that does not embrace democracy. This is a Justice that does not believe that minority voters need protection in the political process. So, why wouldn't he embrace Alabama's more extreme argument of a reading Section Two to have an intent-based test? Because he faced more friction for doing it.

[00:32:29] Rick Hasen: Remember, it was Justice Alito who wrote the *Dobbs* decision. The leaked *Dobbs* decision that, even after it was criticized in draft, he didn't make any changes, even citing to some misogynistic sources from the 18th century. Justice Alito has already taken a hit somewhat. Why not just do the same thing, which is essentially weaken protection for minority voters without taking the hit of saying you're overturning precedent by overturning the *Gingles* test? It's just a cheap and disingenuous way to try to water down or weaken the Voting Rights Act.

[00:33:08] Jeffrey Rosen: Jason, before we leave these points, do you believe that Alabama was right to argue that Section Two should be interpreted to have an intent requirement? And do you think that Justices Thomas or Gorsuch or any other Justices may agree with them?

[00:33:22] Jason Torchinsky: Thomas and Gorsuch are where they are on Section Two. I don't think whether there's an intent requirement or not is going to move them. I think most of the Justices would probably say it's an effects test, not an intent test, following the congressional action after *City of Mobile*. So, I don't know that that's where this case is going to turn. Um, I think this case is really going to turn on what exactly is reasonably required.

[00:33:49] Jason Torchinsky: And one thing I do want to point out as we talked about and the court has focused on this a couple of times in cases involving race and voting, the country is not the same country that it was in 1965. In the '70s and '80s, when you look at the Congressional Black Caucus, almost every Congressional Black Caucus member represented a majority Black district. These days, more and more African American members are representing districts that are not majority-minority. I think something like less than half of the Congressional Black Caucus currently represents majority-minority districts. So, this notion that minority representatives are only going to be elected if you have a majority-minority district is proving less and less true over time, which I think actually shows that some of how our society and our culture has changed, where people are less likely to vote on race lines than they are on party lines.

[00:34:46] Jason Torchinsky: One of the things about Section Two that I think we have to keep in mind, it says on account of race, right? So, it's not disputed, right? It's a factual matter that, in most places around the country, something like 90 plus percent of African American voters, vote for Democrats, right? And that doesn't vary depending on whether the candidate is White or Black or Hispanic. That's just the vote for the Democratic candidate.

[00:35:14] Jason Torchinsky: There's actually a prior judicial ruling from this last decade from Alabama, where the district judge dismissed the claim against the Alabama judiciary and chronicled this and said, "look, what gets reflected here is not necessarily motivated on the basis of race. But the fact that Democrats in Alabama are losing statewide elections is the decline of the Democratic Party. It's not a racially motivated thing. It's just the decline of the Democratic Party in Alabama."

[00:35:43] Jason Torchinsky: Section Two also says on account of race, and I don't think we've broached that subject here. But I think you've got to have some showing that this isn't just a

partisan issue. Because if you look back at these cases over the last 10 years, Democrats brought a lawsuit in Virginia and said you didn't need a second Black congressional district there. Why? Because they thought it would benefit the Democratic Party. Why are Mark Elias and the Elias group of plaintiffs in Alabama? Because they think adding a second majority Black district down there is going to add another Democrat. So, it is as partisan for them as Rick says, it is for Justice Alito, right?

[00:36:18] Jason Torchinsky: You have the Elias group and their allies trying to take apart majority-minority districts in the Virginia House, in the Virginia congressional delegation, and then trying to add majority minority districts in Louisiana and Alabama. Why? Because they're motivated by partisanship, not motivated by expanding the number of minorities in the legislature.

[00:36:41] Jason Torchinsky: If you look at the outcome of what happened in the *Bethune-Hill* case in Virginia, which was one of the cases where the Virginia legislature had some racial targets based on anecdotal testimony from the Black Caucus, that districts needed to be at least 55% African American to elect candidates of choice, the plaintiffs in that case convinced the court that that was wrong. And when the special master redrew those districts, two of the districts were dropped from north of 55% African American to, I think, one was dropped to 52%, and one was dropped to 49%. And guess what happened in the 2021 elections. White Republicans won both of those districts. And guess how many seats Republicans hold the Virginia legislature by, like, one seat. So, this notion that somehow the plaintiffs in these cases are White knights for minority groups is really not true. In a lot of cases, the plaintiffs in these cases are motivated as much by partisanship as Rick casts on the judges.

[00:37:41] Jeffrey Rosen: Rick, do you agree or not with Jason, that the voters are motivated in these cases as much by partisanship as race? What are the consequences for the application of the *Gingles* test? And do you see a majority of the court converging around Justice Alito's reasonably configured rethinking of the *Gingles* test or not?

[00:38:03] Rick Hasen: The first thing I'd say is that it's artificial to talk about race for party. I've written a lot about this. In a place like Alabama, something like 90% of voters who are African American vote for the Democratic Party, more than two thirds of White voters vote for the Republican Party. So, when there's discrimination against African American voters, there's discrimination against Democrats. So, it's artificial to separate that out. I certainly think there are some parties that come in that really want to maximize drawing districts to help the Democratic Party, no doubt about it. I don't think that explains the position of the NAACP Legal Defense Fund. They're not lawyers for Democrats. They're lawyers for Black voters, and I think their motivation is to try to assure that there's fair representation. Just like when I speak to Nina Perales and she's doing work for MALDEF in Texas, it's not about helping Democrats. It's about helping Latino voters. Of course, there are partisan actors. For a very long time, both Democrats and Republicans have tried to manipulate their understanding of the Voting Rights Act to help their parties.

[00:39:13] Rick Hasen: I think the Voting Rights Act should be read, not to help the parties, but to help the minority voters that it was meant to protect. As far as what's likely to happen, it's hard to say from oral argument because I remember the oral argument in the *Brnovich* case. In the *Brnovich* case, I felt like Justices Kavanaugh and Barrett asked some really interesting, difficult questions. It signaled to me that they were grappling with these issues and trying to come up with some kind of subtle way of dealing with the meaning of Section Two outside the context of redistricting. But then, in the end, they signed on to the horrible opinion by Justice Alito without saying a word. We might see the same thing here. Alito is definitely taking the lead here.

[00:39:53] Rick Hasen: Alito, Thomas, and Gorsuch are clearly against drawing the districts. But Justices to watch are Barrett and Kavanaugh, and, to a lesser extent, Roberts. Roberts is no friend the Voting Rights Act. I should say that Roberts, if we're going to go back to history, Roberts was the point person for the Reagan Administration in trying to prevent the creation of the effects tests in 1982, when Congress rewrote the Voting Rights Act. He failed in getting that language taken out. Roberts is no friend the Voting Rights Act, but he's a relative moderate on this court given how far right this court has gone. I heard some very helpful things from Justices Kavanaugh and Barrett about looking for some reasonable way to preserve the *Gingles* test. But I don't know, based on the experience with *Brnovich*, if we can count on that.

[00:40:44] Jeffrey Rosen: Jason, how do you see Justices Kavanaugh and Barrett and Roberts, based on their questions and oral argument? Do you think that they'll preserve *Gingles* or not?

[00:40:54] Jason Torchinsky: I don't think this is the last time we're going to see this Alabama case at the court. What I see happening after listening to oral argument is, I think there will be a majority of the court to reverse the trial court. I think it'll be sent down for further proceedings with some kind of split or plurality opinion from the majority of the six Justices who I think are going to, at the very least, concur in the judgment that the lower court should be reversed.

[00:41:23] Jason Torchinsky: My fear is, we're going to have two or three opinions from the controlling majority who all concur that the lower court should be reversed. And then we're going to get a remand down to the trial court for it to try to sort through what the Justices actually mean. And a year from now, or a year and a half from now, just as we're coming into the 2024 election cycle, we'll be back up at the Supreme Court for Alabama, after they've had more of a full trial process, because remember, this is still an appeal from a preliminary injunction. I think we're going to have Alabama I, and in a year or two, we're going to have Alabama II. I don't think this case is going to conclusively resolve how we're going to interpret Section Two going forward.

[00:42:12] Jeffrey Rosen: Rick, if the court does say that you don't have to draw a second district here and send it back, how big a deal would that be? Justice Kagan noted in the oral argument that in *Brnovich*, the court stressed that Section Two still is available for vote dilution claims. Um, if the district struck down would, would Section Two be defined in the same way that section five was?

[00:42:33] Rick Hasen: It's really hard to know because the devil will be in the details. There are ways that Justice Alito could write a majority opinion, that would say no district here or remand, as Jason suggested for potential further consideration. That wouldn't make a radical change. Or it could be done in a much more radical way that would cause there to be many fewer minority preferred candidates elected to office.

[00:42:57] Rick Hasen: When you think about how the Voting Rights Act's *Gingles* test was meant to be put in place, it was meant to be what Justice Jackson's oral argument called self-sunsetting. The idea is, once White and Black voters don't prefer candidates on the basis of race, you can no longer make up the *Gingles* preconditions. And there is no Voting Rights Act violation. In many parts of the country, there are places where White voters and minority voters prefer the same candidates. They don't divide on the basis of race. Then there is no good voting rights claim.

[00:43:30] Rick Hasen: I would like to see Section Two sunset because we don't have racially polarized voting in the United States. Until that time comes, though, minority voters still need the protection of the Voting Rights Act to ensure that they have some fair representation in Congress and in state and local legislative bodies.

[00:43:45] Jeffrey Rosen: Jason, on that point, you said that racially polarized voting is less salient than voting on the basis of partisanship. Do you agree with Rick that in some parts of the country, if there's less racially polarized voting, that the need for the Voting Rights Act might indeed sunset on its own?

[00:44:02] Jason Torchinsky: I think Rick is right in that. As Rick demonstrated, he's right about what the research shows about African American voters. Hispanic voters, though, are, are even more difficult to put into any kind of general categorization in a lot of ways. Because how the Hispanic vote breaks down depends on where you are in the country, what state you're in, even what part of what state. There are parts of the Hispanic population in Florida where Republicans get a majority of the Hispanic vote. There are parts of Texas now where Republicans are getting a majority of the Hispanic vote.

[00:44:42] Jason Torchinsky: So, this notion that somehow any one particular party has forever control over the votes of voters of a particular race, I think is going to decline over time. I also think as America turns into more of a, a mixed-race country, we're going to see more people who don't clearly identify as one particular race or another as the Census Bureau shows an increase in people who have mixed race identification. I think this notion that we're going to be forever polarized on the basis of race, is going to prove not to be true over the long run, just because of changing voting preferences and changing racial identifications.

[00:45:26] Jeffrey Rosen: Let's take a beat before we close on the debate between Justice Jackson and Justice Thomas about the 14th and 15th Amendments. Rick, I am confident in saying that the 14th Amendment was not intended to apply to political rights at all. It was only intended to apply to civil rights. And the 15th Amendment was not intended to prohibit all racial classifications. It wasn't meant to apply to poll taxes and literacy tests which were used to

disenfranchise African Americans and support for both of those points you can find online at the Constitution Center's early drafts of the 14th and 15th Amendments that rejected that anti-classification rule. Do I have that history right? And, and in that sense, just as a matter of original understanding, when it comes to political rights, do you think Justice Jackson is correct or not?

[00:46:15] Rick Hasen: I'm going to have to defer to you on that. I'm not a historian of that period. Professor Tolson, for example, of USC, Professor Foner of Columbia, there are people who've studied this more closely than I have.

[00:46:30] Rick Hasen: I took Justice Jackson's comment there to be less about the Voting Rights Act case, and more about the affirmative action case, which Jason alluded to. I think that's where this debate is going to come to a head. If you take originalism seriously and the original understanding of the 14th Amendment was that you could have race-based classifications to deal with problems with race discrimination outside the context of voting, then affirmative action is potentially permissible under an originalist understanding. I think she was talking to Justice Barrett. We don't know that much about Justice Barrett. We know she's an originalist. We don't know how seriously she is going to take her originalism in these cases.

[00:47:14] Rick Hasen: What I would say about the point on voting rights is, you can look at the enforcement clauses in the 15th Amendment, in the 19th Amendment, in the 24th amendment, in the 26th Amendment. You can look at the elections clause in Article One, Section Four of the Constitution, and Congress has ample power to put these conditions in for the Voting Rights Act under Section Two. Even if you set aside the 14th Amendment, Congress has so much power to do so. I don't think there's any question about Congress's power to do it. I don't think there's any question that the idea of race consciousness was not foreign to the drafters of the Reconstruction Amendments. I think it's a constitutional non-starter.

[00:47:53] Rick Hasen: I want to go back to one point in history when the Supreme Court was deciding whether or not to overturn section five of the Voting Rights Act. This is what I mentioned earlier that required jurisdictions with a history of race discrimination to get federal approval before making changes in their voting rules. And when there was the challenge to section five, and people were saying "this is so radical, you're going to kill off minority voting rights," the response was, "oh, don't worry, we always have Section Two." And when I heard that at the time, I thought Section Two is next on the chopping block. And what we've seen in cases like *Brnovich* and this case is that's absolutely true, that now that section five has been eliminated, those who oppose protecting minority voting rights are going after their next biggest target.

[00:48:38] Jeffrey Rosen: Jason, your thoughts on the historical question and then we'll close. I'd said to Rick that I thought based on early texts of the 14th and 15th Amendments, that it's uncontroversial that the 14th Amendment was originally not intended to apply to political rights at all. It was only intended to apply to civil rights. And that the 15th Amendment wasn't intended to ban all racial classifications, including poll taxes and literacy tests, but just ballot access. Do you agree or disagree with that historical claim? And what are the implications for the debate between Justice Jackson and Justice Thomas?

[00:49:10] Jason Torchinsky: I'm going to have to back off that debate as well, because I, too, am not a historian or historic scholar. I think we're going to see Justice Jackson and Justice Thomas battle this out. I think each of them are going to cite to historical analysis or historical documents that they support and that support their view of those Amendments. I think that it's fairly clear which sides they're both on. They're both going to make an originalism argument—thank you, Justice Scalia—but come out with vastly different interpretations of their view of what an originalist interpretation would be. Who's right, who's wrong? I'm certainly not going to decide between the two Justices, but it seems clear that the two of them are headed for a head-to-head battle on this, not just in *Merrill*, but also in the upcoming Harvard and North Carolina cases as well.

[00:50:08] Jeffrey Rosen: Well, it's time for closing arguments in this excellent discussion, illuminating and deep about a really complicated and important issue. Rick, first closing thoughts to you. Based on the oral arguments, what do you believe that the stakes and legacy of the Alabama voting case will be?

[00:50:26] Rick Hasen: It's always hard to figure out what's going to happen from watching oral argument. I think the stakes here are very high. If the court sides with Alabama, it depends on how they side with Alabama. It will either be a small blow or a major blow against protection of minority voting rights in United States. In contrast, if the court sides with the challengers to the Alabama redistricting, I think we'd be preserving the status quo, which is that the well-established *Gingles* test would be applied, and minority voters would still be able to have opportunities to meaningfully have representation in Congress and in state and local legislative bodies.

[00:51:09] Rick Hasen: I think that's really what we're thinking about as we look forward. How much damage might the Supreme Court do? Or are we going to continue to stay the course? We'll probably have to wait until somewhere close to June to find out the answer to that question.

[00:51:25] Jeffrey Rosen: Jason, last word in this great discussion is to you. Based on the oral arguments, what do you think that the stakes and legacy of the Alabama voting case *Merrill* and *Milligan* will be?

[00:51:35] Jason Torchinsky: This isn't going to be the end of the story. I think we're going to wind up back down for proceedings in front of the three-judge panel. And I wouldn't be surprised if we're back up in 12 to 18 months on an Alabama decision. Based on the oral argument, I don't know that the Justices are ready to definitively resolve the future of Section Two. And I think there's going to, fortunately or unfortunately, be a lot more litigation before we have some clear direction.

[00:52:04] Jeffrey Rosen: Thank you so much, Rick Hasen and Jason Torchinsky for a civil, thoughtful, and illuminating discussion of *Merrill versus Milligan* and the future of Section Two of the Voting Rights Act. Rick, Jason, thank you so much for joining.

[00:52:17] Jason Torchinsky: It's been a pleasure. Thank you very much.

[00:52:23] Jeffrey Rosen: Today's show was produced by Melody Rao and engineered by Dave Stotts. Research provided by Sophia Gardell, Kelsang Dolma, Liam Kerr, Emily Campbell, Sam Desai, and Lana Ulrich. Please rate, review, and subscribe to We the People on Apple and recommend the show to friends, colleagues, or anyone, anywhere who's eager for a weekly dose of thoughtful, civil, and deep constitutional debate. And always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement, the dedication to lifelong learning, and to civil dialogue from people across the country who are inspired by our mission. You can support it by becoming a member at constitutioncenter.org/membership, or give a donation of any amount to support our work, including this podcast at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.