



## Will the Supreme Court Strike Down South Carolina's Voting Map?

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**[00:00:00] Jeffrey Rosen:** In this most recent round of redistricting, the South Carolina legislature changed the population in a congressional district, resulting in a number of black voters being moved to a different district. Challengers argue that the state violated the 14th Amendment by unlawfully engaging in a racial gerrymander. Lawmakers counter that political, not racial factors motivated redistricting.

**[00:00:25] 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's a nonpartisan, nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode of We the People, we'll break down the oral arguments in the case, which were held this week, and we'll talk about how the court might resolve them. Joining me to discuss this important question are two of American's voting rights experts, UCLA law professor Rick Hasen and Jason Torchinsky of the Holtzman Vogel Law Firm. Rick Hasen is an internationally recognized expert in election law as well as legislation and statutory interpretation. He's the author of the forthcoming book "A Real Right to Vote: How a Constitutional Amendment Can Safeguard American Democracy". He's co-author of a leading case book in election law and remedies, served as a CNN election law analyst and an NBC analyst, and directs UCLA Law's Safeguarding Democracy Project. Rick, it is always great to welcome you back to We the People.

**[00:01:34] Rick Hasen:** It's great to be with you.

**[00:01:35] Jeffrey Rosen:** And Jason Torchinsky is a partner at the Holtzman Vogel Law Firm, specializing in campaign finance, election law, lobbying disclosure and issue advocacy groups. He's filed two amicus briefs in this case on behalf of the National Republican Redistricting Commission and members of Congress from the South Carolina delegation. Jason, it's wonderful to welcome you back to We the People.

**[00:01:56] Jason Torchinsky:** Great. And thanks for having me.

**[00:01:58] Jeffrey Rosen:** Rick, give us a sense of how we got here in terms of the evolution of Constitutional doctrine.

**[00:02:05] Rick Hasen:** Yeah. And it's really complicated, and I think last time that Jason and I were on your program, we were talking about *Allen v. Milligan*, which was a Voting Rights Act case involving redistricting, and so it's important to separate out three different kinds of claims that people can make about redistricting, or, or maybe even four if we count partisan gerrymandering. So at least once every 10 years, every state has to redraw its district lines to make sure that it has equal numbers of people in them, and this process can be a political one where lines can be drawn to help one side or hurt the other. Often that leads to litigation. Sometimes that litigation is making a claim that the way the lines were drawn were done in such a way so that minority voters didn't get their fair share of political power.

**[00:02:58] Rick Hasen:** There's two kinds of claims like that. One is a claim under the Voting Rights Act Section 2, which guarantees minority voters the same opportunity to participate in the political process and to elect representatives of their choice. That was the part of the Voting Rights Act that was an issue in the *Allen v. Milligan* case that we talked about last time. The other kind of claim is similar under the United States Constitution under the 14th or 15th Amendments, it's very similar but it also requires proof of intentional discrimination, intending to discriminate in how lines are drawn. That's an issue in the case we're gonna talk about today, but it's kind of a side issue, it wasn't before the court really yesterday, but may become part of the case.

**[00:03:38] Rick Hasen:** A third kind of claim is that lines were drawn to help one part and, and hurt the other. Back in 2019, the Supreme Court in a case called *Rucho v. Common Cause* said that the federal courts can't hear those kinds of cases because there's no standards under the US Constitution to apply. And then that brings us to the fourth kind of claim, which is the one that was an issue in the *Alexander* case that was just argued before the Supreme Court. And that's not an argument about dilution of votes, that some group has less power than others because of how the lines were drawn, but instead, that lines were drawn in a way that separated voters on the basis of race without adequate justification.

**[00:04:20] Rick Hasen:** This is a so called racial gerrymandering claim, it originates in a 1993 case called *Shaw v. Reno*, and it's really a two part chess. First, did race predominate over traditional districting factors when a redistricting plan is done? And if the answer is yes, did the state have a compelling reason to do so? For example, it might have a compelling reason if it was doing so because the Voting Rights Act required doing so. And so, at issue in the South Carolina case is a claim as to whether or not the latest congressional districting that was done by South Carolina's legislature counts as a racial gerrymander. The other issue in the background, was it also a form of intentional race discrimination in violation of the Constitution's 14th and 15th Amendments? So while both of those claims are Constitutional claims, both of them might be under the Equal Protection Clause, you prove two different things with those kinds of cases, and we're talking here about the racial gerrymandering, the separating of voters on the basis of race.

**[00:05:22] Jeffrey Rosen:** Thank you so much for explaining those four claims so clearly. Jason how is the South Carolina legislature defending its plan, and what specifically is at issue in the case?

**[00:05:37] Jason Torchinsky:** Sure. The South Carolina legislature basically said, "Look, we drew this map to strengthen the republican vote in the first congressional district." The first congressional district is in southeastern South Carolina and centers around Charleston

County it is actually Nancy Mace's district, she had narrowly lost that seat and then she won it in 2020, and the republicans in Columbia said, basically, "We wanna make sure that it's stronger and more republican." So they had the guy who was the legislature's map drawer draw on the basis of politics, and that was basically their defense through this. And, and they said, "We drew to make this more republican. We didn't draw on the basis of race. And therefore, this racial gerrymandering claim should fail."

**[00:06:25] Jason Torchinsky:** Going back to what Rick was just pointing out about the whole question of predominance the question was, was why? What was driving the line? And probably the easiest predominance case to use as an example is there's a case out of Virginia called the Bethune-Hill where the legislature said, "We want every majority black district to be at least 55% black because we have this anecdotal evidence that says that's what we need for African American candidates to win, and so we're gonna hit this target and we're gonna draw based on this racial target," and the Supreme Court said, "No, you can't just set out a racial target." And so what the plaintiffs did was basically argue they had a couple of different professors do some analysis and say, "Aha, we find that they moved out more African Americans than they moved out white voters, and therefore this was an intentional racial gerrymander." And the state came back and said, "No, when republican vote and or when democratic vote and black vote correlate so highly in this region of South Carolina," which no one's really disputing, when you try to strengthen the district and make it more republican, there's a consequential effect of reducing the black population of the district because you're trying to put more republicans in there.

**[00:07:50] Jason Torchinsky:** And there's two other sort of critical background facts in think people need to understand when they think about this case. The first congressional district was overpopulated by about 90,000 people, which meant when you looked at how South Carolina's population had grown or shifted within the state the South, the first congressional district was overpopulated, so that district had to shed 90,000 people. And what, ultimately, after they did what they did with the political data, the black population of the district dropped from, I believe, 17.78 to 16.72 black voting age population. And that, the plaintiffs argued, violated the Constitution.

**[00:08:31] Jeffrey Rosen:** Thank you so much for helping us understand that aspect of the case. Rick central, as you both suggested, is the question of what happens when race and politics overlap, and in addition to Shaw v. Reno, the precedence that the court focused on included Easley v. Cromartie which held that when racial identification correlates highly with political affiliation how should a court evaluate whether a map is permissible. Tell us about the relevance of that case and how the parties are disagreeing about the overlap between race and politics.

**[00:09:07] Rick Hasen:** Right. So to delve a little more into the race or party question, I think we need to ask, what is the injury that is caused by a racial gerrymanderer as the Supreme Court identified in Shaw v. Reno. In Shaw v. Reno, the court wasn't all that clear as to what the injury was, but said it was not dilution of votes, it wasn't a power problem, it was a problem about the message that was sent when you divide voters on the basis of race. And in later cases, the court said that this was a kind of expressive harm. The idea is that the state is sending a message that voters are being separated on the basis of race without adequate justification, and that offends the Equal Protection Clause. That's the theory.

**[00:09:52] Rick Hasen:** I've always been skeptical of the theory. I've been skeptical of the theory when conservatives used it to try to stop the creation of extra majority minority districts, I'm skeptical now when people on the left are trying to use it to make more what I would call vote dilution claims in disguise. These are cases where the claim is that there is dilution of the vote, but you can't prove it on a large enough scale that it could satisfy a Voting Rights Act Section 2 claim or a Constitutional claim.

**[00:10:22] Rick Hasen:** So taking as a given that, that this is a harm, which, which I don't, but that the court does, it matters if you do something because of race or you do something because of party. This is a very difficult question in the American South, in particular because race and party are really highly correlated. So if you look at North or South Carolina, you're gonna have about 90% of African American voters voting for the Democratic Party, and maybe something like two thirds of white voters voting for the Republican Party. So when a white republican legislature decides to move black voters, as happened in this case, in order to shore up republican interests, are they acting out of racial interests or out of partisan interest?

**[00:11:07] Rick Hasen:** To me, I think that question is nonsensical because they're doing both at the same time. You can't separate the two. It's not a coincidence that black voters like the Democratic Party; it serves their interests or they see it as serving their interests more. And so there is a correlation between race and party. And so the whole idea of separating, to me, is ridiculous, but that's what we're doing in these cases.

**[00:11:32] Rick Hasen:** So if you're going to say it's okay to discriminate on the basis of partisanship, which is what the court essentially says in *Rucho*, they're not gonna police partisan gerrymandering, but not on the basis of race, then legislatures have every incentive so say what they're doing is a partisan gerrymander. Now, South Carolina didn't initially start defending itself by saying they were engaged in a partisan gerrymander, like we saw in that *Rucho* case in 2019, they defended themselves by saying that they were applying traditional districting principles. And only later on did they make the, the party issue, and then the experts started hashing it out and doing different kinds of empirical tests to figure it out.

**[00:12:10] Rick Hasen:** So as you mentioned, we have two earlier cases where the court tries to distinguish between race and part. One I think is in 2001, the *Easley v. Cromartie* case out of North Carolina, it was the fourth time in the same redistricting cycle that the court had looked at North Carolina's congressional districting. And the court said that you analyze the question of whether it's race or party for clear error. That's a standard that is very deferential to the trial court, very hard to win under that standard, but if the evidence is so one-sided, it's gotta only come out one way. "We think they did this," the Supreme Court said in *Easley*, "for partisan reasons, not for racial reasons," they reversed the finding of a racial gerrymander.

**[00:12:52] Rick Hasen:** In *Cooper v. Harris*, which was another case out of North Carolina, it was an opinion by Justice Kagan, and she said some things that I was pretty surprised at the time. She basically said in this case, in finding that there was a racial gerrymander in North Carolina's districting, that because race and party correlate so well, you can't hide behind party when you take a step that in effect separates voters on the basis of race. And that seemed to make it much easier for plaintiffs to win in these cases, especially cases where a white republican legislature draws lines that hurt black democrats.

**[00:13:31] Rick Hasen:** And so a big question after *Cooper v. Harris* was, were the conservatives on the Supreme Court going to stick with this? Because, you know, the partisan politics of this is that are you gonna have a safer republican district? That's really the, the, what's at issue here when it comes to the partisan politics, just like in *Allen v. Milligan*, were you gonna get a second black majority district in Alabama that was going to essentially give democrats an additional seat?

**[00:13:59] Rick Hasen:** And so now, there's this big fight in the court, and we heard it in the oral argument yesterday, over exactly how you separate race and party. What kinds of tests do you use, and how much deference do you give in terms of this clear error review to the lower court when, here, a three judge lower court found that it was really race rather than party that predominated?

**[00:14:24] Jeffrey Rosen:** Jason, tell us about the oral argument and the nature of the disagreement. There were several exchanges with Justice Kagan, where she disputed the idea that you had to show that there was no alternative map that could produce the same partisan effect before you found a racial gerrymander, and she said that that requirement was not well rooted in the cases. Tell us about that dispute as well as disputes about how deferential to be to lower courts.

**[00:14:58] Jason Torchinsky:** Sure. So there was a lot of discussion during the oral argument about alternative maps. One of the positions that the defendants took before the three judge district court was, "Hey, look, if you wanna prove that this was race and not politics, show us the map that achieves our political ends but doesn't discriminate on the basis of race as you alleged we discriminated on the basis of race." And there was a dispute among the justices about whether an alternative map was required. Obviously Justice Kagan did not believe that an alternative map was required. She thought that the PhDs who say it was more likely that blacks were gonna get moved than whites was sufficient to make it a racial gerrymandering case.

**[00:15:44] Jason Torchinsky:** There were maybe two or three justices who sort of came to an opposite conclusion about whether alternative maps were required. I don't count to five to impose an alternative map requirement, but a couple of the justices just didn't say anything about it at all. So clearly, Justice Kagan doesn't think it's required, and I believe Justice Jackson, based on the questions, also doesn't think it's required. I think there might be two or three justices that think that an alternative map is required.

**[00:16:15] Jason Torchinsky:** But I think what the alternative map does and why the, the defendants were pressing for it so hard is, I think what they're trying to show is that this is really a partisan gerrymandering claim in the disguise of a racial gerrymandering claim, because what they say is, as Rick said, because African American vote and democrat vote correlate so highly in this area, you really can't make this district more republican without as a sort of follow on effect, a reduction in the black population of the district.

**[00:16:50] Jason Torchinsky:** And I also kind of wanna just take issue with one other comment Rick said, which is that this somehow hurts black democrats. I mean, just to, to be clear in the Alabama case, it's most likely going to be an African American democrat who wins the, the additional seat that was created. In this area of South Carolina, I mean, we're

talking about basically like one democrat who has held this seat in, I think since maybe the 1980s and it was a white democrat from Charleston who only held the seat for two years, from 2018 to, to 2020. The percentage of African American population in the district we're talking about is literally a reduction from 17.78% black voting age population to 16.72 black population, and that, the plaintiffs say, was a Constitutional violation.

**[00:17:44] Jason Torchinsky:** So I think that's part of the reason that I think the sense from a lot of the observers of the argument have, is that the majority of the justices are having a hard time finding a, a racial gerrymandering claim there.

**[00:18:00] Jeffrey Rosen:** Rick what did you make of that division on the court about whether an alternative map is required? Do you think that such a holding should be imposed or not? And what about other disputes among the justices about whether to defer to the lower courts?

**[00:18:16] Rick Hasen:** So I agree with Jason that these were the two places where the justices were sparring the most. One was over exactly how much deference to give, how much review to give for this clear error review. And the other is, how do you show that there was racial predominance rather than political factors primarily in play without producing an alternative map? I think a fair reading of Justice Kagan's earlier opinion in *Cooper v. Harris* is that you don't need that map. But as I heard Chief Justice Roberts in the oral argument in *Alexander*, it sounded like he wanted to see an alternative map or something close to it. I also heard Justice Barrett saying that Justice Alito was relentless in going after the lawyer for the black voters in South Carolina, making it clear that he thinks that under clear error review, this was clear error.

**[00:19:14] Rick Hasen:** You know, if you're counting the votes it's a little unusual in that the justices in this, these racial gerrymandering cases don't always divide along partisan or ideological lines in the way that you would expect. One thing that Justice Thomas has done in earlier cases is said that clear error review really means you're very deferential to the decision of the lower court so it's hard to fully handicap it, but there was a lot of skepticism on the part of some of the conservative justices about whether there was enough evidence that was produced.

**[00:19:46] Rick Hasen:** But I wanna come back to this point for a minute about vote dilution and the relationship between a racial gerrymandering claim and vote dilution. I recall Paul Clement who was not arguing in the case in *Alexander*, but I believe it was in *Cooper v. Harris*, he was arguing in one of these earlier cases, and what he said is that essentially what's happened with these racial gerrymandering cases is that they've become what he called junior varsity evoked dilution claims. And I think this is right. So actually, if you look at the language of the plaintiffs lawyers, and they as they talk about the case, they talk about this as though it is diluting the black vote, and there is a separate claim which may get revived, depending on what the court does with this claim, that there was intentional discrimination against black voters, right. You don't have to prove, to be clear, to win a racial gerrymandering claim, you don't have to prove race discrimination. But if you move black voters because you want to dilute their power further, even if you don't move them enough that it would make a difference in terms of whether or not they could elect a candidate of their choice, that could be unconstitutional.

**[00:20:55] Rick Hasen:** And so a lot of these cases, you know, the cases in the last decade followed a kind of pattern. This was true in North Carolina, in Virginia, in Alabama. We saw the concentration, the packing of black voters, not enough to constitute a Voting Rights Act violation, but enough to further weaken their power, where republican white legislatures said that they were doing it because the Voting Rights Act made them do it, because they had to it to comply with either Section 5 of the Voting Rights Act or Section 2. And the Supreme Court was very skeptical of those, those claims, and said, "No, the Voting Rights Act didn't require you to do that." And in fact, this is the first decade in many that we don't have Section 5 of the Voting Rights Act still in place because of an earlier Supreme Court decision called *Shelby County v. Holder*, which essentially put Section 5 on hold or eliminated it all together.

**[00:21:46] Rick Hasen:** So how do you attack attempts to dilute minority voting power that's not enough to satisfy Section 2 when white republican legislatures are packing or spreading black voters in order to further dilute their power? You can't attack it as a Section 2 violation. Trying to prove it's a Constitutional vote dilution claim is hard because you need evidence of intentional racial discrimination. You can't attack it as a partisan gerrymander by *Rucho* says you can't do that anymore. So the only two you have left aside from maybe state law, is to claim it's a racial gerrymander.

**[00:22:22] Rick Hasen:** And so these claims that race predominates have been used, it's a kind of flipping, because in the 1990s, these claims were used by conservatives to try to stop the creation of more black districts. So now we have this flipping, we have what I consider to be an attempt to try to do something to stop intentional dilution of minority voters. But everyone's dancing around the issue because they're fighting about whether race predominates. But I really think there's something else going on beneath the surface in these cases.

**[00:22:50] Jeffrey Rosen:** Jason, what's your thoughts about Rick's suggestion that this might be attacked as a junior varsity vote dilution claim? And is that really what's going on?

**[00:23:03] Jason Torchinsky:** I mean, I think what's really going on is this is partisan competition playing out in the legal world, right? What you have is basically democrats or their allied groups challenging essentially every map drawn by a republican legislature. And I think we're in a different world than we were in the 1960s where white voters simply wouldn't vote for minority candidates, right? A majority of the Congressional Black Caucus today doesn't represent majority black districts. Why? Because non-minority voters are willing to vote for minority candidates. And I think we're in a different world, and I think what you're seeing playing out in the courts is essentially basically a continuation of partisan warfare going on through the courts, right? And if you look at these cases, right, who's challenging the maps, right? It's frankly, if you look around the country, in 2020, because of the configuration of state legislatures and the states where legislatures are still drawing the maps, they tend to be a lot more seats controlled by republican legislatures.

**[00:24:10] Jason Torchinsky:** So where do you see the lawsuits? You see the lawsuits where the democrats didn't win in the political process, so they're turning to the courts, right? Texas, the legislature drew the map, democrats and their allies sued. Louisiana, republicans drew the map, democrats and their allies sued. Alabama, republicans drew the map, democrats and their allies sued. Florida, republicans drew the map, democrats and their allies sued. Georgia, republicans drew the map, democrats and their allies sued. South Carolina,

same thing. North Carolina, same thing. Virginia, resulted in the Bethune-Hill case, same thing. I mean, what you have is democrats trying to use the law to create more democratic districts. This is not even about creating more districts that are going to be represented by minorities, this is about creating more districts that are going to be represented by democrats.

**[00:25:02] Jeffrey Rosen:** Rick, your thoughts, and do you disagree that this is essentially partisan warfare being played out for the courts with a racial gloss?

**[00:25:11] Rick Hasen:** Well, I guess I reject the premise of the question, which is that you can separate those two things. When a white republican legislature in Alabama or South Carolina discriminates against democrats, they're discriminating against African American voters, and they're limiting their power. So I certainly understand why Jason is talking this language, he has to litigate these cases in the framework that the Supreme Court has created. But I just don't think these two things are separable. I wrote an article about this a few years ago, and I asked, "Is it race or party?" And I said, "The answer is yes." Right? It is not one or the other. And so we are stuck in this artificial box. And if the court had come out the other way in Rucho, for example, Rucho was the case where 2019 where the Supreme Court says, "Federal courts can't hear partisan gerrymandering claims."

**[00:26:02] Rick Hasen:** If the court had come out the other way and said, "You know what? Egregious partisan gerrymanders, they're going to be found unconstitutional," whatever standard they're gonna talk about what the different standards could be. If that had happened, then minority voters in the South would have been better protected. And that would've happened not because there would've been any policing on the basis of race or under the Voting Rights Act, but because partisanship and race correlate so well in the American South you know, that's just the reality. And so I don't think you can separate these things.

**[00:26:33] Rick Hasen:** You know, of course voters whose power has been diluted, voters who end up on the short end of the stick are going to use whatever doctrinal tools they have to try to bring a claim. So if you can bring a partisan gerrymandering claim under a state constitution, you do that. If you can't, maybe call it a racial gerrymander to the extent that there is a correlation between race and party as there is in the American South. And so I don't think that this is trying to dress up a partisan fight as a racial fight in disguise, I just think you can't separate those things.

**[00:27:10] Jeffrey Rosen:** Jason, do you disagree that race and politics strongly correlate? And as you litigate these cases, it appears that the court is struggling to figure out exactly how to police the line and decide when the predominant purpose is racial and when it's not. Is that right or not?

**[00:27:29] Jason Torchinsky:** I think it is a challenge. I think as we've talked about the, the correlation of race and party the reality is, that is the strongest when you're looking at African American voters. When you look at other minority groups in other parts of the country, you don't find that same level of high correlation. I mean, I'll give you a great example. I am actually representing some, some voters in a case out in, in Seattle where we're actually in the process of appealing, but in that case the Washington legislature is drawn by a commission, it's two republicans and two democrats. The two democrats on the commission were convinced that they needed to draw a majority Hispanic district in the Yakima Valley of



Washington. The republicans said, "No, we don't think it's required, but we're gonna basically cut a deal and we're gonna draw that district as a majority Hispanic district."

**[00:28:27] Jason Torchinsky:** So the district was drawn as a majority Hispanic district, and in the first and only election that has been held under those district lines so far, a Hispanic republican woman won the district with somewhere between, depending on whether you listen to the plaintiff's experts or the intervener's experts, somewhere between 40 and 50% of the Hispanic vote in the district. And the judge found that that district violates Section 2 of the Voting Rights Act. Again, it's a majority Hispanic voting age population, citizen voting age population district that elected a Hispanic woman that the judge found violated Section 2. Well, why? Because it's the democrats that are pushing it, right? The guy that wrote the memo for the democratic commissioners that said, "You need to draw a majority Hispanic district there," also happens to be one of the Democratic Party's top national pollsters, right?

**[00:29:19] Jason Torchinsky:** So what are we talking about here? We're talking about the fact that the democrats want another seat in the Yakima Valley of Washington. And they're using race to try to get there. I mean, you literally have a majority Hispanic district that is electing a Hispanic candidate, and the judge still found that it violates Section 2 and needs to be drawn more Hispanic. I mean that's kind of where we're heading on these race versus party claims, and really what's going on there is a partisan action dressed up as voting. In that particular case, it's a Voting Rights Act Section 2 claim that is basically just trying to get another democratic seat.

**[00:29:59] Jason Torchinsky:** And that's really what is going on in these cases. What do the democrats want in the first district in South Carolina? They want a district where they can defeat Nancy Mace. What do the republicans want? They want a district that's gonna look like a district that a republican like Tim Scott, who held that seat before, or Nancy Mace could win again. And that's really what we're at right now. I don't think this is voting based on race, I believe this is actions based on party affiliation and party loyalty.

**[00:30:29] Jeffrey Rosen:** Rick, as Jason suggests that politics can be complicated, and in this South Carolina case, a ProPublica report found that Representative Jim Clyburn's office was involved in designing the republican map, apparently in exchange for protecting his own seat. Representative Clyburn says involvement was routine and that he supports the NAACP's case. What do you make of the cross-cutting political and racial interests in these cases, and what's their legal relevance?

**[00:30:57] Rick Hasen:** First of all, this is nothing new. In the 1990s and in the 2000s you saw what some referred to as an unholy alliance between white republicans and black elected officials. Black elected officials, like all elected officials who are elected from districts, want their districts protected when lines are redrawn. And so there was a kind of overlapping interest where you could draw the existing majority minority districts as safe districts, that helps those incumbents stay in office, but you do so by packing more minority voters in there. So you can end up ultimately helping white republicans stay in power while still having these strong districts that have small, a smaller amount of minority representation, but stronger representation in each district.

**[00:31:47] Rick Hasen:** So self-interest certainly explains a lot about redistricting, and so I wasn't so surprised when I saw the report that Clyburn wants to make sure that he had a safe district. Whether he ends up with a safe district or not, I don't think has much legal relevance, because the question is whether or not, for whatever reason voters are being separated on the basis of race without adequate justification. If that was done to please Jim Clyburn or not doesn't really matter to that question. So legally, I don't think it matters. Politically, I think it might matter in the sense that if it doesn't look like this is purely republican action against black democrats and in fact a leading black democrat in South Carolina actually supported it, then the optics make it look different. But I don't think it is actually evidence that effects the legal question one way or the other.

**[00:32:44] Jeffrey Rosen:** Jason, in your brief on behalf of the National Republican Redistricting Committee, you argued that the lower court applied the wrong standard when evaluating the South Carolina map and employed a non-retrogression test when it should've applied a racial predominance test. Tell us more about why you think the lower court was wrong.

**[00:33:03] Jason Torchinsky:** Yeah. I think the lower court looked at this and said, "Look, the experts put forward by the plaintiffs conducted statistical analysis and concluded that basically, as the district became more republican, it also became less black," right? And frankly, in South Carolina, I'm not sure that you really needed an expert in regression analysis to tell you that because everybody knows the, the high correlations that, that Rick and I have already discussed with you. And I think basically what the court said was, "If you intentionally drop the minority population, that constitutes, you know, racial gerrymandering, and therefore you can't do it." And so essentially, what the court basically said is, "You have to keep that district at least 17.78% black or you've violated the Constitution."

**[00:33:54] Jason Torchinsky:** I think that's the wrong standard. I don't think that Section 5 when it's test applied, said you couldn't leave minority voters in a worse off position than they were before. And the coverage formula for where that applies was what was struck down in the Shelby County case. So right now, the only place that Section 5 applies is where there's a specific judicial order putting a jurisdiction under kind of a Section 5 pre-clearance regime. And, it feels like and reads like, if you read that district court order, they're basically saying, "The republicans discriminated against black voters because there was any kind of reduction in the black population from the benchmark into that existing district." And I think that's the wrong standard for a couple of reasons.

**[00:34:42] Jason Torchinsky:** One, the legislators said, "We did this for partisan reasons." two, the high correlation means you can't achieve the political aim without a consequence being the reduction in the black population, and there's nothing that requires, I don't think the Constitution requires the maintenance of a 17.78%, you know, black voting age population in that district. And yet this court seemed to suggest that any drop in the black population constituted an intentional racial gerrymander. And I just don't think that's the right standard.

**[00:35:19] Jeffrey Rosen:** Rick, what is your thoughts about whether or not a non-retrogression standard or a predominant racial intent standard should matter. And more broadly, this is taking place against a backdrop where some color-blind conservatives, like Justice Thomas, think that any intentional use of race is unconstitutional in the voting context, even if it's used for remedial purposes to help black people, not to hurt them and

therefore, Justice Thomas thinks that Section 2 of the Voting Rights Act itself is unconstitutional. What's the relevance of that debate for this case?

**[00:35:52] Rick Hasen:** Well, I think that Justice Thomas's views, to start with that, represent a distinct minority view on the court. If you look at *Allen v. Milligan*, you have a majority of the court that is still willing to engage in race based remedies for districting wrongs. And even if you looked at the dissenters in *Allen v. Milligan*, maybe Justice Gorsuch is along for the ride for at least part of what Justice Thomas thinks that still represents a decidedly minority view.

**[00:36:18] Rick Hasen:** On the broader question about intention to discriminate on the basis of race in South Carolina, I think this is a really interesting question. If you read the solicitor general's brief, let me explain how the United States government gets involved. This is not a case where the US government is party, but the United States government has an interest in how these cases are litigated, and it filed a brief, and actually one of the lawyers from the Solicitor General's Office argued in court.

**[00:36:45] Rick Hasen:** And the SG's office took an interesting position on the question about what to do about the other claim, which I mentioned at the top of our show, about whether there was intentional discrimination against black voters on the basis of race. And the SG's office said that the lower court kinda got confused. And it's easy to get confused, like we talked about how there are four different kinds of claims that can be brought over the same redistricting. This is not easy stuff. The district kinda got confused between the racial predominance test for racial gerrymandering, and the question of intentional race discrimination in violation of the 14th and 15th Amendments, and suggested that if the US Supreme Court reverses on the racial gerrymandering claim, it needs to go back to the trial court to rethink the question of whether there is evidence of intentional racial discrimination in this case.

**[00:37:37] Rick Hasen:** I'm not as steeped in the details of this case as Jason is. Jason filed, I think you said two briefs in this case. Well, that's unusual to see the same lawyer filing two briefs in the same case in the Supreme Court. So he knows these facts a lot better than I do, so I can't really opine on what the evidence is, but I certainly believe that to the extent that the lower court was confused in what the difference of the standards was, there should be a chance for the court to reconsider that question, potentially take new evidence and decide whether or not there is an intent to dilute minority voting power in the South Carolina case.

**[00:38:10] Jeffrey Rosen:** Jason, you did file two briefs how big a deal is this case? How important is its resolution to other voting rights cases that you litigate? And how important is the court's choice of standard? South Carolina, in this case, during oral arguments, seemed to demand an alternative map and then backtrack. How much does it matter to you whether or not the court requires an alternative map?

**[00:38:35] Jason Torchinsky:** It matters a lot. And I'll explain why. And let me just also just address a couple things for your, for you readers, just so they understand the overall content. First of all, the, on the two briefs, I filed one brief at the jurisdictional statement stage, which was when the court was deciding if they were gonna hear it. Once they decided to hear it at the merit stage, I filed a brief on behalf of the, the South Carolina republicans in the

congressional delegation. So it was, it was two briefs, but it was at two separate stages of the case which is, again, a little unusual, but I did it here.

**[00:39:04] Jason Torchinsky:** The other thing I think to keep in mind is the context of African American population in South Carolina. Between 2010 and 2020, the percentage of African American population in South Carolina dropped overall statewide from about 28% to about 25%. And as I mentioned, there was substantial growth in the first congressional district, which means it had to lose 90,000 people. So overall statewide as a percentage, you have less African Americans present in the state in this new decade, and the first congressional district had to lose 90,000 people.

**[00:39:41] Jason Torchinsky:** To get to your question, particularly about the maps, I think that if the court is clear in imposing an alternative map requirement, I think what's gonna become very interesting is exactly what they lay out that requirement to be. You know, what the state said is, "Look, they have to show us a non-racially discriminatory map that meets the political objectives that the state put forward." very interesting in South Carolina, I don't think the plaintiffs would be able to do that and I think the state and frankly the plaintiffs know that. But that might not be true in other places.

**[00:40:24] Jason Torchinsky:** And I just don't know exactly how that's gonna play out, because I think exactly how the court describes what the alternative map requirement is gonna matter a lot in future cases. You know, we already have kind of an alternative map requirement in the Section 2 claims, right, because to meet the jingles one test and to show the numerosity and compactness of the minority population, you do have to produce a map that shows how you would draw the additional majority minority district. And basically what, what South Carolina's saying is, "Yeah, and there should be in these claims too to show us how we can achieve our political objectives and still meet and still draw a map that you say doesn't discriminate on the basis of race."

**[00:41:05] Jason Torchinsky:** And essentially, because the plaintiffs have the burden, what they're saying is, "Okay, like, put it up, show it to us. Show us what the non-discriminatory map would look like here." And frankly, I think the reason, part of the reason the state's saying that is because if you look at every single alternative map that the plaintiffs put forward, like, democrats win. I think one of them one of their professors I think did like 10,000 maps, and the state's experts looked at their maps and said, "Yeah, and a democrat would win the first congressional district in like 90% of these." And I think it's just impossible to do it otherwise. Which is part of the reason the state was pressing so hard for the alternative map requirement.

**[00:41:49] Jeffrey Rosen:** Rick, you began by saying that you're not a fan of the Shaw v. Reno cases which say that expressive racial harms are justiciable. And the court also decided in Rucho that political gerrymandering claims are justiciable. Justice John Paul Stevens, the late Justice Stevens, thought that both political and racial gerrymandering claims should be justiciable. If the court embraced that view, would these cases be easier to resolve?

**[00:42:18] Rick Hasen:** Well, I think that if you could make a partisan gerrymandering claim depending on what it looked like, Justice Stevens wanted it to look like the Shaw claim, which I'm not a fan of that either, which would be does it appear that you're separating voters

on the basis of party without adequate justification? You know, if you're gonna have a partisan gerrymandering claim, I would much rather it be a dilution kind of claim, whether that's using the standards that Justice Kagan put forward in her dissent in *Rucho* or something else. But I do think it would have the benefit, if partisan gerrymandering were policed directly it would have the benefit of putting less emphasis on race in how the court has to decide these things, and that would probably be otherwise appealing to Justice Thomas, who wants us to be less race conscious in how we do all of these things.

**[00:43:06] Rick Hasen:** So would we have less litigation? Probably not. Would we be talking more honestly about what's going on in a lot of these cases? I think probably yes. But because we're not, as I said, you litigate with the tools that you have, and you know, if it's not a perfect fit, you try your best. This is why after *Rucho* this is something I think we talked about over a year ago, when partisan gerrymandering claims are found to be non-justiciable under the US Constitution there was a claim made under the North Carolina Constitution. And when democrats controlled the North Carolina Supreme Court, they found that partisan gerrymandering of the state constitution. Then there was a big push by republicans to change the composition of that court, they did, now partisan gerrymandering claims are no longer justiciable in North Carolina under North Carolina's Constitution. But in Wisconsin, the opposite happened. Wisconsin rejected partisan gerrymandering claims when republicans controlled the state Supreme Court there, and now there's a big fight because democrats, or justices allied with democrats have taken over control in that state.

**[00:44:08] Rick Hasen:** So, see, to kind of give the general point here, the general point is that people are going to fight with whatever political tools they have, and Justice Frankfurter, who warned against courts going into the political thicket, maybe he was onto something, because these cases go on for every decade, because there's a new line that's drawn after each census, they start again, you know, in the '01, '11, '21, '31, you can expect the litigation cycle to start anew. That's why I'm a fan of states with the initiative process passing redistricting commissions and enacting those. The Supreme Court has seemed to give some blessing to doing that. And the one thing you can say about lines drawn by commission is they tend to be much harder to challenge in court, and they tend to be more resilient throughout the entire decade.

**[00:44:55] Jeffrey Rosen:** Jason, was Justice Frankfurter onto something when he warned of courts entering into the political thicket? He pointed out that the framers of the 14th Amendment didn't think that it applied to political rights at all. And would it make your job easier as a litigator if the court said that both political and racial gerrymandering claims were justiciable, or not?

**[00:45:15] Jason Torchinsky:** I'd be a lot busier if they both were that's for sure. But, the problem here in terms of involving the courts in redistricting is, whoever feels like they're on the losing end of the political process in the state has no incentive not to litigate right? And, you see this play out over and over again. I know I was earlier I talked about some of the states where republicans held the pen and, and democrats sued, but there's also plenty of examples I can come up with where democrats held the pen and republicans sued. For example, there's a case being argued next month in the New York Court of Appeals over partisan gerrymandering under the New York State Constitution. There is a case that is on appeal now to the New Mexico Supreme Court where democrats held the pen, the state has imposed a state law partisan gerrymandering claim, the case is on appeal to the New Mexico

Supreme Court, which already actually adopted Justice Kagan's standard in *Rucho* and said, "That's the law here in New Mexico." and then you had the Oregon Supreme Court again, the maps were drawn by democrats, the Oregon Supreme Court said, "No, we don't think that map was a gerrymander," when republicans brought a challenge out in Oregon.

**[00:46:26] Jason Torchinsky:** So the incentives in these redistricting cases, and this would be even more true if both partisan and racial gerrymandering claims were allowed, is if you think you can pick up a seat or two or three here or there if you come up with some legal theory that can prevail and result in lines that are more favorable to your political party, as long as you have the resources, there's no incentive not to proceed with the case. 'Cause if you don't proceed with the case, you're no worse off than if you did and you lost. But if you proceed and you win and your party picks up a seat or two here or there, and I know we're talking about Congress a lot, but this also applies in state legislatures, right? And so the incentive is, whoever feels like they were on the losing end of the political process should at least take a shot at a judicial process to try to pick up seats.

**[00:47:17] Jeffrey Rosen:** Rick, as we wrap up, what standard would you apply for identifying unconstitutional racial vote dilution claims? The most dramatic example might be the *Gomillion and Lightfoot* case where after the Civil Rights Act of 1957 the City of Tuskegee basically redrew the maps to turn a black majority city into a white majority one and literally denied African Americans the ability to elect a majority. What standard would you adopt in these cases? And should South Carolina win or not?

**[00:47:54] Rick Hasen:** Well, I think you've asked two different questions in one. You know I don't see the claim before the court in South Carolina right now as a vote dilution claim, I think it's a racial gerrymandering claim. I think on remand, we'll get to hear the vote dilution claim. There was discussion of *Gomillion* during the oral argument in the South Carolina case the lawyer for the plaintiffs tried to use that to say you don't need to show an alternative map, and Chief Justice Roberts didn't think that was a very apt comparison, and I think in part because *Gomillion* was an intentional discrimination case. I think plaintiffs should get a change to prove intentional discrimination on remand if they lose, as it appears that they may following the oral arguments. Certainly you can count on Justice Alito to be seeing clear error in these cases.

**[00:48:38] Rick Hasen:** But more broadly I think the wrong turn and since we're getting to the end of the podcast, this'll probably have to carry over to another discussion, the wrong turn the Supreme Court took was in 1980 in *City of Mobile v. Bolden*, which was a case where the courts involved a constitutional vote dilution claim, this is not before *Shaw v. Reno*, not a racial gerrymandering claim, vote dilution claim. And the court imposed a kind of tougher standard to prove it, as opposed to relying on more circumstantial evidence of an intent to discriminate on the basis of race, where you could infer that intent from a big discriminatory effect. And I would like to go back to that, that's kind of what is embodied in Section 2 of the Voting Rights Act at least as it was initially interpreted by the court.

**[00:49:21] Rick Hasen:** But ultimately, and thank you for giving me a chance to plug my book I think we need to amend the Constitution to guarantee a right to vote. We can do it in a way that will take the courts out of the business of doing some of this stuff, protect minority voters, protect the integrity of the election system against fraud and lack of confidence. There's a lot that we could do. The fact that you keep having Jason and I come on your show

and try and disentangle the latest twist and turn shows you that this is a kind of never-ending battle and we need to do something to get out of these voting wars. Most countries do not have this kind of persistent litigation over elections. I'd rather talk about something else because some of these issues will finally be settled.

**[00:50:04] Jeffrey Rosen:** Thank you so much for that. We will indeed have you back on the podcast to talk about your new book, and as long as the court stays in the political thicket, we'll continue to have you and Jason on to help us understand it. Jason, last word in this installment of our ongoing conversation, to you, do you agree with Rick or not that the court took a wrong turn in *Mobile* and that you should be able to infer discriminatory intent from discriminatory effect or not, and just to sum up, why do you think that South Carolina should win this voting rights case?

**[00:50:35] Jason Torchinsky:** Sure. I mean, look, I think even if we went back to the *City of Mobile* standard, we would still be here decade after decade because, again, you know, there's no incentive not to bring a claim if your side doesn't get the number of seats in the, the particular legislative body you're talking about. So we would still be here, we'd be here under different standards, but that wouldn't reduce the role of the courts in this process. It would change how they approach things, but it would still keep the courts engaged. And back to, to South Carolina, I mean, I think that it seems very clear from the evidence that South Carolina was really trying to shore up the first congressional district for republicans and didn't move people around on the basis of race.

**[00:51:21] Jason Torchinsky:** You heard, I think it was Justice Kavanaugh who came back and kept asking about a particular white majority area of Charleston that was also regularly voted for democrats that got moved out as well, and I think that was something that I think we might see in an opinion from Justice Kavanaugh that sort of says, "Hey, look, this move alone also tells us they weren't just moving African Americans, they were moving democrats." and that's frankly why I think South Carolina is ultimately gonna prevail here.

**[00:51:54] Jeffrey Rosen:** Thank you so much, Rick Hasen and Jason Torchinsky for a thoughtful, rigorous, and as always, illuminating discussion of voting rights and the Constitution. Rick, Jason, thank you so much for joining.

**[00:52:06] Rick Hasen:** Thank you.

**[00:52:07] Jason Torchinsky:** Thank you.

**[00:52:12] Jeffrey Rosen:** Today's episode was produced by Lana Ulrich, Bill Pollock and Samson Mostashari, was engineered by Bill Pollock. Research was provided by Yara Daraiseh, Samson Mostashari and Cooper Smith. Please recommend this show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of Constitutional illumination and debate. Sign up for the newsletter at [constitutioncenter.org/connect](https://constitutioncenter.org/connect). And always remember, whether you wake or sleep, that the National Constitution Center's a private nonprofit. We rely on the generosity, the passion, the engagement, the devotion to lifelong learning of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate. Support the mission by becoming a member at [constitutioncenter.org/membership](https://constitutioncenter.org/membership), or give a donation of any amount to support our work,

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