WHAT TRUMP CAN TEACH US ABOUT CON LAW
Cracking and Packing

ROMAN MARS: It is Tuesday, June 9th, at 2:42 p.m as we're recording this. What are we gonna talk about today?

ELIZABETH JOH: Well, Roman... So what does the term "gerrymander" mean to you?

ROMAN MARS: Well, as I understand it, it means, like, drawing a ridiculously shaped district in order to advantage your own political party.

ELIZABETH JOH: I think that's right. So if you see a district that actually doesn't look like anything that you would find in nature or in a political nature--that is, it's not a square, it's not a rectangle, it might have very strange contorted shapes in it--it's probably been gerrymandered. And so you're right, "gerrymandering" refers to the creation of a voting district that is deliberately drawn to advantage a particular political party. And the name goes back to 1812 when the Massachusetts governor, Elbridge Gerry, decided to approve congressional districts that were drawn to help his party, the Democrat Republicans. And one of the newspapers at the time, the Boston Gazette, published a cartoon of one of these strangely drawn districts, likening it to a dragon, which was a salamander, and deemed it the now famous term, Gerrymander, after Elbridge Gerry. And ever since, lawmakers have tried to draw congressional districts for political purposes. Gerrymandering is a common part of today's electoral politics. But today, the situation with gerrymandering is a mess and arguably a hyper-partisan, undemocratic mess because of recent Supreme Court decisions. But understanding this mess, which is itself a complicated story, requires untangling several constitutional threads. And those involve redistricting, political questions, the Voting Rights Act, and six members of the Supreme Court who are acting in increasingly polarized and partisan ways. You ready?

ROMAN MARS: I am ready. Let's do it.

This is What Trump Can Teach Us About Con Law, an ongoing series of indeterminate length and sporadic release where we look at cracking, packing, and the gutting of the Voting Rights Act and use them to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars.

ELIZABETH JOH: So why don't we start out with congressional redistricting, some of the basics, okay? So Article I, Section 2 of the Constitution, plus the 14th Amendment, means that we count the national population every 10 years. That's the census. And we do this in order to distribute House seats across states. Every state has to have at least one House member per the Constitution. But how many House members a State has beyond that minimum is based on population gains or losses that we discover from the census. So the census is a very important tool of political power distribution in the House. And it's a fixed number. You know the number?

ROMAN MARS: Yep, 435.

ELIZABETH JOH: 435 ever since Congress passed the Permanent Apportionment Act of 1929. So one state's gain is always another state's loss. And what that has traditionally meant is that, after each census, states use this as an opportunity to redistrict, meaning redraw their congressional district maps within their state. And the Supreme Court has

interpreted the Constitution to require that congressional districts within a state have an approximately equal number of persons. But otherwise the states have kind of a lot of freedom to redraw their districts. Now, the Constitution also gives Congress the authority to regulate congressional elections. This is also known as the Elections Clause. Roman, could you read it for us?

ROMAN MARS: Sure. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." And here, choosing is charmingly spelled C-H-U-S-I-N-G.

ELIZABETH JOH: Now, this elections clause refers to Congress's ability to regulate the time, places, and manner for congressional elections, just like it says. But it's not just literally that. Congress also has the power to regulate all aspects of congressional voting, like voter registration, voter protection, vote counting, and even protecting against voter fraud, and, of course, redistricting. Now, Congress has, in the past, relied on the Elections Clause to pass redistricting standards. Now the last major statute was the 1929 Permanent Apportionment Act. That's the same act which sets the number of House seats at 435 and hasn't changed since. So actually today, most redistricting is done by state legislatures. And the remainder of what's legal and isn't legal, in terms of congressional redistricting, is dictated by a set of judicial decisions, some federal statutes, constitutional principles, and state laws. It's pretty complicated. So today I thought we'd just mostly focus on what federal law and the Constitution says.

ROMAN MARS: Great. So how does gerrymandering become an issue here in terms of redistricting?

ELIZABETH JOH: Well, in theory, the goal of redistricting is kind of benign, right? The idea is you have a new set of populations. They've moved from one state to another and even within a state. So you want to make sure that, within your state, each district represents a fair portion of the voters. So that's the theory. But since most redistricting is done by state legislatures, the party controlling the state legislature has every incentive to keep itself in power and, of course, keep the other party out. So that means drawing congressional district maps so that they advantage one political party over another, even if the districts end up looking very strange, like salamanders. So, lawmakers might gerrymander districts in ways that are called "cracking and packing."

ROMAN MARS: So I know a little bit about this, but tell me more about cracking and packing.

ELIZABETH JOH: Okay, so packing happens when voters with similar characteristics are concentrated into as few geographic districts as possible. So the idea would be you have a group of people who are Democrats or Republicans or Black voters or Hispanic voters. And if you pack more than 51% of these voters into a district, then the packing essentially creates some wasted votes when you have a winner-take-all House election because you don't need all those extra voters.

ROMAN MARS: Yeah, you just need 51%. You're interested in having your party control 51%. But any percentage over that is wasted.

ELIZABETH JOH: Yeah, but it's actually pretty advantageous if you don't care about those voters.

ROMAN MARS: Alright. Okay.

ELIZABETH JOH: And so "cracking" is the opposite. You take the same like-minded groups of voters and distribute them across so many congressional districts that there's no chance that they can vote for the person that they want to have represent them in the House. Because of the cracking, they're unable to have the voting power they need to actually go ahead and vote someone into the House.

ROMAN MARS: Is cracking and packing legal?

ELIZABETH JOH: Well, that is a big question. And it depends. So, first it depends on what kind of gerrymandering you're talking about. So for our purposes, there are two important kinds of gerrymandering to distinguish. We can call one "partisan gerrymandering" and the other one "racial gerrymandering." So partisan gerrymandering happens because lawmakers want to draw a congressional district map in a way that favors one political party over another. So, one way to think about whether that's legal is whether you can bring a lawsuit because you're claiming, "Hey, partisan gerrymandering is illegal or, in fact, unconstitutional." Now, in 2019, in a case called Rucho versus Common Cause, voters in North Carolina and Maryland challenged their state's redistricting maps. Now, they claimed that the new maps were unconstitutional partisan garymanders, which violated their rights under the first and 14th Amendments. But in Rucho, the Supreme Court, in an opinion written by Chief Justice Roberts, responded by saying, "Well, they couldn't really help the plaintiffs at all because their lawsuit raised the political question doctrine.

ROMAN MARS: So what is the political question doctrine?

ELIZABETH JOH: Well, you can't find it in the Constitution. But the political question doctrine is one of several rules the Supreme Court has interpreted out of the Constitution's requirement that the federal courts can hear only cases and controversies. So, you know, we've heard of a lot of high profile Supreme Court cases in the past couple of years where the plaintiffs either have or don't have what's called "standing" or "legal injury," right? So you know that term. Well, the political question doctrine is similar because it's about the kinds of cases the Supreme Court says that it and other federal courts either can or cannot hear because the Constitution doesn't permit it. Now, the unfortunate thing about the name is that it's pretty misleading. The political question doctor doesn't mean that a court can't hear politically controversial issues. That's not what it means at all. Instead, the political question doctrine means that there are some types of cases that the Court says, "You know, it's better if the political branches, like Congress, deal with this issue rather than the courts. It's just too hard of an issue for the courts to manage in any way." And so in the 2019 case, the Supreme Court decided that claims about partisan gerrymandering were what we call "non-justiciable," can't be judged, political questions. In other words, if your legal claim is that, "hey, the lawmakers in my state are redistricting to favor one political party over another," that's just not the kind of claim a court can hear. Case dismissed. So that's one constitutional thread for gerrymandering. Lawsuits over partisan gerrymandering don't go anywhere.

ROMAN MARS: Yeah. So it de facto makes them legal because the Supreme Court says it isn't even, like, legal to consider it or it isn't law to consider it.

ELIZABETH JOH: Yeah, we can't even hear it at all. That's right. And there's actually something even more interesting because, in Rucho, the Court says, "Look, we can't hear

this case. But we're not approving of partisan gerrymandering." In other words, they say, "Look, maybe people aren't happy with this, but that's not a good reason for us to hear it." But they're also not really condoning partisan gerrymandering either. They're like, "Well, we don't love it, but we can't hear this guy."

ROMAN MARS: What does it mean to condone in that situation though? I mean, I don't know.

ELIZABETH JOH: Well, you'll see.

ROMAN MARS: I guess, but it sounds to me like a generous interpretation of this is that this is a political problem with a political solution. If you don't like it, then vote the people who did this out of office.

ELIZABETH JOH: Exactly. That is the message. That is the message.

ROMAN MARS: So now we've done partisan gerrymandering. What is racial gerrymandering?

ELIZABETH JOH: Okay, so let's take a very quick look at history. So the reconstruction amendments--the 13th, 14th and 15th Amendments--are passed after the Civil War. And they abolish slavery, guarantee equal protection and due process of a law and the right to vote. But after Reconstruction, the Southern states passed all kinds of laws to restrict or burden the rights of Black voters and basically to impose racial segregation. That was the Jim Crow South. Now the right to vote that was guaranteed in the 15th Amendment becomes, in reality, a long struggle to actually gain the real right to the vote. Now one of the big turning points of the civil rights movement in the 20th century was the brutal police attack on March 7th, 1965, on hundreds of non-violent protesters marching for the right to vote. So I think lots of people remember or have seen pictures of John Lewis being beaten on the Edmund Pettus Bridge outside of Selma, right? So that's a pivotal, iconic moment. So the violence there and the public attention to that violence added even more pressure to Congress as they considered what would be the Voting Rights Act, which had been introduced the very same month.

So the Voting Rights Act was signed into law by President Johnson on August 6th, 1965, that same year. It is the primary federal law meant to enforce the 15th Amendment, which bans the denial of voting rights based on race, color, or previous condition of servitude. And you can see that, just by thinking about where this comes from and what it's meant to do, the entire objective of the Voting Rights Act is to ensure that racial minorities can exercise the right to vote. So the Voting Rights Act is widely considered one of the great landmarks of federal civil rights legislation, along with the Civil Rights Act of 1964, which prohibited racial discrimination in public accommodations. And it was pretty successful. The first two Black southerners to win House seats after the Voting Rights Act was passed won their districts after they were redrawn to follow the law. And they happened to be the first Black southerners to have been elected to the House since the 1880s. So, this and the Voting Rights Act absolutely made a difference to non-white representation in the House.

ROMAN MARS: So how does the Voting Rights Act actually work?

ELIZABETH JOH: Okay, well, once upon a time, there were two important sections of the Voting Rights Act that protected voting rights for Black voters. Now the Voting Rights Act

actually protects the rights of racial and language minorities, but to keep things simple, I'm simply going to refer to the voting rights of black Americans here. So Sections 4 and 5 of the Voting Rights Act work together to establish what are called "pre-clearance requirements" for certain states. Now, when the act was first passed, it made it mandatory for states with a history of racial discrimination--and these were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and North Carolina--to receive approval or pre-clearance before they were allowed to change their voting rules. That included redrawing new congressional district maps. And later amendments to the act extended that pre-clearance requirement, in other words, getting pre-approval to additional states like Arizona and Texas. But in 2013, the Supreme Court effectively put an end to Section 4 in a case called Shelby County versus Holder. And they did that by invalidating the formula used to determine which areas should be required to get pre-approval or pre-clearance to make sure that the voting rules in those states were not racially discriminatory.

ROMAN MARS: So why did the Court decide that?

ELIZABETH JOH: Well, as a matter of legal doctrine, the majority in Shelby County said, "Section 4 violated a principle of equal sovereignty among the states," given what it called "current conditions." And what were those current conditions? Chief Justice Roberts put it this way: "Our country has changed. While any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions." So a short way of understanding this is like, "Ah, we're kind of over it. What racial discrimination?"

ROMAN MARS: Yeah. "They used to be racist. They're not so racist anymore."

ELIZABETH JOH: "No, there's not too much racism." That was the answer. The result of Shelby County guts a central part of the Voting Rights Act. Shelby County was a five-four decision. It's a major shakeup of what we think about when we think of the Voting Rights Act. And you don't really have pre-clearance anymore because, again, the formula that is supposed to be used--the Court says you can't use it anymore. But it's not remotely unanimous. It's five-four. The four dissenters include Justices Kagan and Sotomayor, who are still on the Court, Justice Breyer, who retired, and Justice Ginsburg, who died in 2020. Justice Ketanji Brown Jackson replaced Justice Breyer. The conservatives would lose Justice Kennedy, who retired, and Justice Scalia, who died 2016. But then, of course, President Trump added three more, Justices Gorsuch, Kavanaugh, and Barrett. And so that's been the enduring six-three divide that we have seen all these years.

ROMAN MARS: The keyword here is "indoor."

ELIZABETH JOH: [CHUCKLING] "Indoor." That's right. And after Shelby County, states that had previously been covered by these pre-clearance requirements immediately passed restricting voting laws because they don't really have to wait at all.

ROMAN MARS: Yeah. Yeah. This is the famous dissent where Ruth Bader Ginsburg said, "This is like throwing away your umbrella because you're not getting wet during the rain."

ELIZABETH JOH: Exactly. How can it be that the one thing that's kept this kind of oppressive voter suppression from happening or being worse... Why have we decided that that's not needed anymore?

And then there's Section 2 of the Voting Rights Act. That was not touched by Shelby County. Now, Section 2 bans states from using what the law calls any "standard practice or procedure to deny voting rights based on racial discrimination." The states are not supposed to engage in what we'd call "vote dilution." So Section 2 has been primarily used to challenge the redistricting maps that we've been talking about. The claim here is when a state is involved in racial gerrymandering, they are redrawing a congressional district to dilute the voting power of Black voters.

ROMAN MARS: Cracking.

ELIZABETH JOH: That's right, cracking or packing. Remember, splitting up geographic areas or cramming similarly grouped voters into as few districts as possible. So both kinds of actions dilute voting strength. And if it targeted Black voters, then that would seem to be a valid Section 2 challenge.

ROMAN MARS: So what would happen if these Section 2 lawsuits were successful?

ELIZABETH JOH: Okay, so there's a couple of things to keep in mind: how Section 2 lawsuits were supposed to succeed and what courts did when challengers won their cases. Now, in 1982, Congress amended the Voting Rights Act so that the states could not put voting rules into place that result in interfering with the right to vote on the basis of race. I've paused on that word because that's really important--when the voting rules of a state result in what look like racially discriminatory effects. Now, why did Congress do this in 1982? Because the Supreme Court had decided a Voting Rights Act case that interpreted the Voting Rights Act to ban only intentional discrimination. So those are two very different standards. You can sort of see which would be easier for a challenger to prove, right?

ROMAN MARS: Yeah, yeah, yeah. It's much easier to prove. I mean, like, you can't prove intent. And then you can wait for the results, which after that, you know, the horse is out of the barn.

ELIZABETH JOH: Yeah, I mean, it's very, very uncommon for a state to say, "Oh, we are intending to engage in racial discrimination. Here's the smoking gun." It's much easier to prove results. So as a result of those amendments to the Voting Rights Act, which I should mention here was a bipartisan effort signed by President Reagan, states are not supposed to do things like draw districts that result in making it harder for Black voters to exercise their rights or, as the act puts it, "if they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." So there are Supreme Court cases that make this analysis much more complicated, but the main thing to keep in mind is that Congress did not want it to be so hard for challengers to win a Section 2 claim in a redistricting case. They just couldn't prove intent. That's why we have this results-based language. If the state drew a new map, that resulted in less chances for Black voters to have a meaningful vote in their state, then that might qualify as a Section 2 violation under the Voting Rights Act.

ROMAN MARS: Okay. Okay.

ELIZABETH JOH: So that's a big part of it. Now let's turn to what's called, like, the legal remedy. Let's say you're a challenger. You bring a Section 2 case. And in the old days, what happens if a court determines that, yes, the state has violated Section 2 of the Voting Rights Act? Well, a court could actually demand that the state come up with a different

map that would be fairer to Black voters so that their voting power is not diluted. So if you look at these cases, these decisions... You can pull up one of these Section 2 cases. And they have little maps in the decision--competing maps with different color-coded districts. So that's pretty neat, but that's exactly what courts were doing.

ROMAN MARS: Wow.

ELIZABETH JOH: Now, that was the way Section 2 of the Voting Rights Act was supposed to work until this year. And that's because of the Supreme Court's decision in Louisiana versus Callais. And Callais broke what was left of the Voting Rights Act.

ROMAN MARS: So how did it do that?

ELIZABETH JOH: So let's go back to the basics. After a census, the states have an opportunity to redraw their maps, right?

ROMAN MARS: That's right. That's right.

ELIZABETH JOH: And I'd imagine that every state does because you want to. Your population changes. I mean, that's part of the normal political process that modern politics is on.

ROMAN MARS: That is how it's supposed to be working, yeah.

ELIZABETH JOH: Now, after the 2020 census, Louisiana redrew its six congressional districts so that it would have one majority Black district and five majority white ones. Now it's worth noting that a third of the state's population is Black. So a group of Black voters sued about the new map, alleging that this represented a legal racial vote dilution under Section 2 of the Voting Rights Act. Now, after a federal trial court said the plaintiffs were likely to win, the state redrew its map in 2024 to create a second majority Black district. But then a different group of white plaintiffs filed a lawsuit and said that this new map was itself unlawful because it was an unlawful racial gerrymandering precisely because the was using race to redraw a map. So they're claiming that the second Black majority district not only wasn't required by the Voting Rights Act, but it was itself a violation of their rights--the white plaintiff's rights--under the 14th Amendment. So the logic--the crazy logic--of the white plaintiffs here is that the state, by trying to comply with the Voted Rights Act, was simultaneously violating the rights of the white plaintiffs by relying on race to create a second Black majority district in the state.

ROMAN MARS: Got it. Okay.

ELIZABETH JOH: So the Supreme Court combined both of these lawsuits and, on April 29th, decided Louisiana versus Callais. So, legally speaking, there's a lot to unpack here. The Supreme Court had to decide against the backdrop of several complicated Voting Rights Act decisions. And these include things like how to figure out the appropriate baseline for measuring vote dilution--things of that nature. But there's just one big and easy thing to understand from the Callais decision. To succeed from now on, on a Section 2 claim, you need to show that the state intended to redistrict because of racial discrimination. It's the opposite of what happened in 1982.

ROMAN MARS: Yeah. Oh my goodness. Okay.

ELIZABETH JOH: So as a result, that second majority Black district that the federal district court had ordered Louisiana to create in order to comply with the Voting Rights Act was itself unlawful. "The state can't use race to redraw a district," said the Court, "because this also was a kind of racial discrimination against white voters." The only circumstances in which the state can override this ban is when the challengers to a map say that the state initially intentionally drew a district to discriminate against Black voters, which, as we've already discussed, is very, very hard to do. It's hard to find that kind of evidence.

ROMAN MARS: So, given that decision, what does the redistricting challenge look like now?

ELIZABETH JOH: It's really hard if not impossible. So the kind of racial gerrymandering we've historically associated with suppression of voting rights and the dilution of Black voting power has become nearly impossible. There's little chance that you're ever gonna find the kind evidence that you need. And what do you think lawmakers are always gonna say?

ROMAN MARS: "We didn't intend to."

ELIZABETH JOH: "We didn't intend to. It wasn't our intention."

ROMAN MARS: In this process, did the Court overrule the Voting Rights Act?

ELIZABETH JOH: No. Interestingly, it feels like it did, but it's saying that it did not. Justice Alito who wrote the opinion said specifically, "We are not overruling the Voting Rights Act." But now that Section 2 claims are virtually impossible, and we know from Shelby County that Section 4 claims are also impossible, the effect of the Callais decision is to gut the Voting Rights Act. It seems formally alive but sort of functionally dead.

ROMAN MARS: So this has happened this year. So what have been the effects of the Louisiana decision so far?

ELIZABETH JOH: Well, the general message seems to be a green light to gerrymander in ways that suspiciously look like what had been illegal racial vote dilution. We've already seen announcements in states like Mississippi and Tennessee that the lawmakers want to draw new maps. And a good example of this just happened in Alabama, which was twice told that it was acting illegally until the Callais decision, when the very same behavior that had been told was illegal was suddenly legal. And Alabama eventually ended up going to the Supreme Court three times. So let's talk about this crazy journey that they took.

ROMAN MARS: Okay.

ELIZABETH JOH: So in 2021, Alabama drew a new redistricting map after the 2020 census. That map had only one majority Black district. But about 27% of the state's population is Black. So that map was challenged in court as a violation of Section 2 under the Voting Rights Act. And the federal district court agreed. It found that the state's new map diluted the voting power of Black voters. And the district court told Alabama, "Go ahead and draw a new map." Now Alabama said, "But we can't make a new map in time before our 2022 primary election." And so the Supreme Court allowed Alabama to use their map as a temporary measure. So, if you're listening to this carefully--that's right--the voters voted with an unlawful map. That's trip one.

18 months later, the Supreme Court considered the case fully and formally. And they decided, "Actually, the federal district court was right. Alabama's new map was a violation of Section 2 under the Voting Rights Act. Draw a new map." Alabama did not do that. They did not comply. They did draw a new map, but they drew another map without complying with the Voting Rights Act. They did put in a second Black majority district. So the plaintiffs went back to court. The district court said, "Fine. We will draw the map since Alabama won't do it. We'll draw a new map for 2024." And that new map sent two Black representatives to the House. So Alabama went back to court again. In the meantime, the Supreme Court decided the Callais case about Louisiana's maps. And in May of this year, the Supreme Court vacated the district court's order in Alabama to use the 2024 map. That's trip two. I know it's confusing because it is confusing.

So Alabama said, "Great! We'll use the 2023 map, the one that the district court already said was illegal for 2026." Well, here's the thing. There was a May 19th primary a week away from the decision. So if you were a voter in four districts whose maps had just been changed because of the Supreme Court, you voted, but your vote actually did not count. The governor said, "Okay, let's have a special election for those four districts." The challengers went back to court. You can't do that either. And this time, the district court gets really mad--this is after the Callais decision--and says, "Look, Alabama is, in fact, intentionally this time discriminating on the basis of race." The court decided not only that this was a violation of the Voting Rights Act, it also violates the 14th Amendment's Equal Protection Clause. Again, this is a decision after the Callais case. So Alabama takes trip three to the Supreme Court. And on June 2nd, just a couple of weeks ago, the Supreme Court decided in an unsigned, four-page opinion that, yes, Alabama's map, the bad 2023 one, not the better 2024 one, was fine for the state to use. That case, called Allen versus Milligan, was like Callais, a six-three decision.

ROMAN MARS: So, why did the Court reach this decision?

ELIZABETH JOH: Well, you can't really call it a "finally reasoned decision." This was on the Court's so-called "emergency" or "shadow docket." So it's actually just four pages long. But what the Supreme Court seems to be saying in the Alabama decision is that when legislatures redraw their maps, from now on, Court should assume that the state is acting in good faith, meaning you should presume they're not discriminating on the basis of race. And that's true as long as the state can give some non-race-based reason for drawing its map. They did it, I assume, for partisan reasons, says the Court, that just happen to coincide with race. But it gets even worse because the Supreme Court has developed what's called the "Purcell principle." I don't know if you're familiar with it.

ROMAN MARS: I am not, so please tell me the new thing I will be disgusted with.

ELIZABETH JOH: Okay. So the name comes from a Supreme Court case from 2006 called Purcell versus Gonzalez. And in that case, the Supreme Court put a pause on a lower courts block of a voter ID law in Arizona that was just two weeks before a midterm election. And the reason why the lower court wasn't allowed to stop this law? Here's what the Supreme Court said in 2006: "Court orders affecting decisions can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." So the Purcell principle basically means courts shouldn't try to change election rules too close to an election. That sounds pretty good, right? I mean, that seems sensible.

ROMAN MARS: That sounds prudent, yes.

ELIZABETH JOH: But in the Alabama case, the one where they take the three trips, the Supreme Court now says that while courts shouldn't make last minute changes, states can. Here's what they said: "States are free to decide for themselves whether last minute changes to an election are in their best interests, meaning that a state can make a last-minute change that dilutes the power of some voters, I guess, and maybe create some confusion. But that's not the same as a court doing it." Now, if you'll go back to that crazy story of the three trips that Alabama took, one part you might remember or I'll remind you about... Alabama had complained one of the times when it was ordered to change its map because they said it was too hard. "It's going to take us too much time." It wasn't too hard this time when they were just a week away, right? So let's sum up where we are so far. If you have a claim that a state is engaged in a legal partisan gerrymandering, that's a political question that can't be judged by a court.

ROMAN MARS: Doesn't matter.

ELIZABETH JOH: Doesn't matter. So, if you want to win on a claim that the state diluted your votes--the voting rights of a racial minority under Section 2 of the Voting Rights Act--then you have to show that the State intended to discriminate, which is another way of saying you're not going to be able to win. And courts shouldn't try to change election rules too close to an election, but states are free to do so. So, the effect of all of this is even more gerrymandering. And that explains what actually happened in Texas and California.

ROMAN MARS: Okay. Let's talk about those.

ELIZABETH JOH: All right, sure. So one hurdle that Section 2 challengers under the Voting Rights Act now face is that they have to show intentional discrimination instead of political gerrymandering, which apparently the states can do. So, remember in 2019, in the case of Rucho versus Common Cause, gerrymandering is subject to the political question doctrine. Courts can't hear them. So the court also said, if you remember, that partisan gerrymandering... Well, it isn't that great for democracy. "We'll tolerate it, but let's not encourage it." But in Callais, the decision that the Court just decided this year, we see a dramatic change. Justice Alito, the author of the opinion, says, "Partisan gerrymandering is, in fact, a legitimate state interest." In other words, not only do we tolerate partisan gerrymandering, states can and-- Well, maybe they should gerrymander in partisan ways as much as they want because if partisan gerrymandering is now a legitimate state goal, it's no longer just an unfortunate side effect of politics. It's something that states should be freely encouraged to do.

So what are we facing this year? The midterms. So, historically, the president's party loses seats in the midterms. And I'm sure you're aware that the Republicans are majority in the House but kind of just barely. They've got, like, maybe-- I think it's a six-seat advantage right now. Now, last year, Trump called on Texas to redraw its congressional districts, right? And Texas did just that. A group of voters filed a lawsuit arguing that race was impermissibly used to redraw the districts in Texas. And the lower federal court ruled that Texas had, in fact, unconstitutionally drawn the new districts based impermissibly on race. Now, on December 4th of last year, the Supreme Court put a pause on that order. And what did the Supreme Court rely on? Their Purcell principle. It's just too late to change the rules before an election. So for the midterms, Texans will vote on a map that the federal district court had found was used to target the seats of five Black and Latino members of Congress. And then you know, of course, what our state, California, did.

ROMAN MARS: As a reaction, we decided we were going to erase that five advantage, basically.

ELIZABETH JOH: Yeah. We were just going to do the exact same thing.

ROMAN MARS: Except for it went to an actual popular vote.

ELIZABETH JOH: That's right. So we approve, the voters of California, Proposition 50. So as a result of Proposition 50, California set aside a district map that had been drawn by an independent redistricting commission. And in its place is a new map drawn by the state legislature, which of course is controlled by the Democratic Party. So with this new map, California Democrats stand to win five more House seats. So Proposition 50 itself was challenged in court, but the Supreme Court declined to review it. And that's just California and Texas, right? As a result of what's been going on in the Supreme Court, every state now has an incentive to redistrict in as partisan a manner as possible. A number of states have already called for special sessions to redraw maps before the midterms. And the states that don't get their act together by the midterms will almost certainly redraw their maps before the 2028 elections. And then House redistricting, as a result of all this, I think, kind of starts to look like the electoral college because any party that wins control of the state legislature and the governorship will immediately redraw its own maps. And they'll try to lock in power for as long as they can. So red states are going to get really, really red. And blue states are going to get really, really blue. And I guess the question is whether that's a meaningful kind of democracy for ordinary American voters. For black voters in the South, it almost certainly means reducing their ability to elect representatives of their choice.

ROMAN MARS: It's a disaster.

ELIZABETH JOH: Yeah, and I think one of the things that really is remarkable is the partisan nature of what's happening in these election decisions. The Callais decision is a six-three decision, and it turns Section 2 of the Voting Rights Act into the exact opposite of what Congress had intended. So remember, the 1982 amendments were done so that it would be easier for challengers to win. All you have to show is that what the state did in redrawing its maps resulted in an abridgment or dilution of your voting power. But after the Callais decision of this year, well, it doesn't really matter because you have to show that the state intended to engage in racial discrimination. And that's, again, totally impossible.

ROMAN MARS: Yeah, it's like are they racist in their heart kind of nonsense. And also because political lines and racial lines are not lockstep--but they're pretty linked--you can always rely on the permissible version of this, which is that it is a partisan gerrymander, not a racial gerrymander.

ELIZABETH JOH: Exactly. That's certainly true in the South and with Black voters. You're always going to be able to say, "Well, we're just doing this to redistrict against Democrats," which also happened to map on to the power of Black voters in the South. And then of course, there's the Court's timing in these cases, right? So there's the Purcell principle again, the basic idea that courts should not change the rules too close to elections; that'll confuse voters and make people mad. So, what usually happens in a Supreme Court decision is that when we read a high profile case, we read it on the day it comes out. But actually there's a period of time, 32 days, before the judgment is considered final. It's a procedural date. So it doesn't actually take effect formally for about a month. That's pretty

normal. But in Callais, the Louisiana case, the white plaintiffs who were successful asked the court, "Hey, can you issue the judgment right away?"

ROMAN MARS: Why is that?

ELIZABETH JOH: Well, because Louisiana's primary election was officially scheduled for May 16th, which was just a few weeks after the Supreme Court's decision. And actually mail-in ballots had already gone out to voters. So when the Supreme Court decided that Louisiana's attempt initially to comply with the Voting Rights Act was unconstitutional, the governor then suspended the ongoing primary election. He said, "Oh, we're going to have a new one!" And to make that happen, the winning parties in Callais asked the Supreme Court to speed things up. So that part, I think, is pretty nasty politics, right? But here the Supreme Court has a choice. The Court could have said, "No, we do things in a normal, regular, procedural way. And you have to wait." And that would have made it much more difficult for Louisiana to suspend its primary, nullify the mail-in ballots, and then have a do-over. Or the Supreme Court also could have said, "We have this momentous decision, but it's pretty close to the midterms. So they're not going to take effect until the next election cycle. They could have cited the Purcell principle and said, "We don't want to confuse people." But they didn't. They agreed. They agreed to let the judgment speed up in order for Louisiana to have this do-over.

The same is true for the Alabama case. The reason the Supreme Court issued a four-page opinion in the Alabama Case is because the state asked for an emergency ruling, letting it ignore the map they had been ordered to make from the lower federal court. So here, too, the Supreme Court could have said, "Look, voters in Alabama are about to vote. We shouldn't do this." But the six-justice majority, again, decided it would allow Alabama to use the map. But the Texas case--the one where the plaintiffs argued that the new maps demanded by President Trump were an unconstitutional racial gerrymander, and the lower federal court said, yes, it was--the Supreme Court blocked that ruling. And what did Justice Alito, who would later write the opinion in Callais, say about this lower court decision, which was in December? "It's just too close to the election. Texas needs certainty for the 2026 midterms." Remember, he's saying this in December of 2025.

ROMAN MARS: Wow.

ELIZABETH JOH: So, is there a coherent principle explaining these decisions? It's hard to see one. A cynical person might say, "Purcell seems to matter when it helps GOP-controlled states, and it doesn't matter when it doesn't."

ROMAN MARS: Yeah. I don't think it takes cynicism to make that decision. It just takes a pattern recognition to make that determination.

Since this all seems to be, like, a one-way ratchet to make GOP states more GOP and democratic states more democratic, is there any way out of this?

ELIZABETH JOH: Well, it's like that joke that's going around: I'm sure glad Congress isn't alive to see this, right?

ROMAN MARS: [LAUGHS] That's right.

ELIZABETH JOH: Because theoretically, there are several options that Congress could take. So remember, there is an Elections Clause. The Constitution does give Congress the

power to regulate the time, place, and manner of elections for House members. That's a lot of potential power. House representation is based on population. The Constitution says every state has to have at least one House member. But other than that, there's a lot of freedom here. The Constitution doesn't require that House members come from specific geographic districts within a state. Instead, that comes from Congress. Ever since 1971, Congress has required that states with more than one House member have to have single-member districts. That's not from the Constitution. That's Congress' choice. It's definitely one cause of the gerrymandering problem. Congress could require what would be called at-large House elections, and that would mean voters in a state could vote for as many candidates as there were seats for a state in the House. It wouldn't matter where the voters came from or where the candidates were coming from. So, at-large elections would definitely eliminate gerrymandering.

ROMAN MARS: Yeah, because there'd be no district shapes to contend with at all. Yeah.

ELIZABETH JOH: There'd be none of those. It might make candidates more politically moderate since they have to appeal to everybody in the state.

ROMAN MARS: Sure. Or they lean hard into one small group and it puts them in the top five or whatever and that's fine.

ELIZABETH JOH: Yeah. But there's definitely some downsides. I mean, it would make House elections much more expensive.

ROMAN MARS: Oh, interesting.

ELIZABETH JOH: And I think some voting experts think it might not help minority voters. But I think I can say with some confidence that it's not worse--clearly worse.

ROMAN MARS: Yeah, I don't think it could make it worse. I mean, it does seem like there might be something to be said about "my district thinks more like me than not." But if we collectively have enough power to put that person in fourth place in a statewide election, that seems like that's the way to get that done as well. So the idea related to land mass doesn't strike me as all that compelling of a thing to keep alive, honestly.

ELIZABETH JOH: Yeah, that's definitely a possibility. Another one is Congress could use its Elections Clause power and actually ban multiple attempts at redistricting--the kind of thing that you see with Alabama and Louisiana--just like every state gets one shot after the census, and that's it. That certainly would be within their power.

ROMAN MARS: Yeah.

ELIZABETH JOH: Congress could also require the states to establish nonpartisan, independent redistricting commissions. So that would be at least one way to address some of the extreme partisanship we see in maps. There are just a handful of states that have independent commissions--except ours was one of them but is temporarily suspended for the time being.

ROMAN MARS: Yeah, you know, you can't bring a knife to a gunfight, I guess. They're really, really concerned. I mean, they're just reacting to what is already happening. I don't think that would have happened otherwise.

ELIZABETH JOH: Yeah, it's absolutely a race to the bottom, which is completely sanctioned by everything that the Court has done.

ROMAN MARS: Which sucks. What about the idea of just, like, not capping at 435? Anyone thought about what that would do?

ELIZABETH JOH: Yeah, I mean, there's no reason that we have to have it that way. I mean, that's coming from a completely different angle. We could just have many more representatives. Period.

ROMAN MARS: Yeah, I mean, then there's some variety to become, like... Well, not everyone can be a sycophant to the executive branch. There must be just a greater variety there, and therefore, maybe this sort of moribund Congress wouldn't exist the same way.

ELIZABETH JOH: Yeah. And of course, there's the biggest question--the one that's not even the redistricting question. Do we even need to keep the Supreme Court the way it is? Right? I mean, that too is up to Congress. The Constitution requires no specific number of justices. We've sometimes historically had six. We've sometimes historically had 10. We've had nine justices since 1869, but that is entirely a matter of choice. You know, I think lots of people are familiar with FDR's court packing plan. He wanted to add six more justices to the Court because the conservative majority kept striking down his new deal legislation. The proposal didn't win, but he got what he wanted in the end for whatever reason.

Now, President Biden established a commission on Supreme Court reform in 2021. Nobody really expected the commission to do anything. And it delivered on that because it issued a 288-page report in 2021, and this commission couldn't agree on whether to recommend packing the Court and didn't really offer any other recommendations either. And after that, five months later, that's the document where we see the Court deciding to overturn Roe versus Wade. You might remember in Dobbs, Justice Alito said, "It's time to heed the Constitution and return the issue of abortion to the people's elected representatives." That's the same Justice who would say, four years after Dobbs, that partisan gerrymandering is a constitutionally permissible goal of government in the Callais decision--in fact, it's a legitimate thing for states to do. So court packing ideas have been tossed around for a long time, but I think some folks are beginning to think that it's less of a fringe idea. And because the number of justices isn't constitutionally required, it's actually much easier than some of the other Supreme Court proposals that have been passed around because... Let's say one of them is, like, term limits for justices. That's actually much harder. It would require a constitutional amendment since we all understand the Constitution to guarantee what's called "life tenure" for not just justices but all federal judges. So it'd be much easier, actually, to pack the Court.

ROMAN MARS: Yeah, I mean, you could do it with the majority, right? Or I guess you'd have to get over a veto if you had a non-agreeing executive. But other than that, that's it, right?

ELIZABETH JOH: Right, and much easier than changing the constitution.

ROMAN MARS: Yeah, much, much much easier.

ELIZABETH JOH: One last thing. I just want to return for a moment to Purcell versus Gonzalez. In that case, the Supreme Court said, "Confidence in the integrity of our electoral processes is essential to the foundation of our participatory democracy." So as

we get closer to the midterms, it's pretty clear that people are worried about election interference, vote dilution, voter suppression... Will the Supreme Court play a role in supporting American democracy and diminishing partisan tension? I don't think it's clear at this moment.

ROMAN MARS: No, well, I mean, I think it's clear. But I just don't think it's...

ELIZABETH JOH: The wrong direction.

ROMAN MARS: It's in the wrong direction. It's clear that they're not going to diminish anything. They're just going to be more partisan and make it all worse. It's just a terrible situation to be in. It makes me so upset. Every decision is just sort of inconsistent and partisan in these ways that it's just, like... It's hard to not apply intent to it. You certainly can apply results to it. The result is Republicans are winning these fights all the time. At a certain point, you have to assume the intent, because otherwise the results don't make any sense.

ELIZABETH JOH: Absolutely.

ROMAN MARS: Well, this is fascinating and depressing stuff. The thing that I hope for is... People are so disgusted with Trump right now. And there's, like, these plus 30 generic Democrat advantage that, even in these ultra red states, you're talking about 10 points. And maybe these redistricting efforts won't actually work in a way. You know what I mean? Maybe they'll surprise people by what people vote for in the end.

ELIZABETH JOH: I think that's right. And one of the things to keep in mind is it's an easy moment to be really cynical and think, like, nothing really matters. But what is actually going to overcome all of this is not cynicism but actually working hard to make sure that some of these barriers are overcome.

ROMAN MARS: That's right because these advantages in these different states and these different districts is not set in stone. And there's way more people that don't vote that could change the election tremendously. And we just went through a primary vote here in California. And it had an incredible amount of participation. And it was really heartening. And so I really do hope that, when we get to the next phase of it, the bad actors in all this are just surprised by the amount of people who actually care about the election enough to vote and therefore vote them out of office.

ELIZABETH JOH: Me too.

ROMAN MARS: Let's hope that the political remedy is actually the one that actually could actually happen. But we'll have to see.

ELIZABETH JOH: Yep.

ROMAN MARS: Thank you.

ELIZABETH JOH: Thanks, Roman.

ROMAN MARS: If you want more on the Supreme Court and Article III and how the judicial branch is structured, check out the 99% Invisible Breakdown of the Constitution. Our guest was Adam Liptak. It was really a fantastic episode.

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