

Kris Turner:

The Voting Rights Act case before the Supreme Court, *Louisiana v. Callais*, is widely viewed as a blockbuster challenge to the future of the Voting Rights Act. Depending on how broadly the court rules, it could either adjust the standards for using race and redistricting or significantly curtail federal protections against racial discrimination in voting. Welcome back to Wisconsin Law and Action from the University of Wisconsin Law School. I'm your host, Kris Turner. Today, we have two guests from our UW Law faculty here to talk about the case and the possible impact of a ruling this term. Each has a perspective and expertise that can help shape our understanding. First, clinical professor Steve Wright teaches and writes about criminal law, voting in civil rights, race in the law, and appellate practice and policy. Before joining the UW Law faculty, Professor Wright was a trial attorney in the voting section of the U.S. Department of Justice, and he litigated cases to enforce the Voting Rights Act.

So he has firsthand experience with the subject matter at hand, and I will mention this is his third time joining the podcast. So welcome back, Steve. It's great to have you back.

Steve Wright:

Thank you.

Kris Turner:

You're welcome. And Assistant Professor Torey Dolan is a former William H. Hasty Fellow whose scholarship focuses on the intersection of federal Indian law and election law. This fall, Professor Dolan filed an amicus brief on behalf of the Navajo Nation in *Louisiana v. Callais* on the constitutionality of race-conscious remedies under Section 2 of the Voting Rights Act. Your first time on the podcast, Torey, but thank you for joining us today to talk about this.

Torey Dolan:

Thanks for inviting me.

Steve Wright:

Yay.

Kris Turner:

Of course, yeah, hooray indeed. I agree. Welcome to you both. I'm excited to hear from both of you. So before we get into the VRA case, I'd like to give you each a few minutes to talk about why you have focused on this kind of work in the first place and maybe share a few highlights or trends you've noticed over time. So Torey, since this is your first time, let's have you go first.

Torey Dolan:

Okay. So my work is really informed by past practice experience in Arizona, particularly because federal Indian law and election law are not often in conversation with one another, but every election cycle they would come to ahead. This has to do with Section 203 compliance under the Voting Rights Act for native languages, polling locations on tribal land, et cetera. Really, that practical experience guides my scholarship. Part of why I got involved in *Callais* is because one of the questions is about race conscious redistricting and its lawfulness. And of course, representing tribal communities, you care a lot about tribal lands, which are predominantly Native American. And so respecting tribal boundaries is

necessarily going to implicate race. And so the Navajo Nation is one of the largest tribes and we wanted to represent their interests before the court as they consider this issue.

Kris Turner:

It's going to be great to have your perspective as we continue to dig into these cases. Steve, how about you?

Steve Wright:

I think my answer here is the answer I've given each time that I've done the podcast, which is I landed on voting sort of by happenstance. After I finished clerking, I applied just generally to be honors attorney at the United States Department of Justice. And I applied to work in the Civil Rights Division. And the way it works is you basically just apply to the division as an honors attorney and they stick you anywhere. And so I think voting had been my third choice, to be perfectly honest on where I wanted to go in the civil rights division, but they stuck me in voting. And I'm so grateful that I did. It was a transformative experience, both as a young lawyer, but also helped me understand the nuts and bolts as well as the big picture ideas behind our democracy. And those are the type of things that I know so many of our colleagues, including Torey, they try to emphasize to our students, right?

That is the idea of law in action. How do you take these big laws, these big principles of fairness, equality, elections, democracy, and how do they actually play out both on the ground and in people's lives? And so I was there for about five years, including the 2010, 2012 redistricting cycle, and I'm sure we'll talk more about that. But I primarily specialized in voting cases on behalf of African American and Hispanics. Largely in the South, Louisiana was the jurisdiction where I was head of federal law enforcement on voting rights from probably about 2008, 2009 to 2012, bringing Section 2, section five and section 203 cases.

Kris Turner:

You bring something up, Steve, I want to ask before we dig into the case itself is, what have you seen from students on this perspective? Torey or Steve, have you been working with students or hearing from them about voting rights cases?

Torey Dolan:

I'll say last semester, the American Constitutional Law Society and the Indigenous Law Students Association co-hosted an event to talk about these cases and talk about their impacts on tribal communities, which they reached out to me and frankly, completely unprompted. So I think that they're thinking about the future of the country and the present stakes of the country through the lens of voting and the Voting Rights Act, which I think is important because it makes my job easier that they know this already and I don't have to belabor the point that the Voting Rights Act is really critical to everything in this country and constitutional function in so many ways.

Steve Wright:

For me, I hear those same things. One of the things that I've been interested in, I've been at the law school now for what, 12, 13 years. I've really noticed a shift in terms of where students want to focus their thinking on elections and voting mechanisms. When I first came here, there was definitely a lot of talk about voting and voting rights, but I think in particular after the 2020 election, there were two sets of conversations that were happening. One was generally just the larger conversation about voting and race, but we began to hear after President Trump refused to acknowledge his laws, greater

conversations about just the institution overall, and in particular, and perhaps it's just a function of being a member of our criminal faculty, what exactly were the rules governing voter fraud? What were candidates' rights?

And so I started hearing a lot more questions that dealt less so much with the inclusion question, as much as the typical bread and butter, what are the fairness? What are the penalties? How do we prevent these type of things from happening again?

Kris Turner:

So it sounds like we are seeing both deeper thinking about this in different areas, but also active student participation in organization trying to think harder about this, which is very encouraging to all three of us, I would say. But now let's turn our attention to the case at hand. Steve, let's start with you. Can you briefly summarize the diminished status of the VRA heading into 2026?

Steve Wright:

Yeah. So the case at hand is just another step in the neutering of the Voting Rights Act. When I was in voting, I specialized in cases brought under what was then Section five of the Voting Rights Act. And we've talked about it before, but the Voting Rights Act used to have a requirement that certain states, and I believe it was 13 of them and maybe a couple counties around the country, had to receive federal permission before they could enact any type of voting change, whether it's big or small. I think even the critics recognized that it was perhaps one of the most transformative pieces of legislation in American history. I think there's no question that it not only elevated the rights of people of color, particularly African Americans in the South, but it also set minimum standards and prevented a lot of the sort of dragging their feet or games that many states that oppose desegregation and equality.

It prevented that type of obstreperous behavior. And so when that fell, I want to say in 2013, '14, the court holding that the formula behind it was unconstitutional. I would probably say half of the Voting Rights Act, 60% of the Voting Rights Act just no longer was law. And so Section 2 remained one of the last viable means for people of color, one of the last viable statutory means for people of color to vindicate their rights and participate in our democracy. And so bit by bit, the court has narrowed the scope of Section 2, sometimes through evidentiary rulings, and sometimes by redefining some of the test. And so that brings us to today. And so this case from Louisiana is really one of the last tests to see whether the remaining provision of the Voting Rights Act Section 2 will have the same type of historic teeth that it has had in the past.

And it specifically looks at the ability of jurisdictions, how they can go about, or whether they can even go about taking race into account when they're drawing congressional districts or any legislative district, I guess.

Kris Turner:

And to dig further into those details, Torey, you filed the amicus brief in this case. I think you have a pretty good grasp on the details to put it lightly, but how about an overview of the Louisiana v. Callais case? I know it was held over from last term argued before the court in October, correct?

Torey Dolan:

Yes. So it was held over from last year. Last year, the briefing was about the standard Section 2 vote dilution jurisprudence and whether or not Louisiana's intentional creation of a second Black majority district was lawful. The court held it over and then relisted it for argument on the question that appeared in one of the briefs the first time around, which is whether or not race conscious districting is

lawful under the 14th and 15th Amendments of the Constitution. So what was previously widely accepted that you can consider race on balance with other considerations to ensure that communities of color adequately represented in the process of districting is now inherently suspect in a way. And so the argument really veers from the norm of the Voting Rights Act universe that we were living in. And now through, I think the briefing and the oral argument, it's clear that folks are really interested in turning the Voting Rights Act universe on its head.

And if I may add to what Steve was saying, the loss of Section 5 really is integral to this moment that we're in, in part because after Section 5 was struck down, Arizona was one of those pre-covered states and Arizona put a law back on the books that it couldn't get the DOJ to approve. And so that third-party ballot collection ban that went to the Supreme Court in 2021 under a Section 2 challenge was upheld. And the court there modified the standard for the Section 2 analysis and added all of these factors that are very state favorable. And so this incremental shift in the Voting Rights Act, I very much imagine it like the Monty Python sketch where there's the knight in the forest and he just kind of keeps losing a limb and he keeps fighting, but he's getting whacked and he has less and less to stand on. And that's kind of how the Voting Rights Act is fairing right now.

Kris Turner:

Very great analogy. I have that picture perfectly in my head right now, Torey, I have to say. Based on the oral arguments, we'll stick with you for the start of this one, Torey. Based on the oral arguments, what are those major questions that the justices are facing?

Torey Dolan:

The justices are facing this idea, I think, that really goes back to whether or not, is our Constitution, I wouldn't call it race blind, but I'd say race ignorant? Can you think about race in these matters? And so with respect to districting, part of the procedural posture of this is that there was a separate case where the court said that Louisiana's maps likely violated the Voting Rights Act because it only had one Black majority district when there were enough Black people in the state to make a majority of two districts. And so Louisiana subsequently draws these maps and then these maps are challenged for overrelying on race. And that's how we get to this point.

Some of the things that really concerned me about the oral argument was this idea that was somewhat being floated by some of the justices, especially Justice Alito, that if there's a correlation between race and partisanship, then it's a partisan gerrymander and somehow that's okay. I think that's clearly concerning, given that the Voting Rights Act was never intended to be tolerant of racial politics, even if they are partisan. So yeah, we're really just coming at this with, what is the future of civil rights legislation? How much can we accommodate race? How much can we consider it? And it's an odd world to be in if you know the history of the Reconstruction Amendments.

Kris Turner:

Steve, what do you think? Is this an odd world to be in or what are those questions? What are your thoughts on that?

Steve Wright:

I mean, it's definitely an odd world to be in, regardless of the case, but I want to just add one other thing and particularly about distinguishing between politics and race. One of the things that I admired honestly about Section 2 is when it was passed in 1965, the bipartisan Congress that passed it was pretty actually thoughtful about discrimination. The Senate and the Congress renewed it and modified it

in 1982. But one of the things that I think often gets lost in the conversation is, you can't bring a Section 2 claim just because one is capable of drawing an additional majority minority district. There are other things that, as just as a matter of burden of proof, that have to accompany the case.

So one of the things you have to show is racially polarized voting, which is basically your minority group is going to vote for one guy and your majority group, the white community is going to vote for another guy, and their interests aren't really going to align. When you get into the nitty-gritty of it, you also normally have to prove that racism remains a fundamental aspect of a citizen's experience in that jurisdiction. So when you look at the Senate factors, they encourage the courts to look at, is there a history of racism? Are there still widespread disparities? Did the campaigns have to result to racial appeals? And so it's not just a question of, "Is this just a black community or is this a Democrat community?"

The question is, is there evidence that the democracy in that community is just fundamentally failing and that you have a sizable number of people of color and their ability to participate in our society at all is hampered by their inability to elect people who understand their plight.

Kris Turner:

Some of the words I've heard from both you already are, getting sliced apart. Is democracy failing? Is it hampered? Along those lines, what are the potential consequences or outcomes of this case? Steve, go ahead.

Steve Wright:

I think this just fits into a larger pattern or it fits into a larger vision about two things. One, what is the role of courts in our elections, but also how are we going to go about defining what our democracy is all about? If your vision for the United States is that we are going to be a multiracial, perhaps pluralistic type society where we recognize that there's strength in having different voices and different communities represented and coming together to figure out how everything works for everyone, that's a very different vision than, winner takes all majority rules, the rest of you have to live with it. And so I think it's at stake is just fundamentally, how are we going, in the 21st and 22nd century, how are we going to go about deciding who are our decision makers and how are we going to work in a democracy where there are so many different views, so many different people, so many people of good character, good faith, and how are they going to be able to work together to come up with solutions that benefit everyone?

And that obviously will translate not only to race and issues, that'll translate into corporate versus worker interest. It obviously plays a role in everything from reproductive rights to crime law. So it's really just setting the stage for, how do we go about recognizing and appreciating our differences and having respect for so many of the strengths that I think have traditionally served this nation very well?

Kris Turner:

Torey, what are your thoughts? What are the consequences or outcomes on this case?

Torey Dolan:

I agree with everything Steve said. And I think additionally, in that conversation about what the future of democracy is, it's also a conversation about power shifting and subordination. Fundamentally, the Voting Rights Act is an anti-subordination statute that comes out of the Civil Rights Act, that comes out of the legacy of the failures of reconstruction and the harms of Jim Crow. And it was aspirational in a way because many of the people who threw their lives behind advocating for the Voting Rights Act like

marching on Selma really envisioned a future where subordination would not be the standard, but also the future of democracy wouldn't be decided in congress. If we lift the barriers to the ballot box, if we lift the barriers to participation, then the people can decide what this future looks like for them. In many ways, the Voting Rights Act wasn't perfect. It didn't fix everything.

I know that I in the past have certainly critiqued some of the barriers to bringing Section 2 claims that Steve mentioned because serving tribal communities, they're often very small communities that have a hard time passing these litigation thresholds. But ultimately, at the end of the day, I think the question is, where does the power lie in a democracy? And the vision of democracy I've always been sold is in the people. And when you keep the people out of democratic participation, then I think it begins to shift the power in a ways that are anti-democratic.

Kris Turner:

Are there any parallels in legal history to this series of cases? I hesitate to use the word precedents, but are there any parallels that you can see throughout American history or elsewhere where there has been an act that's been passed and then slowly changed and evolved or sliced apart over time?

Steve Wright:

So I don't want to go to the extreme example, but following the Civil War and during the reconstruction era of reconstruction, that was the time that America saw its first Black senators, the first Black members of the House of Representatives. And I believe it's 1882 or 1884, that grand bargain to end reconstruction happened, and there was a massive shift in the ability of African Americans to participate. And don't get me wrong, I recognize that shift was a product of terror and lynchings and violence. And I'm not saying in any way that that is happening again, but I will say that that legacy of discrimination did continue until 1965, and the Voting Rights Act was assigned to stop that. And so what happens when we remove those barriers, I think, is one of the very big questions. Other cases like the affirmative action case, Justice Thomas has suggested when we remove these type of barriers, everything's going to be fine.

I think we already have both anecdotal and statistical evidence to show that that's not true in voting. Torey already spoke about the example of Arizona reintroducing legislation and laws that were prohibited under Section 5 because the Department of Justice found that they would hurt the interest of minority voters. There's a couple studies out of Georgia, a pre-cleared state on what happened before and after Section 5, and those studies indicate that Black voting participation took a hit, that polling places in Black communities close, the amount of time that Black voters in line increased, the number and easy access of polling places was reduced. And so there's no question in my mind that the end of Section 2 will definitely cause both Black electoral power or the electoral power of people of color or other groups that were protected under the Voting Rights Act, there's no doubt in my mind that those groups are going to take a hit. I think the real question will be is to what degree?

Kris Turner:

Torey, can you share a little bit more about the amicus briefs that you filed and why it was important to get it filed in this case?

Torey Dolan:

Yeah. Part of the really alarming question in the re-listening parallel argument was whether or not race conscious districts inherently violate the Equal Protection Clause of the 14th Amendment or the 15th Amendment, which prohibits discrimination in voting based on color, race, or previous condition of

servitude. And so there was this underlying idea that not only can you not focus on race, but you have to tune it out in the redistricting process. And given the history of this country with respect to native communities, that would severely harm tribal voters because we know that reservations were established to be a permanent homeland for these tribal polities and that they are majority Native American. And so one of the things that we were constantly fighting for as voting rights advocates is the idea that tribal boundaries and tribal polities be respected in the redistricting process. That they not be maligned, that they not be carved up to the point where tribal communities are unable to exercise the full extent of their political power at the ballot box.

Additionally, we know from native communities that racism is often the hardest on indigenous people with the communities that are in closest proximity to reservations. They're often called border towns. And so we know that, especially when it comes to local politics, redistricting and how these state legislative lines are drawn and these federal lines are drawn, really impacts the ability of native people to fully have a say. And so we really wanted to utilize the amicus brief to highlight that to the court because recognizing tribal boundaries is necessarily going to implicate race. And the idea that that violates the 14th and 15th Amendment, frankly, we found to be a bit absurd, but also just incredibly dangerous. And given the amount of diversity in this country and given that much of the Voting Rights Act was spurred by the Civil Rights Movement in the American South, not a lot of folks are aware of how these things impact reservation communities specifically.

And so that was a point we wanted to get across on behalf of the Navajo Nation. The Navajo Nation falls into three states. It's approximately the size of West Virginia. It falls in three counties in the state of Arizona, I believe seven or eight in New Mexico. And so the Navajo Nation is already politically disadvantaged by virtue of falling in multiple states. And so we certainly didn't want a ruling to come out that would threaten the ability of the nation to be kept whole in the variety of states that they're in.

Kris Turner:

Torey, sticking with you, you mentioned that Louisiana v. Callais has garnered a lot of attention, obviously. Here we are talking about it today, but there are other VRA cases to keep an eye on. Do you want to give us an overview of those and why they're also so important?

Torey Dolan:

I'll briefly mention cert. is pending in Turtle Mountain Band of Chippewa versus Howe? And so this case has to do with the question of whether or not you can support a private right of action under the Voting Rights Act. So in particular, the litigants there, they brought a claim under the Voting Rights Act. And when the Eighth Circuit said there was no private right of action in the Voting Rights Act, they amended their complaint to bring it under a civil rights enforcement statute. And the Eighth Circuit, again, said, "No, you do not have a pathway to bring a private right of action." And so if that Eighth Circuit ruling were to stand, that would be very harmful because essentially then the Department of Justice is the only entity that can bring claims to enforce the Voting Rights Act. And I'm sure Steve can attest to the Voting Rights Division, a DOJ works very hard, but cannot sustain all of the Voting Rights Act litigation in the country that is necessary.

And as somebody that's engaged in VRA litigation on behalf of tribal governments and voting rights groups and intertribal organizations, it would essentially stymie the claims there. And so then tribal communities would be entirely dependent on DOJ to bring these claims, and there's just not enough resources, time, and attorneys, frankly, to bring everything that's needed to enforce the Voting Rights Act.

Steve Wright:

I'd go even a little bit further. I mean, the Trump Administration has been pretty explicit that they do not want to bring Voting Rights Act cases unless they're on behalf of white voters. So in the absence of a private right of action, it's very likely that there will just be years where no one in the country brings a claim under the Voting Rights Act. I should also say there's plenty to go around. The DOJ, when I was there, and this was the Obama Administration, still gets very much criticized for which voting rights cases they take. Traditionally, the government just has different standards for bringing cases. So for example, there might be a preference for bigger impact cases on the statewide level, bringing claims against the state of Louisiana and the state of Georgia, but that makes it very hard in smaller counties or rural counties sometimes to bring claims just because it may not be worth the... These cases are expensive.

They cost one, two, three million dollars just because of all the experts and the maps and the depositions and private right of action, the cost is already so prohibitive for most private right of actions. Eliminating the private right of action, I think just creates a mess. I should also say that even under Democrat administrations, my experience and talking to people who've been around is the DOJ tends to be fairly conservative in their litigation. They don't take cases where there's any chance you can lose. And so when there is innovation in the case law or when there are perhaps very thorny fact questions, the DOJ isn't going to touch it even if there is a problem.

And so the private right of action is not only necessary to bring cases that perhaps are closer call on the evidence, but also cases that, in the past, were used to explore the full potential of the Voting Rights Act. If you look at the majority of Section 2 cases that went up to the Supreme Court over the past, what, 20 years, I think the overwhelming majority probably at a ratio of seven to one were brought by private litigants.

Torey Dolan:

I've worked on data for congressional testimony about this, and I believe the last time that DOJ brought a case on behalf of tribal communities was in the '90s. And so all of the Voting Rights Act litigation on behalf of tribal communities since then has been undertaken by private actors. And in addition to what Steve said in terms of how DOJ manages its resources, many native communities are enforcing the Voting Rights Act against county governments, really local decision. One of the cases I worked on was about how county in Arizona would not provide early voting on tribal lands. Early voting was available off reservation, but you had a reservation the size of Connecticut and a second reservation in the county that got nothing. And so that's the type of case that DOJ's not necessarily going to spend their precious time and resources on, especially in a truncated litigation timeline of an election year.

And so losing the private right of action, it'll be hard to imagine that the effects of the Voting Rights Act will be fully felt in Indian country.

Kris Turner:

A challenging legal landscape for the Voting Rights Act looking forward here between all these cases. I'm grateful that you two and others or other scholars are watching this and contributing to the amicus briefs and discussing this with us on the podcast because I think sometimes it's hard to see the force for the trees with these individual cases. And when you look at them altogether, you can see the trouble that could be caused by losing some of these rights that have been seemingly inherent for about 50 years or so. But before we close out, what else are you two working on or looking forward to in the coming year? Torey, let's start with you this time.

Torey Dolan:

I'm writing a couple pieces about how I think reservation boundaries should be respected in creating electoral districts for legal reasons outside of the Voting Rights Act, such as treaty rights, federal law, issues of federalism. I think additionally, I'm always paying attention to what the court is doing. So earlier this month, I worked on an amicus brief on behalf of the National Congress of American Indians with the Native American Rights Fund in a case that has to do with voting by mail and whether or not states can count ballots that are postmarked by election day and received after election day, which if anyone is aware of Alaskan Native villages and how rural and remote they are, their ballots come in via bush planes. And so you really need to have flexibility there in receiving those ballots to make sure that the election is free and fair.

And then I think lastly, it's an election year. We have midterm elections this cycle, and so I'm always keeping an ear to the ground and my eye on the communities to see how they navigate because I think elections are a constantly evolving landscape and as a matter of law can be very complicated with the interplay of federal and state law. So there's always going to be movement in this space.

Kris Turner:

Steve, how about you? What are you working on? What are you looking forward to in the coming year?

Steve Wright:

Nothing election related. I was on the podcast for the first novel, and the second novel is, oh my God, about two weeks from being done. So fingers crossed on that. And I will probably be doing a lot less crime law in this upcoming year and doing a lot more immigration cases. So I'm looking forward to that.

Kris Turner:

Can you give us any insights or brief synopsis of what the new novel is about or is that not for [inaudible 00:33:44]?

Steve Wright:

Well, you researched half of it. I'm amazed that you can't, but it's a-

Kris Turner:

Signed an NDA.

Steve Wright:

Yes. It's a book written in... This is for all the writers out there, always have friends who are great librarians and who are more than willing to answer your midnight, "Oh my God, what did this look like in this year?" Type questions. So I'm thankful for Chris for that. The book is set in 1944, Indiana, and it follows Thurgood Marshall and a group of three law students who are litigating a death penalty case.

Kris Turner:

I'm looking forward to reading it. Torey, can I sign you up to get a copy?

Torey Dolan:

Please do.

Kris Turner:

All right, there we go. I just sold a book for you, Steve.

Steve Wright:

Thank you, my friend.

Kris Turner:

Yeah, you're welcome. You're welcome. It's always my pleasure to do research for you, Torey, or anybody. So please feel free to reach out to anyone. It's fun for me to go on the treasure hunts and find all those mysterious answers from 1944 and see what's out there. Thank you both again for sharing your insights, your knowledge with us on the podcast today. It's been so great discussing these complicated, but so critically important cases and questions today. This was the first time we've had two professors on the podcast at the same time to discuss the Supreme Court cases, and I think it went really well. I really enjoyed discussing it with both Torey and Steve. I, again, truly appreciate it. We'll link out to both Professor Wright and Professor Dolan's scholarship on our podcast page, as well to some other explainers that provide maps for Louisiana v. Callais on our podcast page.

Check it out. All their work will expand on what we've talked about here today and so much more. Thank you for listening. This was Wisconsin Law and Action from the University of Wisconsin Law School. To hear more conversations with our faculty about their research and its real world impact, visit [wilawinaction.law.wisc.edu](http://wilawinaction.law.wisc.edu). Stay up to date on Wisconsin Law School Scholarship by subscribing to this podcast via the Apple iTunes store or follow the Wisconsin Law School on social media for updates on faculty news and publications. I'm Kris Turner. Thanks for listening. See you next time and happy researching.