

Podcast with Professor Girardeau Spann Discussing his Forthcoming
Article, *Gerrymandering Justiciability*

November 8, 2019

Janae: Hello everyone. Welcome to our first recording of the *GLJ* podcast. My name is Janae Staicer and I am the Senior Articles Editor of Volume 108 of *The Georgetown Law Journal*. Today is our first ever taping, and we are so excited to have Georgetown Law's very own Professor Spann with us as our first guest. I wanted to first provide some quick background about the Articles Committee and provide some thank yous and acknowledgments before we get started.

The Articles Committee is made up of fourteen members. Over the last several months, we have read collectively thousands of articles in various areas of scholarship. We finally, back in September, ended up filling Volume 108 with a lot of articles that we really love and are excited to be publishing. I wanted to give a quick thank you to Sam Glazer, our Senior Development Editor, who helps put this great event together, as well as the Georgetown Law Library and specifically Savanna Nolan, our library liaison, for providing us with the equipment to make this podcast possible, as well as giving us the great idea to do this podcast in the first place.

The purpose of this podcast is to dive into some of the articles we will be publishing in this volume. Max Crema and Nathan Garg, members of the Articles Committee, will interview Professor Spann about his article, *Gerrymandering Justiciability*. Professor Spann's thesis is that the Supreme Court has gerrymandered its gerrymandering doctrine to advance the interests of white Republicans. At this time, I will now turn it over to Professor Spann, Nathan, and Max. Thank you all for coming.

Max: Hi, this is Max Crema and to my left is Nathan.

Nathan: Hi.

Max: Professor Spann, we're so happy to have you here.

Prof. Spann: Max, thank you very much. I'm delighted to be here. This is, as you might imagine, quite an ego trip. We're having a whole podcast just about my work.

[laughter]

You guys show interesting taste in judgment.

[laughter]

I'm very happy that *The Georgetown Law Journal* decided to publish this article. Nothing could make me happier. Janae, Max, and Nathan have been incredible through the editing process. Honestly, I just have to say, this is one of the best student edits I've ever had. The article is just much better as a result of the work you've done than it was when I gave it to you. Thank you very much, Janae. I will do my best not to embarrass any of us in this podcast.

Max: I'm sure that can't happen. Thank you very much. It was a real pleasure working on it. I know I speak for all three of us. We've identified basically two main pieces in your article. The first is that the Supreme Court's gerrymandering doctrine is indeterminate, and it gives them a significant amount of discretion to uphold or strike down maps. The second is that the Supreme Court has historically used discretion in areas like this to advance the interests of whites over blacks. We're going to ask you to quickly explain both sides of those two pieces and then dive into them a little further.

Prof. Spann: That seems fair enough. I actually agree with both things that you said, not surprisingly. The reason I decided to write about gerrymandering is, gerrymandering has become a really hot topic recently, well, in the last couple of decades, actually. When the Supreme Court came out with its *Rucho v. Common Cause* decision last June, I believe, I can't say I was surprised. Even though I wasn't surprised, I was kind of surprised.

I just didn't think they would go this far writing an opinion the way that they had written it, especially the way that the doctrinal ground had been laid prior to this decision. Here's what I think is going on. The law of justiciability is hot. In *Rucho*, the Supreme Court decided that partisan gerrymanders posed unconstitutional political questions. They didn't rule the partisan gerrymanders are constitutional or unconstitutional. They just said, "We can't reach this issue, because it's a political question."

Earlier in 1993, in a case called *Shaw v. Reno*, the Supreme Court had decided that racial gerrymanders were constitutional. For reasons that I will try to explain as we go through this discussion, those two things seemed inconsistent to me. It bothered me how much of the cases were decided in a way that gave the Supreme Court vast amounts of discretion in determining how it was going to deal with gerrymandering cases.

The reason Supreme Court discretion troubles me is that, historically, and I think at the present time, the Supreme Court tends to exercise its discretion in ways that benefit the interests of whites and are adverse to the interests of racial minorities. I think that's reflected in the gerrymandering cases in sort of the disparity between the way we treat partisan gerrymanders and racial gerrymanders. I also think it just fits into a long history of Supreme Court decisions that seem to sacrifice the interests of racial minorities in order to advance the interests of whites.

Max: Do you see your articles fitting into a broader context of changes to the political system as a whole, often initiated through litigation or through the Supreme Courts? I'm thinking here of the census case or of the *Crawford v. Marion County* case.

Prof. Spann: Boy, I wish I could say the answer to that was yes, it seems like things are getting worse. But no, my answer is no. It doesn't seem like things are getting worse. This seems like business as usual. For reasons that again, that I suspect we'll be talking about later, I just think there's a long history of cases in which the Supreme Court has sacrificed the interests of racial minorities to advance white interests, and this just fits into that pattern.

Max: All right. Shall we dive into the distinction you draw between partisan gerrymandering and racial gerrymandering?

Prof. Spann: I'm willing to do this at whatever level of detail you like. I have the strongest of arguments or counter-arguments I could raise. Another option is, I could give you the two or three-minute versions if that's what you would prefer.

Nathan: Maybe you could start off with kind of a higher-level outline like that, and then we could dig in more to some specific points.

Prof. Spann: Okay, let me try this. In the *Rucho* decisions, Supreme Court held that partisan gerrymandering presented a nonjusticiable political question. What that means is the Court is saying that as a constitutional matter, the issue that's raised ought to be resolved by the political branches of government rather than by the judicial branch of government. The reason the Court said that in *Rucho* is because it found a lack of judicially manageable standards.

That was a signal for why this was a political question. In *Shaw v. Reno* in 1993, the Supreme Court decided that racial gerrymandering presented a justiciable, nonpolitical question. It was suitable for judicial resolution as political resolution. I'm sorry. *Shaw v. Reno* was in 1993. One other case seems to be relevant here, in 2001, in a case called *Easley v. Cromartie*, the Supreme Court, basically, I think, truthfully recognized that one form of gerrymandering can pass as another form of gerrymandering because there's so much racial bloc voting in the country.

Rucho holds the following. *Rucho* says that there are no judicially manageable standards because the Equal Protection Clause, which you might think was an act of a certain appropriate standard, doesn't apply—nor the First Amendment Associational preferences apply with their spectrum. We're talking about partisan gerrymandering.

That was a little bit surprising, because in 1986, in a case called *Davis v. Bandemer*, the Supreme Court had held that partisan gerrymandering did present a justiciable question. It was not a political question. More recently, in 2004, in a case called, I don't know how to pronounce this, I'm going to try, *Vieth, V-I-E-T-H, v. Jubelirer*, I believe, J-U-B-E-L-I-R-E-R, it looked as if Justice Kennedy was going to provide a fifth vote for reaffirming the view that partisan gerrymandering did present justiciable political questions, but *Rucho* rejected that.

The Supreme Court and appended by Chief Justice Roberts considered a number of standards that potentially would be judicially manageable, but he rejected them. He rejected proportionality as a standard. He protected vote dilution emanating from the one-person-one-vote holding in *Reynolds v. Sims*. He rejected the predominant intent standard that we tend to use in racial gerrymandering cases. And he did all this recognizing that what he was doing posed a serious threat to democratic self-governance, because to the extent that people's votes are not counted equally, that poses some danger to democratic self-governance.

Then in *Shaw v. Reno* back in 1993, the Supreme Court held that racial gerrymandering did present a legal question rather than a political question because individual rights were involved. The court found a judicially manageable standard in *Shaw v. Reno*, with respect to racial gerrymandering, in the Equal Protection Clause. The Equal Protection- or I should say, in the Equal Protection Clause, as implemented through a predominant factor test that the Supreme Court two years later was going articulate in a case called *Miller v. Johnson*.

That meant that residents of districts that hadn't been racially gerrymandered had a claim that satisfied the Article III case-or-controversy requirement in a way that was sufficient to establish standing. The reasoning seemed to be that when individuals were placed in a judicial election district because of their race, that was as if they were victims of racial segregation. As a result, they suffered what the Court referred to as a representational injury.

That was sufficient to violate the Equal Protection Clause, thereby providing a judicially manageable standard. Based on what those two decisions say, it is a fairly easy matter to just invert the results so that I believe I can make—I hope I have in the article made arguments—that show the arguments in favor of finding the partisan gerrymandering is justiciable, it's not a political question, and racial gerrymandering is a non-justiciable political question.

Those arguments are just as strong as the arguments that the Court has adopted in those two cases. As a result, I assert that the Court has vast largely unconstrained judicial discretion that it will exercise in ways that I'm later going to disapprove of. Now I can walk us through the way that I flipped the doctrines. They are kind of technical and sort of complicated and it might take some time, but I'm willing to do that if you like or we can think maybe what you want to hear will come out in your questions.

Max: I think it might be helpful just start talking a little bit about how you understand *Rucho* and then how that plays into your argument. You read *Rucho* as creating- basically abandoning any kind of predominant intent test. Do you read *Rucho* as saying that it is constitutional to have a partisan intent when gerrymandering or do you read it as saying that courts shouldn't look into that intent?

Prof. Spann: That's a very good question. I know what the hornbook answer to that question is. I'm just not sure I believe it. I assume or if I were Chief Justice Roberts' law clerk, I would have said in the opinion- no, but it's a political question, so the Court is distinctly not addressing the constitutionality of partisan gerrymandering. If what you're asking is whether an effort to camouflage racial gerrymandering as partisan gerrymandering or even partisan gerrymandering s racial gerrymandering would be unconstitutional, my answer to that is probably yes, because of the role that intense seems to play in constitutional jurisprudence under the Equal Protection Clause.

Max: Sure. In *Vieth*, the last real decision that the Court issued on this, a plurality of justices held that gerrymandering was constitutional to extent so as long as part of legislators are motivated by partisan intent. Justice Roberts in *Rucho* seems to rely on that reasoning a lot, particularly in rejecting the trial court's predominant intent test. He says, "Well, why should predominant intent matter if partisan gerrymandering is itself permissible to some extent? The question is, where do you draw the line?" To that extent, it seems to be the first majority holding that a partisan gerrymandering, or at least the intent to drive partisan advantage through gerrymandering, is constitutional.

Prof. Spann: That is certainly true and that has to be true because everybody knows that's the way the political process works. The Supreme Court could not say with a straight face, you can never use politics when you draw election district lines. You've got to decide how much politics is okay and how much is not okay. That I think is what prompts Chief Justice Roberts to say, since it's judicially unmanageable, how are we supposed to draw that line?

I don't disagree with that, but one response is: but the same thing was going on with respect to racial gerrymandering and you managed to draw the line there. If the predominant factor test was good enough for racial discrimination, why isn't it good enough for political discrimination? I have yet to hear an answer to that.

Max: What do you say to the argument that there are different harms in the different cases. In the racial gerrymandering case, it's that the state is classifying someone on the basis of race and that's impermissible. Whereas in the partisan gerrymandering case, assuming partisan

intent is permissible, then it's an effect-based test, which is distinct from the classification harm. I'm thinking here of like the difference in harms articulated by different opinions in *Brown v. Board of Education*.

Prof. Spann: Yes, I just think that that is a very bad argument. It just doesn't work because the harms are exactly the same. Now you could characterize that -- what the Supreme Court does is it characterizes the harms in *Rucho* stemming from partisan gerrymandering as political harms. Whereas the harms in *Shaw v. Reno* being victimized by racial discrimination is legal because it interferes with some individual right as opposed to just some political preference or some political ideology that you have.

Again, because of racial block voting, because race is so highly correlated with political party affiliations, I just don't think the distinction between racial injuries, or racial harms and political harms is a distinction that can be maintained. If you thought there were such a distinction, and it was viable, then I think I can show that the Supreme Court got it backwards. That the one you care about is in the other case and then the one you don't care about is the one that's in this case.

Nathan: Isn't there kind of a principle that the government should never be classifying citizens by race and treating them in a certain way because of their race? Whereas, if we're in a system that's not a proportional democracy, you're not always going to have the relative power of your political party that it represents within the state.

Prof. Spann: From what I understand in The First Amendment, if what you said is true about race, that also ought to be true about your political affiliations. If the Constitution prohibits the government discriminating against people on the basis of their races should prevent the government from discriminating against people based on their political beliefs, their political views. Again, I just don't see the distinction between the two. I understand the Supreme Court sees it, but I just don't.

Nathan: I think that's kind of what the predominant-intent standard is kind of just trying to suss out and in a way that almost works as a per se rule where you're saying that one is okay and the other is not okay. In your article, you explain why the predominant intense standard is essentially arbitrary and doesn't really work. Can you explain that point a little bit more?

Prof. Spann: Let me try this. The reason I think you and the Supreme Court are suggesting that it might be okay to engage in partisan gerrymandering is because we do that all the time, it's just something that happens. How are you going to stop it from happening? It's unrealistic to think you could prohibit it all the time. I think exactly the same thing going on for speculation discrimination. It's here, it's part of our culture, it's never been gone, I'm afraid it's never going to go away, and we do it all the time. I guess what I really want to say is sometimes partisan political influence and gerrymandering is okay, you just got to draw a line. We know the same thing is true about racial influence in partisan and political gerrymandering because one of the things Supreme Court goes out of its way to do in *Shaw* is adopt a predominant factor test to make it okay to engage in all kinds of racial discrimination.

It just gets bad when you cross some line. God only knows where that line is. It's the predominant-factor line. I don't know what that means, but it's hard for me to imagine or to [sic] differently in those two contexts. Yes, racial discrimination is bad. Government ought not to do it, but so is political discrimination, and they're equally rooted in constitutional principles.

One in the Equal Protection Clause, one in the First Amendment. I just honestly don't see the difference.

Max: What do you say to the argument that the Court is just like institutionally incompetent to identify a lasting partisan gerrymander? There's been a number of cases that have reached the Supreme Court in which liberal lawyers have argued, "We need to step in. The Democrats will never be able to win even if they get 70% of the vote," or whatever, and the chambers were flipped a year or two after the Supreme Court dismissed the case without a resolution. Why is this pressing now?

Prof. Spann: Again, I think you were re-raising the question of whether there is a judicially manageable standard. The doctrinal answer is, if there's no judicially manageable standard as a matter of relative institutional competence, as a matter of separation of powers, this ought to be left to the political process, not for judicial process. I don't have any objection to that principle as stated. It's just as applied to the facts of these two situations. Once again, I don't see much difference.

Yes, it's true that even though the Supreme Court, at least currently under *Rucho*, does not intervene and the political gerrymandering process, sometimes, majorities change. I think just last Tuesday in Virginia, the majority changed and presumably that's going to be followed by a different set of partisan redistricting principles. Yes, sometimes that happens, and sometimes it happens with respect to race. The point that I typically make most strongly is even though black people were not allowed to vote or do anything or have any rights, we still somehow managed to get rid of slavery.

Even though Supreme Court was unwilling to do it, the political process managed to do. Now it just took a civil war, but that was just part of the political process. Once again, I'm just- I understand what you're saying, I just don't see how it cuts differently in the racial and the partisan context.

Max: You advance your argument through two different modes. You use a series of doctrinal arguments, largely drawing on descents, and then you also use a series of instrumental arguments to try and invert the reasoning of these two cases. Can you talk a little bit about why you chose this approach and the way it impacted your argument?

Prof. Spann: I can totally tell you that since we're completely off the record, nobody would be recording this. If you want to get your articles published in law reviews, you have to have categories and sections and things.

[laughter]

Also, there were some articles-- at some arguments I was not inventing myself. I was just basically lifting from the dissent and I wanted to distinguish them from the ones I claimed that I was inventing myself. I just gave them labels. I could've called them good arguments and bad arguments. I could have called them my arguments and their arguments, or, since I'm also always pressing for people to do instrumental rather than sort of formalist analysis, I figured why not use those two terms. That's all, I'm just labeling them differently.

Max: *Cromartie* plays a really important role in your argument. How do you feel about the fact that that was the liberal justices protecting a democratic gerrymander?

Prof. Spann: I guess I'm interested in the level of sophistication at which you are asking that question.

Max: Assume no sophistication on my part.

Prof. Spann: No, I think you're supposed to assume total sophistication.

[laughter]

That would be my advice. This is important; my position is not: Democrats protect the rights of racial minorities and Republicans do not protect the rights of racial minorities. My position is the United States as a culture sacrifices the interests of racial minorities for the white majority. Republicans are going to be a little bit more overt about it. Democrats are going to be a little bit more subtle about it. But they're both part of the same overall political governmental structure that I think causes the problem.

My real response to your question is we're just talking details. Yes, it's right. It happened to be Democrats then, but that's all that was going on. More subtly or more insidiously, if I were tried to oppress racial minorities, every now and then I would let them win. I would use the 10% rule. Let him win like 10% of the time, just so I can see we have a legitimate system here.

Max: That raises a broader point, which is that you're arguing for proportional representation for minorities in a winner-takes-all system. Is there a question of how much of a difference that will have?

Prof. Spann: Am I arguing for partial representation? I'm not opposed to proportional representation.

Max: You proposed it is one possible standard.

Prof. Spann: Right. I'm arguing that there are a lot of judicially manageable standards out there and proportional representation is one of them. If you are arguing or you were suggesting that Roberts was arguing, no, that's not judicially manageable because that's not a legitimate standard, that's just crazy. It is a legitimate standard. The Supreme Court itself has held in a case the name of which I can't remember at the moment, that if a legislature wants to engage in proportional representation, the Constitution doesn't permit that.

That's a perfectly constitutional thing to do. There's nothing wrong with proportional representation, but I'm not insisting on it. I am curious that that's not what everybody immediately gravitates to since that would be a fairly easy way to resolve the partisan debate. There are lots of other ways that courts have rejected-- In *Gill v. Whitford*, and I guess in 2018, a three-judges court in Wisconsin that upheld- sorry, invalidated a partisan gerrymander because under some very elaborate mathematical formula, focusing on wasted votes in an efficiency gap, it actually makes some sense and it is understandable.

It's hard to explain, but it's a formula and it generates a number that you could use as a baseline for proper proportional representation. It would work fine if you wanted to do it and three judges in lower court did want to do it. The only reason the Supreme Court rejected it is they didn't want to do it because for some reason, they want to maintain the right of legislators to engage in partisan gerrymanders.

Nathan: I want to touch on something you said in your answer to the question before that where you said that what you think is really going on here is between both parties, what they're really trying to do is benefit whites in America. Can you explain, I guess, first of all, why that is and then, two, through what mechanism Justices would come to all grow this belief in a kind of white supremacy?

Prof. Spann: Yes, I can. I guess I should first say I wrote a book about that, which I don't particularly want to talk about now. The basic argument is, the way the culture works, judges are primarily going to be white males. Even if they're not, they will have been acculturated which white male values. They are likely to reflect the biases, prejudices, and predispositions of the culture in which they were so successful. Unless there's something that caused them to behave differently.

We think, yes, there is something that's caused them to behave differently, it's called legal doctrine. If in fact you think legal doctrine doesn't impose much constraint on the exercise of judicial discretion, that's not much of a safeguard. My direct answer is because that's the way we created the culture, we set it up so that white people would benefit more than racial minorities. The reason for why we would want to do that, it's pretty obvious; because the white people who set it up are the ones that benefit.

Nathan: One of the issues on this particular is that you would think that a racial gerrymandering claim would be able to help minorities, whether it's whose votes have been diluted. The way the doctrines come out is it's, they've kind of been used in a way to benefit white voters. Can you talk about how that's happened and maybe why? I guess not why that's happened, but what's the doctrinal rationale behind that?

Prof. Spann: That's a good question. That I think relates to both racial and partisan gerrymanders. In theory, there's no reason to believe that either gerrymander would benefit one race or one political party more than the other. Just as a pragmatic matter, the way it's going to net out because of who's in power at the moment is partisan gerrymanders are going to disproportionately benefit Republicans just because they run more state houses and legislatures.

Racial gerrymanders are a little bit more complicated. The initial racial gerrymanders that were invalidated under the shawl cause of action were efforts by white people to invalidate majority minority voting districts that had been created to benefit, enhance the voting strength of racial minorities. That's pretty easy to understand. The reason it gets a little bit more complicated is sometimes these days, Democrats who at least for sake of the present argument we're assuming are going to do a better job of representing the interests of racial minorities.

Sometimes Democrats manage to engage in partisan gerrymandering that benefits Democrats; that's what happened in the companion Maryland case and in *Rucho*. Also, sometimes, and this is what tends to be happening these days for [unintelligible] too possibly a little bit, but these days it is not unusual to see the Supreme Court at the behest of a racial minority group and validate some racial gerrymander on the grounds that it's either packing or cracking minority voters if you know what those two mean. Do you want to explain what those two things mean?

Nathan: Yes. I think it would be good for the audience.

Prof. Spann: Okay. Initially the way that the white majority tried to suppress the votes of racial minorities is just by not letting them vote. Then once that became sort of politically distasteful,

even though they could vote, we would engage in efforts to suppress the minority vote, which, of course, is what we see all over the place right now.

A way to suppress minority votes is to draw one district where all the racial minorities live. That's called packing. You pack all the minority votes into one district. They get to elect one representative. If they were spread out more throughout the jurisdiction, they maybe they could elect two or three, or maybe even more, representatives. So by packing them, that is a form of voter suppression.

More recently, Republicans have cleverly- Republicans - assuming that Republicans want to disperse racial minority votes. They have cleverly figured out, "Well, if we crack them rather than pack them, if we put them minority voters in a lot of different districts, then they won't have the voting power to elect their politicians of choice in many of those jurisdictions. That's a way we can dilute minority voting power.

Max: To be clear, those tactics also work in partisan gerrymandering.

Prof. Spann: Thank you. Those tactics also worked in partisan gerrymandering. In the racial context, there are few recent cases where the Supreme Court has just gone along with that. They said, "Yes, that that is an impermissible racial gerrymander." I'm not suggesting that these cases have to come out one way or another. My claim is just pragmatically when you net stuff out, the Republican, white interests are going to end up being better off than the Democratic, racial minority interests. It doesn't have to happen. It's just what seems to be going on.

Nathan: In your opinion, it wouldn't necessarily be due to the doctrine then. If we were to take your inversion, would it still be netted out this way?

Prof. Spann: The reason I want to blame the doctrine is because the doctrine is the thing that vests the discrimination-- I'm sorry—that was Freudian!—vests the discretion that allows the Supreme Court to discriminate against the gerrymanders that wants to uphold and the gerrymanders it wants to invalidate.

Max: I understand that you-

Prof. Spann: Can I just finish the sentences because there's something you might want to leap on later? That I think reflects what I think one of the fundamental rules of the Supreme Court in our society is, that the Court's job is to facilitate the efforts of the white majority, suppress racial minority votes. Okay, I'm sorry.

Max: No. Absolutely, I'm glad you finished that thought. You've advance broader arguments elsewhere that all doctrine is ultimately indeterminate. Why focus on this and why focus particularly on subverting these two principles of doctrine to prove this point when you think ultimately the Supreme Court can do whatever it wants?

Prof. Spann: Yeah . . .

[laughter]

Prof. Spann: Well, the answer is because I have an audience.

[laughter]

If your basic position is legal doctrine doesn't mean anything, which is my basis position—not that it doesn't mean anything. But if your position is that doctrine is indeterminate, if you're a legal realist or a fancier version of that—if you believe critical legal studies or postmodernism, you start with the assumption that whatever is generating the result, it's not the legal doctrine. I actually firmly agree with that.

Note that I'm not here arguing that the Supreme Court, in one of these cases or another case, got the doctrine wrong—because I don't think it means anything to get the doctrine wrong, at least in linguistics, syllogism terms, that just doesn't mean anything because I don't think doctrine has a constraining force at that level. I do, however, think that doctrine helps the Supreme Court mask what its function is. If the Supreme Court writes an opinion that says, "I'm ruling this way because I want to advance the interests of whites over the interests of racial minorities," it's harder to sell that than if you're allowed to say, "Well, nobody has standing here. This is a partisan gerrymandering, so it's a non-political question."

Just the doctrine gives you some place to hide. That's why the doctrine is important. I guess you could characterize what I'm doing, even though I don't believe in the doctrine, as I'm trying to get other people not to fall for the doctrinal tricks. When the Supreme Court says, "Don't worry, what we're doing here is justifiable under the doctrine," I want people to realize that it's not.

Max: The way you talk about this makes it sound like there's some kind of conspiracy on the Court. I wonder if we were to apply an *Arlington Heights* analysis to the Court and its actions, you would say that it was intentional or is it just the effect of their decisions?

Prof. Spann: One of the nice things about living in a discriminatory culture where the discriminatory inclinations are institutional rather than invidious on the surface, is you don't have to engage in conspiracy. You just know because you live in the culture the way it's supposed to work. I got a toxic dump. I got to put a white neighborhood in the black neighborhood. You don't have to do conspiracy to figure out what the answer to that question is going to be. I got a high tension wire it's going to cause cancer, what neighborhood am I going to put it in? We know that way those decisions are going to be made.

All I'm arguing is that one of the reasons you can get away with that, is the Supreme Court is going to help you out by articulating doctrines that enable you to advance those interests. If you want to say, "Wait, they're discriminate against me on the basis of my race by putting this toxic dump in my neighborhood," the Supreme Court can say, "Well, wait a minute. Under *Washington v. Davis*, I don't see any intent to do that." Well, of course you don't! Of course, you know because they know enough to hide their intent. The Supreme Court now articulates the discrimination doctrine in a way that means you lose unless you can satisfy some intense standard that the Supreme Court knows you're not going to be able to satisfy.

If what you're asking is whether when they do that-We're supposed to be talking about gerrymandering. Now, we're talking about *Washington v. Davis*.— When they do that, whether doing that intentionally, they certainly know what the consequences are going to be, and they know that they're doing it despite those consequences. If you're asking me whether they think of themselves as bad people when they do that, I don't think so. I think what they think is, "Yes, that's an appropriate way to behave in this culture, in this legal system." That's what we call institutional racism, and that's the bad thing.

Nathan: I think this is related to everything you've been saying. To bring it back into the gerrymandering context why would you reject the alternative explanation that the reason the Supreme Court has gerrymandered the doctrine, as you said, in this way is to benefit Republicans—and not necessarily white people—but it looks the same because of how racially polarized?

Prof. Spann: I actually don't reject that argument. If you were asking me, would they do political gerrymanders and in an all-white state (I want to say South Dakota, it just turns out Vermont is the whitest state, that surprises me), my answer is, yes. They would still engage in a partisan gerrymander. You say, "Well, Spann, doesn't that mean this is not racially motivated? This really is a partisan gerrymander rather than racial gerrymander, as you suggest."

I think, again, the answer to that is no, because of the high correlation that exists between race and political inclinations. Nothing could illustrate that better than the current political campaign, kind of what's happening in the Trump campaign. President Trump is pretty openly appealing to the racially divisive subset of the electorate. He's doing that in the open because he thinks that's the way that he's going to get votes. Now Republicanism and racial divisiveness, it's not an identity, but it's a real strong correlation between the two.

If you go to a white state with a very small minority population, if you ask them how they feel about DC statehood, or how they feel about affirmative action, or how they feel about immigration, they're going to give you the Republican line. It's the Republican line, but obviously, it's going to have a profound impact on racial rights. I'm suggesting at least subconsciously, that's going to be part of the motivation. The reason you're Republican is, yeah, that's the way I feel about these racial minorities who are always asking for more and don't want to pay their fair share.

Max: I feel like we have to push back on that a little bit. The implication that people are voting purely out of racial preferences or subconsciously largely out of racial preferences. We live in a city where there are a lot of people who would say that not all Republicans feel that way. There are Republicans who are pushing, in fact, for racial equality. Whether or not that's true, it is quite a leap to make that all partisan voting or most partisan voting is actually based on racial preferences.

Prof. Spann: I don't want to suggest that it's all partisan voting. It's just the correlation's high enough that I feel comfortable making that statement. I'd actually be surprised if anybody disagrees with that. If you walk up to somebody and say, "Who's more likely to be sympathetic towards racial minorities, Republicans or Democrats? I think we know what the answer is going to be. It's not all Republicans, and God only knows, there are lots of Democrats I don't want to turn my back on."

[laughter]

I guess complexion of the two parties here seems to be ascertainable.

Nathan: Given that, and given that the parties have become more racially polarized now than they were five, ten years ago, do you think this is a problem that gets worse over time?

Prof. Spann: Do I think this is a problem? By this, the antecedent of this is the problem of racial discrimination in the culture?

Nathan: The overlapping between racial issues and partisan identities. Or do you think that was just something that was always inherent and that will always . . . ?

Prof. Spann: I guess I'm agnostic about that. I, obviously, can't take a position that Democrats are always pro-racial minority rights or Republicans are always anti-racial minority rights. President Lincoln would probably get upset if I did that. The parties shift over time. What I'm suggesting is: there will be views about the appropriate role of race in the culture. At any point in time, there will be a political party that predominantly captures the view that you're interested in. There will be some party that wants to oppress racial minorities, there will be some party that wants to minimize the oppression of racial minorities.

Max: We're going to turn it over now to audience questions. I'm looking to our Editor-in-Chief, Grace Paras, who's going to help us by picking people to ask questions. If you guys want to indicate whether you have a question, I or Nathan will then repeat it into the microphone and Professor Spann will give you his answer.

The question is what do we do to combat racial discrimination tactics particularly in the context of *Rucho*?

Prof. Spann: That's a really good question. Unfortunately, I don't have anything resembling an answer. If I did, I would just solve the problem of racial discrimination.

[laughter]

The one thing that I do feel fairly strongly about is that—to the extent that we are able to advance the ball to make improvements in race relations—they will be political rather than legal in nature.

I don't think the Supreme Court is going to help us out. The Supreme Court has not done that in the past. I won't give you my number about *Brown*, but people think, "Well, what about *Brown v. Board of Education*?" That didn't even work out, as you'll note, the schools are still segregated, and the government still uses racial classifications. Whatever the solution ends up being, or whatever causes the improvement, I think is likely to be a change in political sentiments rather than something that comes from a court.

I'm not typically an optimistic person. I'm pretty pessimistic and skeptical and cynical maybe. The fact that my generation has done such a bad job with this doesn't mean that your generation is not likely to do better. When I look around, sometimes I see little sparks of hope that race seems to matter less to you than it did to us. Who knows? Your kids might even be better—or they might just be a backlash.

[laughter]

Nathan: Agnes asked whether people who came to law school to try to change the law and make legal arguments should be worried about this kind of doctrinal indeterminacy. She's wondering what, if any, other avenues they can go through to make change.

Prof. Spann: Agnes, once again, I think that's a great question. I hope the reason you came to law school was so you could figure out the role that law plays in the culture and that's what at least I am trying to teach. If you go to law school thinking, "There's these rules. You look up the rule and it tells you the answer," that's not the role that law plays in the culture. There's

kind of a complicated interaction between law and politics and social values and these days conceptions of truth.

I don't know how to explain how all of that works, but I don't want my students to naively think, "All you do is figure out what the law is and follow it." It's way more complicated than that. One of the things I hope happens when you were at law school is you just get a lot of chance to practice the interaction between law and politics and social values and morality and truth and philosophy and other stuff.

Max: Alden asks how someone who doesn't believe that these doctrines ultimately matter should nonetheless seek to cajole, flatter, or otherwise entice, law review editors into publishing their work while remaining true to themselves and their ideological and philosophical commitments.

Prof. Spann: I used to actually be a lawyer, so I kind of understand how you're supposed to pitch your argument to the judge. When I write law review articles—and I think this is true of most of my colleagues—when we write law review articles, we view them as the judge and we're formulating the argument in a way that we think is most likely to get the judge to buying. It doesn't necessarily mean this is the best argument to make.

The real article I always want to write is a doctrine has to do with anything stop paying attention to it. I'm guessing if you're an article's editor, you're probably not going to want to publish that article.

[laughter]

We can deal then.

[laughter]

Instead what I do is I take a little corner of the doctor and say, "Well, see this one doesn't really matter because you can make it come out either way." Then part three of the article I say, "You could extrapolate this to everything if you wanted," realizing nobody's paying attention by part the three!

[laughter]

Max: Are you optimistic that appointment of more people of color to the Supreme Court could change how these things work or is it just a deeply rooted problem in society?

Prof. Spann: I would never say I was optimistic, but I would like to say that I'm hopeful that increased diversity in sort of the power centers in the culture, including the judiciary, will have a beneficial effect. Yes, that is a true statement. I am hopeful. Am I predicting that that's going to happen? Maybe. At least on my good days, stuff seems to be getting better. If it is, I guess that's why. I'm hopeful. I'm not optimistic, but I'm hopeful.

Max: Well, if there are no further questions, I'd like to invite everyone to join us in thanking Professor Spann for both writing his article, publishing it with us, obviously, and joining us at this podcast.

[applause]

Prof. Spann: Thank you all very much. I really appreciate this. We'll have to do it again sometime.

[00:44:44] [END OF AUDIO]