

Podcast Transcript:

Race and Regulation Podcast

Presented by the Penn Program on Regulation

Episode 4: Creating an Inclusive National Politics with Guy-Uriel Charles

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Music: Joy Ike's "The Fall Song"

Guy Charles: The future of voting rights policy should focus on developing a new political as well legal consensus, in which voting is regarded as a universal and fundamental right, and which is made available to all.

Cary Coglianese: That's law professor Guy Charles, delivering a lecture at the University of Pennsylvania Law School organized by the Penn Program on Regulation. I'm Cary Coglianese, the director of the Penn Program on Regulation and a professor at the University of Pennsylvania. Welcome to our podcast, "Race and Regulation." In this series, we are talking about the most fundamental responsibility of every society: ensuring equal justice, and dignity and respect, to all people. Advancing racial justice calls for all of us to understand better the racial dimensions of regulatory systems and institutions.

We're glad you can join us as we hear from Professor Charles, a professor of law at Harvard Law School. He is one of the nation's leading scholars working on issues of race, democratic participation, and the laws surrounding elections. His lecture at the University of Pennsylvania was the tenth annual Distinguished Lecture on Regulation.

He focused on one of the most foundational legal arenas: the rules governing voting and elections. No regulatory domain can be as essential to a just and equitable society as the one that governs democratic representation.

GC: Structural political inequality and structural racial inequality are mutually reinforcing, and that we can't solve racial discrimination in voting without a vigorous commitment to resolving political inequality, as well as vice versa. That our commitment to political equality must also include a commitment to eradicating racial discrimination in voting.

CC: In recent times, legislatures in many states have considered changing their voting laws. Some of the changes that have passed would make it harder for people to vote. But voting barriers do not affect everyone equally. Particular concern exists over disproportionate impacts on Black voters. The inextricable link between racial equality and political equality leads Professor Charles to shift toward a universal egalitarianism with respect to voting rights. This shift would lead to a nationally recognized, uniform set of voting rules.

GC: Our commitment to political equality must be centralized, nationalized, and taken away from the states. That is where we agree that there are certain sets of practices that advance political equality and that there are certain sets of practices that undermine political equality. We should preclude the states from enacting those sets of practices, and we should nationalize those practices.

CC: The kinds of practices Professor Charles has in mind are designed to expand ballot access to all adults. These practices can include such measures as automatic voter registration, same-day registration, online and mail-in voting. They include making election day a national holiday, limiting voter disenfranchisement, and ending partisan gerrymandering.

To illustrate the importance and legality of nationally-guaranteed universal ballot access, Professor Charles takes a step back into U.S. legal history. The role for national protections of democratic rights, as well as the central linkages between racial and political equality, come through in the U.S. Supreme Court's 1960 decision in *Gomillion v. Lightfoot*. This case centered on the Alabama state legislature's changes to the electoral map in the city of Tuskegee. The changes almost entirely eliminated Black residents from the city's voting base. The Supreme Court declared that the changes violated the Fifteenth Amendment of the U.S. Constitution, which prohibits states from diminishing anyone of their right to vote on the basis of race. Professor Charles begins with the Black residents' lawyer delivering his argument to the Court.

GC: Fred D. Gray stood before the Justices of the Supreme Court of the United States on October 18, 1960, to show them a giant map. Gray was only 30 years old at the time, but he was already, then, a noted civil rights lawyer and preacher. A native of Montgomery, Alabama, he

attended the law school in Ohio because no other law school in Alabama would admit Black people. When he faced the Court on that Tuesday afternoon as co-counsel on the gerrymandering case of *Gomillion v. Lightfoot*, this young, Black civil rights lawyer was nevertheless an experienced hand in making the legal case against the hegemonic regime of the Jim Crow South and its idiosyncratic brand of racial discrimination. Gray, along with Charles Langford, Robert Carter—they were the lawyers for the civil rights activists in *Gayle v. Browder*, which challenged Montgomery's Jim Crow bus system. And the challenges prevailed before a three-judge trial court. In a rebuke to Alabama, the Supreme Court summarily affirmed the judgment by issuing a one-sentence order citing *Brown v. Board*. Without having to say much, the Court sent a very clear message that *Plessy* was no longer the law of the land.

Now, Gray confronted a very different problem in *Gomillion* than the one presented in *Gayle v. Browder*. In *Gayle*, he simply had to get the judges to apply the principles of *Brown v. Board* to the context of public accommodations. Both the law and the facts were on his side in that case. Alabama's law permitting racial discrimination in public accommodation was clearly inconsistent with *Brown*. And the racial discrimination there was undeniably evident on the face of the statute—a law that required racial segregation was racial discrimination.

By contrast, though, *Gomillion* posed an epistemic challenge for Gray and his team. They had to prove that the redrawing of the boundaries of Tuskegee was a racial gerrymander—that is, a segregation of the races—and not a political gerrymander, or simply a remapping of the municipal boundaries. A racial gerrymander, of course, would have been unconstitutional, but a political gerrymander, or change simply in the municipal boundaries, was within the sovereign power of the state under the law of the time. So, unlike *Gayle*, in which the evidence of racial discrimination was evident on the face of the statute, the statute in *Gomillion* did not say anything about race, or really anything other than latitude and longitude.

Now, there was no doubt about the fact that the remapping of Tuskegee was a blatant racial gerrymander. Sam Engelhardt, the state senator who authored the statute in the Alabama legislature, was crystal clear about the statute's purpose. He said to exclude colored voters who might become the balance of power in Tuskegee city elections. According to the existing legal doctrine of the time, the state's motivation, which did not appear on the face of the statute, was not a relevant consideration for ascertaining the constitutionality of the statute. So, unless the plaintiffs could convince a court and the Supreme Court to take motive into account, or that the redrawing of the lines was a racial gerrymander, the Supreme Court would defer to the state's assertion of its sovereignty to structure its political system as it saw fit. As the state argued, we have a right to implement our conception of political equality. And as long as we are not expressly engaged in racial discrimination, that right ought to be respected.

Now, though Gray did not have much in the way of admissible evidence, he did have a map. The map illustrated, literally, the egregiousness of the state's racial discrimination. "Look at the map," Gray urged the Justices. The lines of the map represented how Alabama removed almost every single registered Black voter from the City of Tuskegee but not a single white person, much less a white voter. It was clear from the jagged lines of the map that this was not a normal redrawing of the municipal boundaries. The state's exclusionary purpose and the effect, Gray stated to the Justices, is revealed by the map.

Music: Joy Ike's "No Matter What"

CC: Before the Alabama legislature had redrawn Tuskegee's borders, the map of its voting district had been shaped as a square. Afterwards, it was a 28-sided figure. Twenty-eight sides! That alone showed the discriminatory purpose of the state's redistricting: the point was to keep Black residents from gaining political power.

GC: It did not take any imagination to figure out what Alabama was up to. Everyone knew what the state was doing and that it was doing all that it could to prevent Black people from being able to register and to vote. Tuskegee and Macon County were both racial oligarchies. The majority population in Tuskegee and Macon County were Black, outnumbering whites. Black people outnumbered whites five to one in Tuskegee and six to one in Macon County. But white people held all the political power. There were no Black elected officials at any levels in the city or county. And in fact, Bernard Tapper, in his book on *Gomillion*, relayed the indignation and shock of local white residents when a Black woman, Jessie Guzman, Director of the Department of Research and Records at the Tuskegee Institute, ran for a seat on the Macon County School Board. So they were indignant that a Black person would dare run for election.

CC: And yet as clear as the facts were, the Black voters faced obstacles in terms of the law.

GC: The fact that all knew that states like Alabama were practicing gross racial discrimination did not mean that the courts would be solicitous to cries for redress by Black plaintiffs or their allies.

CC: In fact, by the time the litigation had reached the Supreme Court, two lower courts had already ruled in favor of Alabama. As Professor Charles explains, the prevailing understanding

of constitutional law was an obstacle in *Gomillion*, even though the Supreme Court had six years earlier decided *Brown v. Board of Education*. The Court in *Brown* overturned *Plessy v. Ferguson*, famously rejecting the separate-but-equal doctrine under the Fourteenth Amendment's equal protection clause. But the *Brown* Court had confronted segregation laws that embedded racial distinctions in state law itself.

GC: *Brown*'s articulation of constitutional equality was inarguably beneficial to Black people subjected to Jim Crow discrimination. However, the new legal framework also made it possible for the government to shield its discrimination under the cloak of neutrality. So, unlike the school desegregation cases, or cases in which the government used an explicit racial classification, here the act did not use an explicit racial classification.

CC: Professor Charles notes that the Alabama law redrawing Tuskegee's voting map said "nothing about race at all."

GC: The statute, on its face, was a redistricting statute. So the substantive content consisted of a series of instructions under the new municipal lines of the reconstructed city. So the act provided that the new city would begin at the northwest corner of Section 30, Township 17-N, Range 24-E in Macon County, Alabama that would proceed south 89 degrees, 53 minutes east, 111 feet, then south 37 degrees, 34 minutes east, and continue that way until it mapped out the full lines of the new city.

So Alabama could, and did, plead both race neutrality and state sovereignty. They argued that the redrawing of the city was just that; it was a map that drew new boundaries of a subsidiary of the state, not a statute that separated the races upon its face, and then altering the configurations of a political or municipal boundaries is wholly within the power of the state. We have the right to draw our municipal lines and to determine who belongs and who ought to have political authority per our state sovereignty. Was not at all relevant, motives were not relevant in assessing the constitutionality of the statute.

Music: Joy Ike's "*No Matter What*"

CC: The motives had been clear. As Professor Charles mentioned, the principal legislative architect of the Tuskegee redistricting was state senator Sam Engelhardt, who had openly admitted that his aim was to dilute Black residents' political power.

GC: So Sam Engelhardt viewed the Black community as an ever-present threat to white political power and anticipated that eventually something more would need to be done. He had long advocated the ingenious plan of removing the Black residents from the city by redrawing the boundaries of the town. He argued that gerrymandering would be an effective way of dealing with insipient Black local power because the courts would defer to the right of the state to draw the boundaries of its municipalities as it wanted. Engelhardt's scheme was not just restricted to Tuskegee, by the way. State leaders were preparing to do the same in Macon County, Alabama. In fact, Alabama had amended its constitution to give the legislature the option of abolishing Macon County or reducing its area. Presumably, this is a strategy that could be replicated across the state and across the region.

So here is the point that I want to make: *Gomillion* vividly presents the symbiotic relationship between structural political inequality and structural racial inequality. Alabama's plan to remove the Black residents from Tuskegee, and ultimately from Macon County, was possible and sensible only because the Constitution allowed the states to create unequal political units. To put it more precisely, Alabama could contemplate gerrymandering Black citizens out of Macon County because the Court did not interpret the Constitution to require the states to create political units that weighed votes equally. The Court allowed the states to engage in a political oligarchy. Alabama was then subject to two different regulatory regimes, one of which allowed it to do whatever it wanted to do with respect to the citizens in its political units, and the other of which required it to grant its citizens equal suffrage rights on the basis of race. One in which it was regulated, and the other in which it was unregulated.

Correspondingly, Black citizens were also subjected to two different types of legal regimes. If they were categorized on the basis of their race, they were entitled to equal suffrage rights. But if they were categorized by geography or by political unit or by political party, they were then treated unequally. These different regulatory regimes presented Alabama with an arbitrage opportunity. The constitutional system was going to prevent Alabama from denying suffrage rights to Black people, but it was not going to prevent Alabama from favoring one set of political units over another. Alabama could still achieve its racially discriminatory aims, that is to oppress the voting rights of its Black citizens, by placing them in disfavored political units. Alabama simply needed to convince the federal courts that the Constitution respected the states' plenary rights to redefine the boundaries of its substate jurisdiction as it saw fit. This is a non-justiciable political question and notwithstanding the discriminatory effects, and maybe even the discriminatory purpose, the state had the sovereign power to do as it wanted to. But differently, Alabama simply had to convince the federal courts that the state had the right to elect between

two different regulatory regimes, and so long as Alabama could shield its racism behind the veil of state sovereignty, Alabama could maintain its racial and its political oligarchy.

The point is that racial oligarchy and political oligarchy are intertwined and that it is hard to have one without the other. And here, the question simply, in *Gomillion*, was whether the federal courts were willing to go along. And, they almost did.

Music: Joy Ike's "No Matter What"

CC: The Supreme Court reversed the decisions of the two lower courts and held that, "When a legislature singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." Even though the Alabama law did not explicitly refer to race, its racially discriminatory manifestations were far too stark and too ugly for the Court to ignore.

Music: Joy Ike's "No Matter What"

The Supreme Court litigation in *Gomillion vs. Lightfoot* has more than just historical significance. Professor Charles explains that the case, and the legal arguments raised within it, also reveal much about the challenges facing the United States today in terms of both political and racial equality.

GC: *Gomillion* demonstrates the challenge posed to plaintiffs bringing voting equality claims by the legal system's default presumption of plenary and legitimate state power. This is a challenge that would seem to favor the state in part because the legal regime saw state authority as presumptively legitimate. And in many respects, we still do. When the state regulates on the basis of its authority to structure its local process, we simply defer. And in part because the claim of racial discrimination in *Gomillion* raised some, if not significant epistemic uncertainties, the questions were very complicated, and they still are today. Right? Is a voter ID a racially discriminatory device? Or is it simply the state deciding for itself what it wants to do with respect to its local system?

Gomillion arose in the post-*Brown* legal context, where there was very little doubt that the Court wouldn't enforce the Constitution's prohibition against racial discrimination when the discrimination was evident on the face of the statute. But it was concomitantly less clear what the Court would do when racial discrimination was not so evident. *Gomillion* thus presented a direct confrontation with assertions of state power and racial equality.

Now, *Gomillion* was not just a race case, it was a voting case as well. That is, adding to the complexity of the case, the voting question here was conceptually mushy. On the one hand, one could characterize the constitutional claims in *Gomillion* as vote denial claims. That is, the deprivation of suffrage rights on the basis of race, and if so characterized, the decisions in, say, the white primary cases left no doubt that the Court would vindicate representational rights under those circumstances.

On the other hand, one could characterize the representational claims as dilution claims. That is, claims about relative voting power on the basis of group identity brought about by the design of representational structures. And if so characterized, the Court's decision in *Colegrove v. Green*, a malapportionment case, made clear that the Court would not vindicate other types of representational claims that were primarily about the composition of electoral structures or structures of representation.

So *Gomillion* presented a multifaceted puzzle that continues to bedevil and trouble the Court's race politics and law jurisprudence. How should constitutional law respond to the intersection of structural racial and political inequality?

CC: Professor Charles groups the legal arguments in response to this question into four categories. Each recognizes the states' primary, or plenary, role in setting election rules.

GC: The first approach is pure and unquestioned deference to the supposed sovereign right of the state to determine its voting rules and arrange its electoral institutions in whatever manner that is consistent with the state's values. This total deference approach rarely acknowledges either the racial inequality or the political inequality.

The second response is to acknowledge the racial inequality but nevertheless defer to the state on plenary powers grounds.

A third approach is deference to the state on the theory that the race claim is, at bottom, a claim about political power and therefore indistinguishable from a claim of unequal political power.

And lastly, there is the approach of race exceptionalism, which is the argument that racial discrimination is an exception to the state's plenary powers. You can do whatever you want, and we will defer to you except where you are engaged in racial discrimination.

CC: This fourth and last approach is the one the Court took in *Gomillion*, rejecting arguments of the first three types. But Professor Charles wants us to see that, as important as the Court's ruling in *Gomillion* was, there is still a fifth approach possible.

GC: There is a fifth possibility, and one that rarely finds support in the Court, but is an approach that concedes that structural racial inequality and political oligarchy are mutually symbiotic. Both types of inequality benefit from each other and the harm caused by one is compounded by the other. Because the harms caused by both types are compounded by their co-occurrence, both ought to be regulated either through congressional oversight or judicial oversight. That, I think, is what I would recommend.

CC: Through legislative and regulatory changes in the years following *Gomillion*, however, the law came to embrace something closer to the fifth possibility recommended by Professor Charles. The law did so through the 1965 Voting Rights Act, or VRA. But as Professor Charles explains, lately the Supreme Court's approach to the VRA has taken some big steps backward.

GC: From my perspective, *Gomillion* then presents a strong question for how we ought to think about this relationship and the structure between political equality and racial inequality, with the Court taking the race exceptionalism approach. *Gomillion* also leads to the Voting Rights Act of 1965, but it also provided the framework to think about the VRA. Even though the Fifteenth Amendment was nominally the fundamental law of the land, the VRA really is what gave promise and life to the Fifteenth and the Fourteenth Amendment. The VRA fulfilled on the promises of the Fifteenth Amendment, began to deliver on the guarantees of self-rule that were implicit under the Fourteenth Amendment, and brought the South into the fold of representative democracy, but also signaled to the nation that a new era of both racial and political equality was at hand.

Now, we know that that regime ended in 2013 with the Supreme Court's decision in *Shelby County v. Alabama*, in which the Court struck down Section 4-B of the act, the provision that identified the jurisdictions required to obtain preclearance, and then sidelined Section 5 of the act, the provision that actually required preclearance. Section 5 of the act said, okay, if you're subject to Section 4, you have to preclear changes related to voting. The Court's decision in *Shelby County*, though it did not come as a surprise to voting rights experts, but ended a regulatory framework in which racial discrimination was placed front and center in the regulatory firmament. From the Court's perspective, the act violated the conceptions of both state sovereignty and equal state sovereignty, the same set of ideas that we saw rejected in *Gomillion v. Lightfoot*. *Shelby County* effectively ended the regulatory regime, and we are now in its aftermath.

Music: Joy Ike's "No Matter What"

And the question then, where ought we go from here?

The VRA represented the relationship among Black agency, Democratic politics, and constitutional law. Black activists using the VRA sought to remake the racial order, but they also sought to remake the political order. A protest movement changed not only politics, but it also changed constitutional law. The task in the post-VRA world is to take the lessons that we have learned from the regulatory regime of the VRA—that there is a strong relationship between racial hierarchy and political oligarchy and that we need to think through how do we make both. And how do we make both through a protest movement? And how do we make both through constitutional law?

So, the fundamental task, I will argue, for American democracy today is to create an inclusive political order. An inclusive order that includes everyone and which fundamentally, our political and constitutional structure take seriously the right to vote and assures that that right is not undermined for any group, whether it's on the basis of race, whether it's on the basis of ideology, whether it's on the basis of geography. The future of voting rights policy should focus on developing a new political as well legal consensus, in which voting is regarded as a universal and fundamental right, and which is made available to all. That conceptions of state sovereignty have no role to play. That the state cannot elect between a regulatory regime that says if you effectively discriminate on the basis of race and we can prove it, we will stop you from doing so. But if it is simply on the basis of politics or political ideology, notwithstanding the fact that these two things can be interrelated and that you can arbitrage between them, we're not going to say

anything about it. We should not allow the government to regulate acts of the franchise and not make the franchise effective. The franchise should be effective and the government should not be allowed to change voting rules that make it harder for citizens to vote on the basis of racial, partisan, or other types of ideological grounds, or impose other barriers to political participation. What does this new world look like?

CC: For Professor Charles, a new world of political and racial equality will need new statutes. He specifically focuses on The Freedom to Vote Act, a bill introduced by Senator Amy Klobuchar and other Democrats.

GC: If you take the Freedom to Vote Act and its provisions, it takes voting seriously as a fundamental right. It attempts to articulate our best practices and to nationalize those practices. It undermines the conception of state sovereignty, that the state has the right to create its political structure as it sees fit. It recognizes that the right to vote belongs to citizens, so it makes certain sets of practices like early voting, mail voting, no-excuse absentee balloting, preventing partisan gerrymandering, providing remedies for vote certification, modernizing voter registration – it takes some of our best practices, nationalizes them, and recognizes that the fundamental point here is to make voting and political participation an important aspect of democracy.

If we are to move forward, we must recognize that the relationship between political equality and racial equality are mutually reinforcing and that we cannot have one without the other. That we need to build a new movement that ought to be worthy of the Civil Rights Movement that led to the 1965 Civil Rights Act, and that it is really up to us to make that determination, and it is up to us to move the ball forward, to make political power and representative democracy true for everyone and for all of us.

Music: Joy Ike's "No Matter What"

CC: Professor Charles recognizes the immediate obstacles facing such a movement today, but still, he has faith that, in time, legal change can happen.

GC: Looking at the current moment in which we find ourselves, we are in a world of deregulation. I think there's reason to be pessimistic that we see that there is a fairly strong partisan divide, but we see a world in which we are extremely divided and that some of the states

are engaged in discrimination on the basis of voting, some of which is on the basis of partisanship, some of which is on the basis of race, some of which is a combination of the two. We're looking at what is going on in terms of gerrymandering and redistricting, racial gerrymandering, and redistricting in a deregulatory world. But for the first time in a very long time, there is a strong segment of the population that wants to take not just voting equality questions, but questions of electoral structures, the Electoral College, the composition of the Senate, different ways of organizing alternative voting systems, want to put all of these questions and issues on the table. We have lots of places in which we have same-day registration, early voting. We have implemented ways of making it easier for people to participate. So, if we are looking at where we are today, I think, yes there are reasons for despair. But if we are thinking about the relationship between political change and political movement, and the relationship between social movements and legal change, and how far we have come in thinking about political participation and anticipating where we might be five, ten, perhaps fifteen years down the road, who knows, there is possibility for hope.

Music: Joy Ike's "Walk"

CC: Thank you for listening to this episode of "Race and Regulation." I hope you have learned more about the legal and regulatory dimensions of the U.S. electoral system—and how they are linked to issues of racial equity. This podcast has been adapted from the lecture Professor Guy Charles delivered in the fall of 2021. He spoke as part of the Penn Program on Regulation's lecture series on race and regulation, co-sponsored by the Office on Equity and Inclusion at the University of Pennsylvania's Law School.

I'm Cary Coglianese, the director of the Penn Program on Regulation. For more about our program and free public events, visit us at pennreg.org. You can also find other episodes in our "Race and Regulation" series wherever you get your podcasts. This podcast was produced by Patty McMahon, with help from Andy Coopersmith, our program's managing director. Our music is by Philadelphia-based artist, Joy Ike.