



What is the “Independent State Legislature Doctrine”? – Part 2

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[00:00:00] Jeffrey Rosen: Hello friends, I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit chartered by Congress to increase awareness and understanding of the constitution among the American people. The Supreme Court has just agreed to hear *Moore v. Harper*, a case out of North Carolina about the power of state courts to review election regulations set by state legislature. At the heart of the case is the independent state legislature theory, and the Supreme Court will now address that theory when it hears arguments in the case next term.

[00:00:43] Joining us to help understand the arguments on both sides of the independent state legislature theory, are two of America's leading constitutional law experts on the theory and on the constitution. Jason Torchinsky is a partner at Holtzman Vogel, specializing in campaign finance election law, lobbying disclosure, and issue advocacy groups. He filed an amicus brief in *Moore v. Harper* on the side of North Carolina on behalf of the National Republican Redistricting Trust. Jason, welcome to We the people.

[00:01:13] Jason Torchinsky: Thank you. Thanks for having me.

[00:01:15] Jeffrey Rosen: And Vikram Amar is Dean of the Illinois College of Law, and co-author of the case book *Constitutional Law, Cases And Materials*. He and his brother, Akhil Amar just published an article in the *Supreme Court Review* on the independent state legislature theory. Vik, welcome back to We the people.

[00:01:33] Vikram Amar: Thank you for having me.

[00:01:34] Jeffrey Rosen: Jason, tell us what is going on in the North Carolina case and why it's important.

[00:01:39] Jason Torchinsky: Sure. So the North Carolina case, uh, arises out of a redistricting case where, and to give you a sense of redistricting litigation in North Carolina, I think between 2010 and 2020, there were 19 redistricting cases filed in North Carolina. Um, and this is, you know, yet another one following the 2021 census. And in this case basically, um, Democrats who were on the losing side of the legislative drawing, went to the state courts and said, "Hey, look, you know, five words in our state constitution essentially prohibit partisan gerrymandering. And so court, we need you to overturn what the legislature did and create a partisan and recognize a partisan gerrymandering cause of action under our state constitution."

[00:02:22] Uh, in North Carolina, the courts are elected in partisan elections, and Democrats currently hold a four to three majority on the state supreme court. And by a four to three vote, the four Democrats, uh, the four elect Democrats on the state supreme court, uh, did what the plaintiffs asked and recognized a, um, cause of action for partisan gerrymandering under the state constitution. And now the legislature, uh, has brought that up to the United States Supreme Court. Just one quick point that confuses people, uh, North Carolina, even though there's the Democratic governor is unique in the, in redistricting for Congress and their state legislature. The governor plays absolutely no role. Under their state constitution, the legislature alone adopts the redistricting maps. The governor has no opportunity to veto. So that's why the governor is kind of not at issue in this case.

[00:03:15] **Jeffrey Rosen:** Vik, how would you describe what's going on in the North Carolina case and how it's important? Uh, what are the words in the North Carolina constitution that the North Carolina court invoked to strike down partisan gerrymanders, and why is the case significant?

[00:03:32] **Vikram Amar:** Well, um, with all due respect, I'm not gonna answer part of your question, Jeff, because it reflects kind of, uh, a bad, uh, instinct, uh, at the outset. It doesn't really matter what the words of the North Carolina constitution are. The question, uh, posed by the ISL theory, uh, is really two-fold. One is whether state constitutions can limit elected state legislatures with regard to congressional and/or presidential elections. So there's a what question. Do, do state constitutions apply? The strong versions of ISL assert that, uh, the state constitution cannot constrain the elected state legislature. The governor cannot constrain the elected state legislature. Uh, the courts cannot constrain the elected state legislature. That the US constitution can first power on this entity, the elected state legislature to do what it wants.

[00:04:18] So the first question is whether the legislature really is independent or untethered to the state constitution. The second question is, assuming the answer to the first question is no, that the state legislature is bound by the state constitution, who gets to decide the meaning of that state constitution? Um, and I think Jeff did, uh, Jason, excuse me, did a good job of describing what happened in the courts below, but with the following caveat, I'm not an expert on North Carolina's constitutional law. Jeff, you're not an expert on North Carolina constitutional law. And with all due respect, Jason, you're not an expert on North Carolina constitutional law. You haven't been, you know, writing scholarly articles about it for gen- decades and decades. So the question is whether the federal courts or the US Supreme Court is better positioned to interpret the, the North Carolina constitution compared to the North Carolina courts. We have a very deep tradition of federalism in the United States that state courts are the master of state law, and the federal courts get to interpret state law only where there is a distinct federal interest.

[00:05:19] And we can say that the North Carolina Supreme Court was creative. We can say they made this up. I could say that about tons of doctrines of the US Supreme Court under the US constitution. The aversion to race based affirmative action is made up. It's not in the words of the 14th amendment or any other amendment. It's not in the history of the reconstruction. The 11th amendment sovereign immunity is made up by the Supreme Court. There is no agreed upon methodology of interpreting either the federal constitution or the state constitutions, so it's really

a question of who gets to decide. And so the, ordinarily the state supreme court gets to decide what state law means unless there's a distinct federal interest at play. But as I read and I've studied this for 22 years, I wrote about the ISL theory before even *Bush v. Gore*, um, in 1999 and early 2000, there's no federal interest in deciding what the, uh, the way that, that states operate federal elections is. It's delegated to the states to do it however they want to.

[00:06:19] Now, some states may give it to the state legislature, others may give it to the legislature and the governor, other states may involve the courts and judicial review, other states may have direct democracy, uh, and initiatives in referenda, but that's all up to each state. There's really no federal interest here for the US Supreme Court to police. And can you imagine the, the amazing line drawing problems that would arise if the US Supreme Court were to say in this case, "Well, we step in only when we think that the state court has interpreted its own constitution too creatively, too aggressively, uh, too ambitiously." Um, what does that mean? State courts interpret words in the state constitution against a lot of backdrops just as the US Supreme Court does with regard to the federal constitution. So I think you gotta think about ISL in terms of the two key questions it poses. Are state legislature limited by state constitutions, and if so, who interprets state law?

[00:07:17] Jeffrey Rosen: Thank you so much for that, and thank you for setting out those two questions. The question that the US Supreme Court set when it granted [inaudible 00:07:25] is, is, is this, whether a state's judicial branch may nullify the regulations governing the "manner of holding elections for senators and representatives prescribed by the legislature thereof..." That's a quote from, uh, Article I, Section 4 of the constitution, and replace them with regulations of the state court's own devising, based on vague state constitutional provisions, purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a fair or free election. I think those are quotations from a North Carolina constitution. Jason, your brief begins with an argument about text and I, I, I'd like to begin there. You argue that the elections clause is unmistakably clear, the power to regulate the "times, places and manner of holding elections" is vested in state legislatures primarily and Congress secondarily. Tell us more about your textual argument about Article I, Section 4.

[00:08:19] Jason Torchinsky: Sure. So for your audience, let me just read what Article I, Section 4 says. "The times, places and manners of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof. But the Congress may at any time by law, make or alter such regulations except as to the places of choosing senators." So, uh, you know, I wanna first of all knock down a theory that's been thrown out by, by people discussing the independent and state legislature doctrine. And that is the notion that somehow the Supreme Court ruling in *Moore* could allow state legislatures to choose electors after election day or, for president, or somehow choose a slate of electors that were not chosen on election day by the, by the people of the state.

[00:09:06] I don't think that that is at risk in *Moore* for a couple reasons. Um, one, I think that, first of all, Congress has set a single uniform national election day for the date of choosing electors. So that's, you know, but the Congress made any time by law make or alter such regulations. And Congress has set, you know, the first Tuesday after the first Monday in

November as the presidential election day. And second, I think, if a state legislature ever tried to kind of change the rules post-election, uh, and, and deem somebody the winner who wasn't actually the winner, I think you would run up against 14th amendment kind of due process problems.

[00:09:44] And then, you know, there's the practical reality that despite the, the pressure that was put on a whole lot of Republican state legislatures around the country in 2020, not a single one acted on the sitting president's exhortation. So I think that that notion of the independent state legislature theory that somehow the court could open the door to, to state legislatures overriding the results of elections, I don't think is, is on the table, except for people that are taking kind of, as, as my colleague said here, kind of the most extreme version of the independent state legislature doctrine, which I don't think the court is entertaining. But I think the problem in North Carolina is exactly as, as you framed it in the question presented, which is, you know, at what point does language like all elections shall be free, allow the state supreme court to come up with a standard that involves the use of mathematical models by political scientists to determine whether elections are fair or not based on their conception of the right partisan and racial balance of districts and, and constrain the legislature in that way?

[00:10:49] And, you know, I think it's important to understand the history of phrases like all elections shall be free. And the lower court in North Carolina, the three judge panel that heard the case before the State Supreme Court got it, um, did a really deep dive into the history of that clause, that actually came from the Virginia Declaration of Human Rights, which had been written by Patrick Henry, who was frankly one of the original gerrymanders when he tried to draw James Madison out of a congressional district. And I think the lower court basically said, look, if the original gerrymanders were writing this language, they would never have, uh, assumed or, or presumed that it could someday be twisted into a prohibition against partisan gerrymandering when the very folks who wrote and enacted the initial version of that language into their own rules were actually trying to gerrymander each other.

[00:11:37] So I think, you know, it's really important to understand what the North Carolina Supreme Court did here, which is basically assume for itself the power to set policy, right? Usually courts, you know, judge based on ambiguity, based on the language of the law. Here, the court basically said, "Look, there have been attempts in this state to address partisan gerrymandering and, you know, the attempts by the, the executive and the legislative branches have failed. And, you know, we, the court are the last ones that can do this, so therefore we must." I mean, that's basically judicial law making, and that's what this case is about.

[00:12:12] Jeffrey Rosen: Thank you so much for that. Vik, Judge Michael Luttig in interpreting the text of the election clause, uh, tweeted the following. The election clause of the constitution provides that, "the times, places and manners of holding election shall be prescribed in each state by the legislature thereof, when, as in North Carolina, the legislature has prescribed the manner in which the federal congressional elections shall be held to include judicial review of the legislature's own elections and congressional districting decisions, the legislature has prescribed the manner of holding elections to incorporate judicial review of the legislature's elections and congressional districting decisions within both the letter and intendment of the

constitution." Do you agree with Judge Luttig's tweet and is that a version of your textual argument, or do you have a different textual argument about the elections clause?

[00:13:01] Vikram Amar: Well, I think Judge Luttig actually agrees with what my brother and I wrote. That's the second of the three arguments. And it's not, it's not a textual argument, it's an argument about what state legislatures have done. But let's, let's back up, 'cause there's so much on the table here that we have to disentangle. Um, so I agree with Jason that even under a broad reading of ISL, state legislature could not change the rules of selecting presidential electors after the election. Um, that's kind of what John Eastman thought that, uh, you know, Trump's folks could do and that's kind of out there. But here's what the state legislature could do if you embrace ISL. They could say before the 20 24 election that we, the state legislature will pick the electors, we will take the views of the voters into account, but we will, we'll make the decision ourself and we'll make it by midnight of election day, uh, and we will pick the slate of electors that we think should, uh, represent this state.

[00:13:57] Um, if you believe ISL, a state legislature could do that, notwithstanding anything in a state constitution that says the people shall pick electors, like the Colorado constitution has a provision saying. Or a state legislature could say, um, again, before the fact, before the election, that if there is a dispute as to who got more votes in the election, rather than the courts resolving that dispute, um, we, the state legislature shall be the resolver. We shall decide who got more votes after the election, and, uh, and, and certify, uh, that, that winner. Um, notwithstanding a provision in a state constitution like say Pennsylvania's that says all federal election disputes shall be resolved by the courts of law. So those are the kinds of conceivable extreme things that state legislatures could do.

[00:14:41] Now, I hope Jason is right in his prediction that those things aren't likely to happen, but you know, in today's world that doesn't give me that much comfort even if a smart guy like Jason has political predictions about those things. Um, I don't think the constitution permits those things, 'cause I think the state legis- ISL theory doesn't make sense. Now you asked Jason about the textual argument. He didn't give you the textual argument for ISL. He gave you the textual argument for why the North Carolina Supreme Court decision was wrong as a matter of North Carolina law. And maybe he's right about that. I'm actually not gonna disagree with him on, on how good or bad the North Carolina Supreme Court decision was interpreting the North Carolina constitution. But state supreme courts get state law wrong all the time, and it's no interest of the federal government, unless there's a discrete federal interest reflected in a federal constitutional provision or a federal statute, uh, um, otherwise states are allowed to misconstrue their state law.

[00:15:36] Now if they misconstrue it so badly that it violates the expectations of the voters, that could amount to a due process problem, but that would be true for state as well as federal elections. So, uh, so the right approach would say the US Supreme Court can override the North Carolina Supreme Court's interpretation of North Carolina law, only if it's so fanciful that it, it does not do right by the voters of North Carolina in state as well as federal elections. So it doesn't have to be a presidential or congressional election, even if, if it was a gubernatorial election. If they came up with some interpretation that was out of bounds, or for state district lines as opposed to congressional district lines to use gerrymandering. Now, Jason said that the

North Carolina Supreme Court was making policy here. Sure, they're making policy. State supreme courts make policy all the time.

[00:16:25] All of us went to law school, I hope not so long ago that we've for- that we've forgotten about this thing called the common law. State supreme courts, unlike the federal courts are charged with making policy all the time. Many st- state supreme court justices are elected, and they're elected by the way in a statewide election, rather than a gerrymandered legislative election, and so they actually represent the people of the state better in some respects than do unelected federal judges or gerrymandered state, uh, uh, legislatures that may not really speak for the people of the state because of, of partisan, uh, uh, chicanery.

[00:16:58] So if we focus on the textural argument that matters, Jeff, it's, what does the word legislature in Article I mean? Uh, Jason read the text. You, you, you had reverted to it earlier. Uh, it says, "The time place and manner shall be prescribed, uh, in each state by the legislature thereof." Then Article II, which ISL people say means the same thing as Article I, says, "Each state shall, uh, shall appoint in a manner, um, uh, that the legislature thereof may direct, a group of electors." Legislature in Article I and II, means a body created and limited by state constitutions that have checks and balances that include in most states, gubernatorial presentment and judicial review and state constitutional limits.

[00:17:42] Uh, and so I go back to the key question, the two there's only, there's only two forks in the road here. Do state constitutional procedural and substantive limits on state constitutions apply in federal elections? Under the original understanding of the word legislature in Article I and II, the answer is yes. And that, and under the original historical practice, several state constitutions regulated federal elections, and didn't leave it up to the elected state legislature. So under original text meaning and original practice, the answer to that is yes. And then the second question is, who then gets to decide the meaning of state constitutions? And while I'm sympathetic to Jason's concern that state courts may, uh, make policy, the one thing that would be worse than the state court's making policy is the US Supreme Court making its own policy in an area of, of state law.

[00:18:29] So, you know, your mention of, of judge Luttig's tweet, doesn't have to do with the text of the constitution, uh, in any way, it has to do with the actions of state legislatures. And the state legislatures, including that of North Carolina, have at least arguably enlisted the state judiciary to administer federal as well as state elections. So even if you embrace ISL's desire to protect state legislatures and what they wanna accomplish, here the state legislature chose to involve the state judiciary, so the state legislature is being respected when we respect the outcome of that state judicial process.

[00:19:05] Jeffrey Rosen: Thank you so much for that. Jason, what is your response to Vik's argument that the textual dispute all comes down to the meaning of the word legislature? Your brief says that the plain language of the clause leaves no room for state and federal courts to alter election regulations set by those who wield the politically accountable levers of government. Tell us why you believe that the meaning of the word legislature does not allow the North Carolina court to act as it did.

[00:19:40] Jason Torchinsky: Um, because basically what the North Carolina court did here was to legislate. Um, I mean basically what the court said is despite the fact that this policy that the plaintiffs are advancing has been considered by the legislature and the executive branch and, you know, on multiple occasions, and in fact, they go through the history of where, you know, the, the regulation of gerrymandering was considered in North Carolina. And then the court says, "Yeah, but we're the last ones left. So we're gonna go forward and basically adopt this into law by interpreting the vaguest of clauses in our constitution to do that."

[00:20:17] Um, you know, I just think that at some point, if we're just gonna allow courts to act as roving legislatures, um, you know, that's really not the role of the judiciary, whether it's the federal judiciary or the state judiciary. You know, uh, and when you think about this, right? Redistricting is rare in that, in, in a lot of other areas of the law, a court can just strike down a statute and something doesn't have to replace it, right? Let's say there was a law against painting your car green, right? And the state supreme court says, "You know what? That violates our freedom of expression. That law is struck down." Nothing has to replace it.

[00:20:53] When you strike down a redistricting plan, something has to replace it, right? Because state constitutions, like in North Carolina say they're, they have these single member districts in North Carolina, right? So you can't just strike down the map without doing something about it. And here the court, you know, gave the legislature an opportunity to fix it and then said, "Yeah, we don't really like the way you fixed it, and so we're striking it down again." And you know, this, this is where it starts to be where the judiciary starts to take on a role that is beyond that of a traditional judiciary, and they start to act more like a legislature.

[00:21:31] And you know, this, the, the Supreme Court first wrestled with this in the, in the kind of modern era in the Arizona Independent Redistricting Case, where the state legislature said in the creation of our Arizona Independent Redistricting Commission violates our rights as a legislature under Article I, Section 4. And the court on a divided vote said, "No. When we said legis- you know, when this constitution says legislature, it means basically the law making process of the state as created by, by the people/the constitution of the state. And because Arizona has these referendums, you know, you can adopt amendments to the state constitution, and that's basically the people acting as the legislature of the state."

[00:22:14] And the North Carolina Supreme court says, "Yeah, we understand all that, and we just don't have that process in the state so we're just gonna make it up." And I think that's where that there is a dividing line, although precisely what that line is, I think is a little ha- as, as Dean Amar said, is a kind of a difficult line to draw. But I think no matter where you draw that line, it's very clear the North Carolina Supreme Court exceeded it here.

[00:22:37] Jeffrey Rosen: Vik, I wanna make sure this textual argument is joined as well as possible. Um, Jason says you can't allow courts to act as legislatures. And when courts act as legislatures, they're usurping the election clauses direction that the time, place and manner of holding elections is vested in state legislatures. So your, uh, final thoughts on, on, on that textual

argument, and then tell us why you think that, uh, Jason's argument is inconsistent with the original understanding of the elections clause.

[00:23:04] Vikram Amar: Well, I think I've already explained why, uh, um, Jason's argument and ISL more generally is inconsistent with the original understanding, because the original understanding of what legislature is, uh, is what, however the state constitution defines it. Um, the state constitutions tell us what a legislature is, what powers it has and what limits it has. Uh, Jason, uh, uh, mentioned that the 2015 Arizona case, independent unelected commission is certainly less democratically accountable than elected state supreme court justices. So if you're gonna analogize to a traditional state legislature, a court is much more like a legislature than an unelected commission is, that no one selected, none of the voters, uh, selected in the particular makeup of the commission.

[00:23:53] But I wanna go back to, so Jason, you know, I wanna pay him respect because he's, he's very smart enough to understand that you can't really embrace ISL as a theoretical or full-throated matter, so he wants to focus on the aggressiveness of the North Carolina, uh, Supreme Court decision here as, as unduly making policy. But I wanna push back in a few ways. First of all, I think the line drawing problems are more than just challenging. I think they're completely insurmountable. But he- the bigger point is if the North Carolina legis- uh, Supreme Court was making it up here with regard to federal elections, then they were also making it up with regard to state elections. So are we gonna say that the North Carolina Supreme Court cannot disallow the state districting maps as being excessively partisan, uh, and relative of the state constitution because the federal Supreme Court thinks the North Carolina Supreme Court was too loosey-goosey.

[00:24:47] You simply cannot do that. More generally, state supreme courts make aggressive policy in so many other areas. Again, remember your casebooks from first year of law school, all the important principles of contract law, of tort law, of property law, these didn't come from legislatures. These came from Supreme Court decisions in states building the common law, brick by brick. So state courts are involved in policy making all the time, that, so it's not just that you have a tough time deciding how much policy making is too much policy making here? The very premise of the aversion to policy making is, is a, constitutional and a, historical. So there's really no there-there for ISL to kind of hold onto in the first place.

[00:25:32] The word legislature in Articles I and II does not mean a particular body. It means a, a process of law making that includes checks and balances and judicial review, and a lot of other... Let me give you one other example. The constitution refers to Congress, 60-something times. And, um, sometimes it'll give Congress power and then say, "Congress may by law do X." Or, "Congress by general law may do X." And then it's pretty easy to see that the president needs to be involved because there, there are, uh, descriptions of the law making process as involving both the house, the Senate and the president. But there are a dozen or so important powers that Congress has. For example approving interstate compacts and admission of new states and regulation of federal territories, a dozen times where the constitution gives the power to Congress and does not mention either implicitly or explicitly by law or by general law or with

the president or like, and yet in all of those settings, we understand Congress to be able to act only after presenting the matter to the president and getting his signature or overriding his veto.

[00:26:45] So it's a great example of how the reference to Congress doesn't mean a body in those instances, it means a process. So too with Articles I and II's references to state legislatures. And that process in every state involves the governor in most instances, the courts in all instances, the people in many instances in states that have direct democracy, and it's up to each state and the people there. If the North Carolina Supreme Court was too aggressive, the people of the state of North Carolina have a remedy for that. These folks are accountable to the citizens of North Carolina. It's not, there's nothing in the US constitution that gives the US Supreme Court license to arraign in state courts in this domain and not in any other domain. And you certainly can't tease that out of the word legislature for the reasons I described. That's not what the word legislature meant at the founding.

[00:27:34] Jeffrey Rosen: Jason, your response to any of Vik's points you think are salient, as well as why you believe that your interpretation of the constitution is consistent with its original understanding. And you mentioned the Arizona case, that was a five to four case written by Justice Ginsburg, where the Supreme Court upheld the state's nonpartisan redistricting system adopted by initiative. Do you believe that Arizona should be overturned?

[00:28:01] Jason Torchinsky: Let me just go back to, to one thing, Dean Amar was saying about the, the North Carolina judiciary. So there are actually, when you're talking, uh, about state supreme courts, there's only eight states in the country that elect their judiciary on a partisan basis. Uh, North Carolina being one of them, North Carolina happens to elect them at large. In let's say Louisiana, they actually elect them by district. So the notion that somehow this judiciary, the, the ju- the state judiciary in general is accountable to all of the people of the state in, in popular elections like legislatures, uh, is not actually true.

[00:28:39] And frankly, in the other 42 states, there's different methods of becoming a state supreme court justice, whether it's appointment by the governor, selection from a list created by the bar, confirmation by the General Assembly or the state legislature. So this notion that somehow just because North Carolina elects all of their state supreme court justices at large, um, somehow gives the North Carolina Supreme Court more license or more freedom here, I think is, is not true.

[00:29:07] Uh, second is, is Dean Amar indicated there is a, you know, a remedy of the, for the people of North Carolina, which is the next round of judicial elections, uh, which happened to be this fall in North Carolina. And what was a four to three majority for Democrats, could well by this January become a five to two minority for Democrats, uh, depending on how this falls elections go. So I think the, you know, one thing we look for from the judiciary's consistency, and this notion that somehow, well, what the state constitution in North Carolina means will vary based on kind of who's elected to the court, um, is an interesting notion.

[00:29:45] In other words, when there's a democratic majority on the Supreme Court, the state can engage in what they deem to be partisan gerrymandering, but when there's a Republican majority, they can. Like that just seems like it's a problematic state of the law. But where the

federal interest here , particularly with respect to the congressional districting, and I think, you know, keep in mind we're not talking about the Supreme Court isn't reviewing the North Carolina Supreme Court's analysis of the state legislative maps, they're only reviewing the analysis of the congressional maps. And that's because there, I, I think I disagree with Dean Amar. [laughs] I think there is a significant federal interest in how federal congressional districts are created, and that's the federal interest that is addressed directly in Article I, Section 4, uh, and the direct sort of provision of that authority to the state legislature.

[00:30:34] And that's why I think this is super important. With respect to the Arizona Independent Redistricting Commission case, I don't think anybody is asking that that case be overruled. Um, keep in mind Justice Roberts wrote the, uh, very vigorous dissent in that case, uh, and, and kind of said the majority got it wrong, but I don't think that justice Roberts is, is up for revisiting something like that. Uh, and I don't think that the North Carolina legislature has asked or, or needed to ask to have that case overruled in order to, to rule in their favor in this particular case.

[00:31:07] Jeffrey Rosen: Vik, is it right that the Arizona case will remain undisturbed? Some have suggested that there are now, uh, five votes to overturn it and have also suggested that under the independent state legislature theory, the court could strike down Arizona's nonpartisan scheme 'cause the state constitution allowed voters to make election law.

[00:31:26] Vikram Amar: So a few po- several points. First, as a logical matter, there's no way to embrace ISL without, uh, overturning the Arizona case. Second, it's not just the Arizona case, Chief Justice Roberts who dissented in Arizona case, cited the Arizona initiative measure or analogs to it favorably in the majority opinion in Rucho four years later, that was signed onto by all members of the conservative majority of the court, save for Justice Barrett who wasn't on there yet. So he cited favorably to a ruling from the Florida Supreme Court that invalidated Florida Congressional Districting as violating Florida's constitution limits on partisan gerrymandering. He cited favorably initiatives in states other than Arizona that created independent commissions.

[00:32:08] So it would be overturning the Arizona case and completely repudiating the very strong, uh, obiter dicta, uh, in, in the Rucho case. Second point, um, I, I invoked the example of state districting, not because that's at issue in the North Carolina case, but because as a logical matter, if you think that there's a federal, uh, Supreme Court power to oversee the state supreme courts in being too aggressive in interpreting their state constitutions, that would apply in state elections as well, and nobody would, would embrace that. So it's a, it's a logical argument. I'm not saying that that's cl- that's presented on the facts of the North Carolina case.

[00:32:48] Now Jason points out that there is a federal interest here because it's a federal election. Well, those of us who've studied Article I and Article II for decades, and the text of the both, both provisions know that they're, the only federal interest in Article I is letting states do what they want to subject to congressional override. No one is talking about the US Supreme court invoking a congressional statute to reign in what the North Carolina Supreme Court did. If there was a congressional statute by which Congress expressed a desire that state supreme courts

not be too creative and too policy oriented when it comes to congressional districting, that would be one thing. But there's no independent federal interest other than state autonomy, 10th amendment laboratory experimentation.

[00:33:35] So, um, so that's why I don't think that, that, that the US Supreme Court can, can enter this fray, um, uh, in that respect. Now, it's true as Jason points out that the accountability of the, the, uh, state supreme court in North Carolina may be a little different than in other states and not all state supreme courts are elected statewide in a way that makes them accountable. But I'll tell you one thing, they're a lot more accountable to the state peoples than the US Supreme Court is.

[00:34:01] And then finally Jason talked about how, how it would be bad if the, uh, North Carolina constitution, uh, were to change in meaning, based on, uh, the election of new members to the court. A couple of points about that. Well, if the US Supreme Court comes in and re and, and changes the meaning of the, of the, of the North Carolina constitution by overruling the North Carolina Supreme Court, that's even more weird, and it would be, I think, rich for this Supreme Court, having just overturned *Roe v. Wade*, to talk about stability in constitutional interpretation as overriding the need to get it right.

[00:34:36] So if, if the North Carolina Supreme Court is the body charged with getting it right under North Carolina law, there are mechanisms for fixing that down the road. Um, and I'm not a, I, I, I actually think the Supreme Court's discussion of *stare decisis* in *Dobbs* was perfectly appropriate. *Stare decisis* shouldn't be sacrosanct, but the US Supreme Court and the federal government more generally, save for Congress, don't have a role to play in second guessing state courts' determination of state law. That's federal courts federalism 101. I keep going back to law school because the ISL theory really runs counter to everything all of us studied at great law schools throughout the United States. And I count all three of the ones we went to in that category.

[00:35:18] Jeffrey Rosen: Jason, Vik suggests that if the Supreme court embraces the independent state legislature theory, it will indeed overturn not only the Arizona case, but also the *Rucho* case decided in 2019, in which Chief Justice Roberts blessed state constitutional constraints enforced by state courts against state legislatures in congressional elections. Do you agree or disagree?

[00:35:42] Jason Torchinsky: I, I disagree with Dean Amar on that. I, I mean, here's kind of the, and, and this keep in mind, this issue's been bubbling up a couple times in front of the US Supreme Court. Um, actually since I represented the Pennsylvania Senate, uh, back, going back to a case back from 2018 about congressional redistricting in Pennsylvania, uh, where we basically made the exact same argument that the North Carolina legislature is making here, back in the Pennsylvania case, this was a case brought in, in 2017 and eventually reached the Supreme Court on certain petition in 2018, which they, they ultimately denied.

[00:36:14] But basically we said the same thing, which is the state supreme court has basically taken upon itself the ability to write substantive state law. And, you know, we, um, we s- we sought to stay and there was a shockingly long time until they denied our stay, but there was no,

no writing and no noted dissents, uh, back in 2018, uh, when we did our s- our stay application and then we were just denied on the cert petition and, and never really didn't get any dissent from denials or anything back in '18. And then going back to '20, um, I was representing the Pennsylvania State Senate when the Pennsylvania Supreme Court, um, essentially extended the absentee ballot return deadline by three days, just because they sort of felt like they should.

[00:37:01] Um, in fact, the state supreme court had actually said explicitly, "There's nothing unconstitutional about our election day deadline. We're just choosing to extend it." And Pennsylvania got kind of a, for lack of a better phrase, something of a modified stay from the Supreme Court, where they ordered the, the late delivered ballots to be segregated, and then ultimately denied cert and got a vociferous descent joined by at least three members of the court. I think Thomas and Alito both wrote separately. So I know Dean Amar thinks that, that there's not much merit to, to the argument here, but obviously there are some certain members of the court who think there are, and obviously there were enough votes to grant cert. And more so, I think people who dismiss the, the concept here as wholly absurd, um, I think are missing the point of view of, of a decent number of the justices.

[00:37:53] So I, I think that we have to realize that legislature in the, in Article I, Section 4 has to mean something, and the question is, what does it mean? You can't just take the word out and pretend that it's not there. And I think that some folks that are on the opposite side of where my client was in this case are basically saying, "Just, just ignore that, that clause in the constitution and allow the state supreme courts to create any kind of substantive law or policy that they want anytime they want, because they're the state supreme courts." Um, and I just think that isn't gonna fly with the US Supreme Court, particularly when it comes to, and, and again, this, I think this is limited to time, place and manner of federal elections. I don't think this is any substantive policy area. And I think that the, the federal election hook and the explicit grant in Article I, Section 4 to the state legislatures is what is the federal interest here?

[00:38:48] Jeffrey Rosen: Vik, I hear Jason saying that although the court doesn't have to overturn the Arizona and Rucho cases, if it adopts a version of the independence state legislature doctrine, it, it may do so. And, and he notes that several justices have embraced a strong version of the independent state legislature doctrine, including Justice Alito. In a statement joined by Justices Thomas and Gorsuch in the Pennsylvania, uh, case from October 2020, Justice Alito said that the provisions of the federal constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature, simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules they thought appropriate for the conduct of a fair election. Do you count five votes on this Supreme Court, Vik, for embracing a strong version of the independent state legislature doctrine that would require the overturning of, uh, Arizona and Rucho? And if so, what would the consequences of that decision be?

[00:39:51] Vikram Amar: So again, uh, I don't think there's a way of embracing ISL without repudiating the Arizona case and the strong language in Rucho. It doesn't, doesn't mean the court won't, uh, embrace ISL and, and disingenuously purport to, uh, uh, um, uh, keep the Arizona

case on the books. But intellectual honesty requires that if you embrace ISL that the Arizona case was wrong, I'm not gonna try to predict what this court's gonna do. I am gonna tell Jason though, I don't, um, minimize the, uh, the support for ISL. If I weren't fully aware of what the, some justices have said, then I wouldn't care about this issue. I wouldn't be writing as much about it as I am.

[00:40:30] I will point out though, that all the justices who have embraced ISL have done it in the shadow docket context. They have not been confronted by all the scholarship. They have not been confronted with all the briefs that are gonna show how weak ISL is, and Justice Alito himself in a third circuit case that I'm sure Jason you're familiar with, a few, uh, uh, last month involving a federal statute. It didn't involve ISL, but he, uh, issued a dissent where he would've granted this stay because the third circuit read a federal statute somewhat ambitiously. Uh, to my mind, I thought that was an, an aggressive reading of the federal statute. He pointed out that, you know, in these shadow docket contexts, we don't have a lot of information and his views may, may change over time.

[00:41:08] So it's one thing to, to write a few sentences, um, as Alito has in some of these dissents, it's another to try to write in a majority opinion that rebuts all of the stuff I'm talking about, the text, the history, the structure, the practice of state legislatures, all these cases. And it's not just the Arizona case and, and Rucho, it's, it's *Smiley v. Holm*. It's, uh, it's *Davis v. Hildebrand* from the early 20th century, et cetera. So I don't know what the court's gonna do, Jeff. I'm cautiously optimistic that when they read all the briefs and read all the literature that Justices Kavanaugh and Barrett will not, uh, pull the trigger on a meaningful version of ISL.

[00:41:45] I'm actually even hoping against hope that maybe Justices Alito and/or Thomas and Gorsuch also, uh, kind of come to see that, that their initial... Look, the, the ISL is not implausible if you just look at the word legislature in isolation. That's, it's, it's initially, uh, plausible, but ultimately constitutionally preposterous when you do a sophisticated analysis. Now, Jason is right that the word legislature has to mean something. And those of us who refute ISL, don't just read it out of the constitution. Clearly, Jason, we don't do that. If you read, read our article, we talk about why the word legislature was included there. It's included to make clear that state legislatures can be involved, that it doesn't have to be done through any particular process. The legislature is a stand-in for legislative process. This is most clear in Article II.

[00:42:29] So we've been talking a lot about Article I and, and *Moore v. Harper* involves Article I. But remember ISL really had its modern, uh, resuscitation in the presidential election setting, Article II. So that's *Bush v. Gore*, where three justices mused about ISL. And then in the run-up to the 2020 presidential election that Jason I was talking about where, uh, the Pennsylvania Supreme Court was issuing rulings that affected the presidential race. Article II says each state shall appoint in a manner the legislature thereof may direct. Let's look at the text and grammar of Article II. The subject of the sentence is each state, not the legislature. The state is the one that has the power and duty of appointing. With regard to the legislature, it just says the legislature thereof may direct the manner.

[00:43:16] Not that it must. Not that it shall. So if you were really just focusing on the text, Article II would refute ISL, and yet ISL people think Article II and Article I mean exactly the same thing. I agree that it means exactly the same thing, but I don't agree what that means. It means basically that state legislatures can be involved, provided that's consistent with state constitutional procedural and substantive limitations enforced by state courts. That's what legislature means just as when the constitution uses the word Congress in a dozen cases, it doesn't mean the house and the Senate alone, it means Congress by law, following the law-making provisions laid out elsewhere in the constitution, subject to judicial review.

[00:44:03] **Jeffrey Rosen:** Jason, to help our listeners understand, is there a strong and a weak version of the independent state legislature doctrine that the Supreme Court might adopt in this North Carolina case? And can you see some justices adopting the strong one and others a weaker one?

[00:44:16] **Jason Torchinsky:** So I guess this is where I wanna go back to kind of what I said at the beginning. The concept here that I think is right, is not that state legislatures have this unfair authority to appoint presidential electors, for exactly the reasons that, that Dean Amar just laid out. But I think there's a difference between the independent state legislature concept as applied in Article I and the independent state legislature concept is applied in Article II because Dean Amar points out there are substantial textual differences between them. And I think in the s- in the context of redistricting, which is where Moore arises, I think the power of the state courts to override the state legislatures are somewhat limited to those sorts of cases where as Justice Roberts points out in *Rucho*, the state through whatever process has either created specific rules or has provided some process where the people of the state acting as the legislators like in the, the referendum or amendment context have actually adopted rules and acted basically in the place of the, the state legislature.

[00:45:23] So I, I think that I see a difference between the text of Article I and the text of Article II as applied here, and I think that's really important. I guess if, if, uh, Jeff, to go back to what you were just saying, I think a strong version of the ISL theory would sort of read the two of them together and see that means the s- and say that means the state legislatures can do whatever they want for anything related to elections, including appointing presidential electors. But I don't, I don't think that's what's at stake anymore.

[00:45:53] **Jeffrey Rosen:** Vik, your response to the idea that the court might decide the North Carolina case more narrowly in ways that would alleviate the, the worst fears of opponents of the, the strong version.

[00:46:06] **Vikram Amar:** So a few points. Um, I, I do completely agree with Jason that the text of Article II refutes ISL, or, or, or it's clear why ISL is problematic by looking at that text, um, just right away. Um, it's worth noting that the justices on the court who have embraced ISL, don't draw a distinction between Article I and Article II. They lump 'em together and talk about the question of the independent state legislatures using Articles I and Articles II interchangeably. Indeed, I think I'm the only person in print talking extensively about the difference in text, in several articles in online essays. But I wanna keep going back to the big point.

[00:46:42] Again, I understand, and I actually sympathize with Jason's concern that state courts might be making too much policy here, but nobody in this podcast or elsewhere has responded I think to my very fundamental point, state supreme courts make policy across number of domains. Why is this different than states fashioning, state supreme courts fashioning contract law rules, fashioning property rules, fashioning tort rules. The only response to that is, "Well, this is a federal election." But Article I doesn't give the federal courts a rule in administering the federal election with regard to state law. Congress can make those rules if it wants to, but the only policy choice that Article I makes is to defer to each state. And if each state wants to give power to its state courts... uh, le- let, let me, uh, uh, put it in a form, a hypothetical.

[00:47:35] Jason, if a state constitution said that, you know, we want our courts to, uh, exercise important policy making roles. So they are like a legislature for a lot of purposes, and when they make decisions, they speak in the name of the people just as our elected legislature does. That would show the lie to ISL, and yet how is the US Supreme Court gonna say, "Well, that's true in some states, but not other states, or in some cases, but not other cases", specially when there's nothing in the US constitution that that suggests that this is a domain where state courts can't make policy, even though they can make policy in every other domain.

[00:48:11] Jeffrey Rosen: Thanks so much for that. Uh, Jason, your response.

[00:48:15] Jason Torchinsky: Yeah. And I, I think I would point you back to the text of Article I, Section 4. We're not talking about contract law, right? I don't see anything in Article I, Section 4 that says the North Carolina State Supreme Court can't decide what common law contracts issues arise, or can't decide a common law contracts issue when it comes up in front of them. I do see a difference when it relates to the time, place and manner of federal elections, because it is directly there in a direct delegation to the state legislatures right in the US constitution. And I think that's where policy making in, with respect to federal elections is different from policy making with respect to say, contracts or torts.

[00:48:56] Um, and again, redistricting in particular is unique because it's not like a court can just strike down the statute, right? If the, if the North Carolina said, "Pass the..." If the North Carolina legislature and the governor signed a law that said, "No more oral contracts in North Carolina." And the state supreme court said, "Nope, that violates our state constitution, whatever clause it is." I don't think there's a federal interest there, right? Because there's nothing in the US constitution that says, that speaks to contract law being somehow designated by the US constitution to be decided by the state legislature. There is with respect to the time, place and matter of federal elections. And I think that's the distinction that I see.

[00:49:37] Vikram Amar: So Jeff, can I just jump in really quickly? The contracts clause of the US constitution says no state shall make any law impairing the obligation of contracts. The text is much more clear with regard to the sanctity of contracts, and yet the US Supreme Court says contract law is up to each state, uh, and each state supreme court can fashion state contract law however it wants.

[00:49:56] Jeffrey Rosen: Well it's time for closing thoughts in this vigorous discussion. And Jason, the first intervention is to you. Please tell We the People listeners why you believe that the

Supreme Court should overturn the North Carolina Court's interpretation of its constitution under the independent state legislature doctrine.

[00:50:18] Jason Torchinsky: Sure. I think under Article I, Section 4, the North Carolina Supreme Court's decision in the case below didn't give appropriate deference to the decision, the policy decisions of the state legislature. And the state supreme court assumed a role that it was prohibited from assuming under the US constitution. And again, I wanna stress that I don't think that this case presents any kind of platform that would suggest that presidential electors could be chosen after election day or that the results of, of presidential elections could be reversed or, or decided differently by state legislatures. I think, you know, the, the popular press has been, I, I think, focused on that and I don't think that's actually at stake here. Um, and I think there is a, there is a way between kind of that debunked theory of the law and, and what I'm arguing, uh, where the court can find a way to overrule the North Carolina Supreme Court.

[00:51:15] Jeffrey Rosen: Thank you very much for that. And Vik, the last word is to you, please tell We the People listeners why you think that the US Supreme Court should not overturn the North Carolina Court's interpretation of its state constitution under the independent state legislature doctrine.

[00:51:30] Vikram Amar: Well, first let me thank Jason for being such a thoughtful and careful and moderate guest, uh, uh, opponent, if you will, in our, in our, our little debate here. Uh, I hope he's right that, uh, if ISL is embraced, uh, that it's, it's limited, uh, to, to Article I and doesn't have implications for Article II. I, I think as a theoretical matter, it's hard to so limit it. And that points up the problem with ISL more generally, that as a matter of text, as a matter of founding history, as a matter of the actions of state legislatures and their decisions to involve state judiciaries, and as a matter of federal judicial precedent, ISL is way, way, way made, more made up than Roe v. Wade ever was.

[00:52:13] Uh, and so if this is, if this is really an originalist court, committed to looking at the text and original understandings of the Constitution's words in context, um, for them to, to, uh, to embrace ISL, and I, I predict if they did it, they, it would be without any democratic appointee joining, um, I think would look really bad for this court. And it would, it would undermine the court's credibility in the eyes of a lot of us who still want to believe that the court is very different than Congress and the White House. And I, I still believe that to my core, but, uh, but if they embrace ISL, uh, it'll be harder for me to, me and people like me to do that.

[00:52:54] Jeffrey Rosen: Thank you so much, Jason Torchinsky and Vik Amar for a vigorous, substantive and indeed moderate, uh, debate about this hotly contested issue. It was great to learn from both of you and we'll look forward to, uh, reconvening if we're able, um, as the oral arguments approach. Jason, Vik, thank you so much for joining.

[00:53:24] Today's show was produced by Melody Rowell, and engineered by Greg Sheckler. Research was provided by Vishan Chowdry, Elliot Peck, Colin Tibaus and [inaudible 00:53:33] Please rate, review, and subscribe to We the People on Apple, recommend the show to anyone anywhere who is eager for constitutional debate, illumination and civil dialogue. And always remember that the National Constitution Center is a private nonprofit. It's so great when you

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