



The Supreme Court Considers the Independent State Legislature Theory

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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 a constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

[00:00:22] Jeffrey Rosen: On December 7th, The Supreme Court heard oral arguments in Moore versus Harper, the case out of North Carolina about the power of state courts to review election regulations set by state legislatures. At the heart of the case is the so-called Independent State Legislature Theory. Over the summer, we had two great guests to walk us through the theory and today we're welcoming them back to recap the arguments and discuss what the future of the Independent State Legislature Doctrine may be.

[00:00:52] Jeffrey Rosen: Vikram Amar is Dean of the Illinois College of Law and co-author of the case book Constitutional Law, Cases and Materials. With Akhil Amar and Steve Calabresi, he co-authored an amicus brief in Moore versus Harper on behalf of the respondents. Vik, welcome back to We the People.

[00:01:09] Vikram Amar: Thank you for having me, Jeff.

[00:01:10] Jeffrey Rosen: And 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 versus Harper on the side of the petitioners on behalf of the Republican National Committee. Jason, it is wonderful to welcome you back to the show.

[00:01:27] Jason Torchinsky: Great, thanks for having me back again.

[00:01:28] Jeffrey Rosen: Vik, during the oral arguments, the advocates laid out different versions of the Independent State Legislature Theory. There was a

strong version and a compromise version. Tell We the People listeners what the various versions that the court is considering are.

[00:01:45] Vikram Amar: I think there are more than two simple versions. The strong version of ISL, as Jason and I talked about last time we were on the show, is, the notion that the word legislature in Article One, Section Four means a specific body in state government, elected ordinary legislators. It does not mean Governor it does not mean courts, it does not mean independent commissions, it does not mean people of the state, and, the state legislature as so defined has the power to prescribe federal election regulations and only that that body has the power.

[00:02:20] Vikram Amar: The problem with that I think that we saw an oral argument is, both historically, and in terms of past cases, other organs of state government have been, centrally involved in election regulation, federal election regulation. So I think the petitioners had a bunch of caveats to their hard version and so at the end of the day, you know, they, said they didn't ask the court to overrule, the involvement of the governor I should say, or the involvement of independent commissions. What they really wanted to focus on is courts, and whether courts can interpret state constitutions in, broad ways when the language of the state constitutions isn't quite explicit.

[00:03:02] Jeffrey Rosen: Thanks so much for that. Jason, how would you describe the various versions of the doctrine that the court was presented with?

[00:03:09] Jason Torchinsky: I think Dean Amar did a decent job of laying it out. I think the legislature took essentially their strongly advocated version of ISL and kind of grasped on to I think, towards the end, their, their fallback position. But I think it's clear that the super strong version, you know, based on the questions from the Justices, doesn't have a support of the majority of the court. So I think the advocates for the petitioners were definitely struggling a bit to find a line that their clients would be comfortable with that they could get to a majority of the Justices with.

[00:03:48] Jeffrey Rosen: Thanks so much for that. Well, let's really dig into both of those versions that you've identified. And let's start with what, you call the strong version, Vik. Lay out for We the People listeners, what the strong version is and what Justices were sympathetic to it, and what the arguments against that are.

[00:04:08] Vikram Amar: So again, the strong version is the notion that the word legislature refers to a body, an entity, a particular organ of state

government, that is given the power to prescribe that is ordain or command federal election regulations. That's how they read the text. That's what the word legislature means they say, and of course, prescribe, I think everyone agrees means ordain or command, there's not really ever been an argument that prescribe means anything else.

[00:04:34] Vikram Amar: The problem with that is that at the founding, at least two states, Massachusetts and New York involved the governor in the making of federal election regulations. New York actually involved state judges in the making of federal election regulations through the Council of Revision. So Massachusetts had a gubernatorial veto for all of its laws, including laws regulating federal elections. And New York had a veto by the Council of Revision, a body consisting of the governor and a handful of judges.

[00:05:08] Vikram Amar: So as a matter of founding history, that reality, plus the fact that the Articles of Confederation, the forerunner to the Constitution, used language very similar to Article One, Section four that said, "The legislature of each State shall have the power to prescribe the manner of selection of delegates to the Federal Congress." State constitutions, both under the Articles of Confederation, and, in the early post-ratification period, did not leave it to the ordinary elected legislature, but rather, included provisions that directly, regulated the process of picking members of Congress.

[00:05:48] Vikram Amar: So as a matter of founding history, and as a matter of past cases, the strong version of the theory wasn't gonna fly among the majority, even though maybe a couple of Justices might wanna try to claim to it. The problem, Jeff, is that once you abandon the strong version, then it's hard to know what's left of ISL as an analytic coherent matter, because if legislature does not mean entity, if it means instead lawmaking system, as it has to mean, because that's how we include governor's that's how we include independent commissions, that's how we include popular initiatives. If it means lawmaking system, and not a particular entity, then it's hard to deny a state the flexibility to include courts in that lawmaking system, as it does for everything else.

[00:06:37] Jeffrey Rosen: Jason, let's focus on what we're calling the strong version of the independent state legislature doctrine. Do you agree that, proponents of the strong version say it means that no other organs of state government can alter the legislature's actions on federal election? And which Justices did you see being sympathetic to that argument?

[00:06:58] Jason Torchinsky: So I think the Justices that were most sympathetic to that argument, who spoke the most were Justices, Gorsuch and

Alito. However, I think that the advocate, you know, David Thompson, who was arguing for the legislature, when he was making that argument, he really got into this morass of arguing substance versus procedure. And that just was, I think, for the other Justices that weren't named Gorsuch and Alito, running him down a rabbit hole that he couldn't dig himself out of during the oral argument. Which is why I think the strong version, the "strong version," where you dig into this substance versus procedure question that they were, that the petitioners were promoting, I just don't think was getting much of a reception on the court.

[00:07:46] Jason Torchinsky: I do wanna go back a little bit to what Dean Amar just said about the history. I think the problem with the history here is each side is picking out the things that it thinks supports its view of the history of this clause. And I'm not sure that there's a definitive view that, that you could objectively say is, is the right one.

[00:08:08] Jason Torchinsky: What I thought was actually most remarkable about the oral argument is that all four of the advocates who were in front of the court, including the one for the petitioners, and three, basically supporting the positions of the respondents, every one of them kind of acknowledged that there's some point where a state court could go so far that the Supreme Court would have to step in. And to me, I thought that was the most stunning part of the argument. In particular, I think Neal Katyal said, "It would have to be, you know, astronomically high." And, the former solicitor general who was arguing had a formulation, that would have been a very, very high standard. And even the solicitor, the current Solicitor General kind of said, "Yeah, there might be something."

[00:08:54] Jason Torchinsky: So everybody that was in front of the Supreme Court acknowledged that at some point, a state court could go too far. And the question is, if the North Carolina Supreme Court didn't go too far, this time, is that even a real standard? Or is what the, the North Carolina Supreme Court did this time, so unique and different from what we expect of courts that it meets the standard?

[00:09:21] Jason Torchinsky: And I think, you know, last time we talked, I think Dean Amar was pretty vehement that there's just nothing here. And I don't think that's the position of any of the Justices, or at least it wasn't the position of any of the advocates in front of the court, for sure.

[00:09:37] Jeffrey Rosen: Well, I do wanna dig further into the strong version of the theory, but Vik Amar picking up on Jason Torchinsky's suggestion, it's true that many of the Justices asked questions about the consequences. Justice

Alito did ask Neal Katyal, "Well, you say the standard is incredibly high, but does it go up to the stratosphere or, do you know into outer space?" What do you make of Jason's suggestion that all the advocates and all the Justices thought that there was a threshold that state courts could surpass, which might violate the Elections Clause.

[00:10:08] Vikram Amar: So to be clear, I did not say last time, and I've never said that there's nothing state courts could do that would violate the Constitution in this realm. The question is, what the standard is and whether the standard differs with regard to state and federal elections? So there is a standard, there is a standard inherent and due process and rule of law principles, courts can't just make things up right before an election or after an election. They can't make those up even in the context of, overseeing a state election.

[00:10:36] Vikram Amar: So the question is, whether the standard for federal elections is different than for state elections. And as you pointed out, Jeff, that has to go back to the Elections Clause. But with all due respect to Jason, there's not a single credible historian who thinks this is a closed case. He may say that both briefs argue history, but I don't know how much history he knows, but, it's notable that the only, legal academic who filed a petition on the side of petitioners was John Eastman. And there's no historians of any note that I know. That no one has pushed back on the merits on any of the history that respondents have adduced or all of the law review articles, and there are dozens of them now, that lay out a clear history.

[00:11:19] Vikram Amar: Now, it may be true that as was true with originalism generally, there's not always as much data historically as you might want, but all the data that's there really leans in one direction, this is not a hard originalist case. Now coming back to the middle ground, Jeff, that you asked about where the standard is and what it should be, I agree with Jason that the respondents Neal Katyal, and Don Verrilli and the Solicitor General, they were weary of telling the court what I think logic and coherence dictate, namely, that the standard is the same for what a state court might do in a state election versus a federal election. Either way, state courts can't make stuff up, on the verge of or after an election.

[00:12:08] Vikram Amar: That's the real, is the, is the state court acting as a court? Or are they just kind of acting so capriciously that they're creating things out of whole cloth? The standard shouldn't be the same. But the respondents were, I think, wary of taking the strong coherent position, partly because they're counting noses and they think that there's a lot of Justices who don't wanna

throw William Rehnquist's concurrence in Bush versus Gore under the bus and they're worried about trying to forge, you called it earlier.

[00:12:40] Vikram Amar: It's interesting, Jeff, you called it a compromise position. I thought I heard you add a D, there almost, it's a compromised position, it may be a middle ground, in the sense that no one gets everything they want, but that doesn't mean that it's a middle ground that has any, plausibility to it as a matter of text. Because once you say, legislature does not mean that entity, and you have to say that if governors and people and independent commissions are permitted. Once you say legislature doesn't mean that entity, then where in the Elections Clause is this skepticism for state courts coming from?

[00:13:20] Jeffrey Rosen: Well, let's put this call at the compromise position squarely on the table. Justice Kavanaugh seemed receptive to a version of the theory outlined by Chief Justice Rehnquist in his Bush v. Gore concurrence that would preserve a role for state courts, but subject to oversight by federal courts if they went seriously astray. And the question is, what would the standard be? Neal Katyal said that the standard would be sky high, Don Verrilli said, "One test distilling Chief Justice Rehnquist's concurrence might be whether the state court decision is such a sharp departure from the state's ordinary mode of constitutional interpretation that it lacks any fair and substantial basis in state law." Jason, how would you describe what we're calling the compromise position and how it fared among the Justices?

[00:14:05] Jason Torchinsky: I think the compromise position got a lot more attention from Justice Roberts and Justice Kavanaugh, than the let's say, the strong version the respondents were advocating. And I think, you know, and we're back to I think where I was when we talked over the summer, which is, the North Carolina Supreme Court here was acting more as a legislator. And I mean, even the Solicitor General basically said, "If a court sort of sees the power to make policies, it could violate the Elections Clause."

[00:14:34] Jason Torchinsky: And I've been saying from the beginning, that's what the North Carolina Supreme Court did here. They said, "The executive branch and the legislative branch have failed to adopt a partisan gerrymandering standard and we're the last branch left that can do it, so we're gonna do it." How's that not policymaking? I mean, that, you know, look, going back to what Don Verrilli said, "Departure from the state's ordinary mode of constitutional interpretation that it lacks any fair and substantial basis in state law."

[00:15:00] Jason Torchinsky: They basically said, "It's not here, so we're making it up." And I think, you know, even under the standards that the three advocates for the respondents made up, if this case doesn't cross the line, then there probably will never be a case that crosses the line.

[00:15:15] Jeffrey Rosen: Vik Amar, you are arguing that Chief Justice Rehnquist's concurrence lacks grounding in the text and original understanding of the Elections Clause. Tell us more about why you think that a standard that would prevent state courts from having interpretations that lack any fair and substantial basis in state law are not well grounded in the Constitution.

[00:15:40] Vikram Amar: So I'm not saying that. I think a state court decision that lacks any fair and substantial basis in state law is, so capricious as to violate due process and rule of law principles, I would strike that down if it involved a federal election, I would strike that down if involves a state election. What Chief Justice Rehnquist's concurrence in Bush versus Gore tried to do is say that the word legislature in Article One argues for some more rigorous standard of review by the federal courts.

[00:16:07] Vikram Amar: He wasn't clear about what it was. It was more of a teaser than an analysis. But if we interpret Chief Justice Rehnquist's concurrence in the same way that Don Verrilli and Neal Katyal are interpreting it, then it comes very close, if not identical to what I think the right standard is, which is basically a due process rule of law approach that would apply equally in state and federal elections.

[00:16:30] Vikram Amar: To go to Jason's point, the problem with this notion, well, that the court is making policy, Jason, can you give me a single constitutional decision by a state or a federal court that does not involve policymaking? There's always some question of policy as you, implement this, the federal constitution and state constitution.

[00:16:52] Vikram Amar: Take equal protection take due process, take standing, take any doctrine you want under the federal constitution by the US Supreme Court, the line simply can't be policy versus not because state courts are tasked with making policy judgments all the time. They fashion common law, they get to interpret their state constitutions, in a variety of manners, and indeed, to take us back to the history, one of the cases that's important is Calder versus Bull in 1793, when the majority of the Justices said, "State judges can serve in a legislative capacity and vice versa, that states can blend legislative and judicial functions for different offices."

[00:17:35] Vikram Amar: Indeed, let me take you back to federal election regulation. The Council of Revision in New York at the founding that vetoed congressional election regulation consisted of the governor and three judges who could take whatever policy they wanted to in account in deciding whether to ratify or veto the proposed regulation of congressional elections.

[00:18:04] Vikram Amar: So the idea that state courts are cut out of the policymaking loop doesn't square with the power of state courts generally, and it doesn't square with the history or text of this particular provision. So it has to be something more than just policymaking.

[00:18:17] Jason Torchinsky: So I think I fundamentally disagree. If you just take, for example, the Don Verrilli formulation, such a sharp departure from the state's ordinary modes of constitutional interpretation that it lacks any fair and substantial basis in state law. All of the other areas where you just kind of rattled off a laundry list, are all things where when a state court does something, they've got some basis in state law to do it. And here, even this majority on the North Carolina Supreme Court was clear that they were creating something new, because the other branches had failed to act.

[00:18:55] Jason Torchinsky: That's very different than, "Hey, our, our statute says everybody can vote from home if they have a disability and I'm, you know, crafting an opinion that defines the scope of disability." That's not what they were doing here. And that's why I think what the North Carolina Supreme Court was doing was more like legislating than like judging. And I think that that's where Justice Roberts and Justice Kavanaugh were coming from, particularly, I can't remember which justice said it, but one of the Justices said, "All right, pretend that the state Supreme Court said, "The fundamental purpose of our state constitution is fairness. And this map is unfair. Would that be, would that have gone too far?"

[00:19:35] Jason Torchinsky: And I think it was Neal Katyal that kind of said, "Yeah, that, that might go too far." And then the the Justice said, "I don't see how that's any different than what the North Carolina Supreme Court did here." And I think that's where I differ from Dean Amar.

[00:19:49] Jeffrey Rosen: Vik, let's put squarely on the table the argument for the Rehnquist concurrence. It held that when a state court engages in a grossly unfair interpretation of a state election statute that could usurp the power of the state legislature and state courts would retain a role in applying state constitutional law in federal elections, but when it engages in a off the wall interpretation and the Supreme Court can step in. Tell us why you think that that

theory articulated by Chief Justice Rehnquist is not well grounded in the text to original understanding history and tradition of the Constitution, and how did it fare before the Supreme Court?

[00:20:24] Vikram Amar: Well, it depends on what you mean by grossly unfair, if grossly unfair means arbitrary and capricious in a way that violates due process and rule of law. And remember, when a court rules in an election case, sometimes it's very late in the day when people's expectations about how the election is gonna run are clearly settled right before an election or even after the voting has started.

[00:20:45] Vikram Amar: So if grossly unfair means a violation of due process, and the like, that's easy. But the passage you read, Jeff said, "Grossly unfair in terms of a violation of what the legislature has done." And again, if you can take the legislature's power away altogether and give it to an independent Districting Commission, and everyone seems to concede now that you can, then there's nothing left of the ISL theory focused on the word legislature. It's now a more general concern that we have about state courts in the federal election realm.

[00:21:20] Vikram Amar: And going back to Verrilli's formulation, his take on Rehnquist's concurrence, if you will. A fair and substantial basis doesn't mean something that's not new. Jason, you mentioned that when a state courts, issue rulings, normally, they're not doing something that's that's brand new. Yes they often do things that are brand new. Look at the common law, look at contract law, property law, tort law, look back in your first year casebooks. All of the major cases you read were huge steps that the State Supreme Courts took, but they had a rationale, they had a methodology that built on judicial tradition, and they built on earlier things that had been done in those areas of law.

[00:22:03] Vikram Amar: So when the departure is so market, if a state court interprets its state constitution, so radically different than it ever has before, not in keeping with the way it's looked at other aspects of the state constitution, yes, that could be a problem. It should be a problem for federal elections, it should be a problem for state elections.

[00:22:22] Vikram Amar: I will agree with this. I think a lot turns, as Jason indicated, on what they do in this case. If they reverse the North Carolina Supreme Court and say, "What the North Carolina Supreme Court did here was too adventurous as a matter of state constitutional interpretation." That will be a very significant development, I think it'd be a very destabilizing and very, unjustified development, but that will be very significant. If on the other hand,

they affirm what the North Carolina Supreme Court did here, that sends a very different message.

[00:22:56] Vikram Amar: So a lot of it will come down to what they thought of the North Carolina Supreme Court ruling under whatever, formulation of adjectives and adverbs that they wanna come up with as a gloss, on the standard of review.

[00:23:08] Jeffrey Rosen: Jason, Vik is arguing that Chief Justice Rehnquist's concurrence was something of a false start. That basically the word legislature doesn't do any interpretive work. And to the degree that the court is simply applying a gross unfairness standard, it would apply equally to state and federal elections. So what's your response?

[00:23:28] Jason Torchinsky: I think there's a bunch to remember about the history here, right? Justice, Chief Justice Rehnquist's concurrence in *Bush v. Gore* was joined by Justices Thomas and Scalia, one thing we know about Justice Thomas is, his view of the world seems to be relatively consistent from decade to decade. And I think there's a critical sentence in Justice Rehnquist, or Chief Justice Rehnquist concurrence, where he said, "What we would do in the present case is precisely parallel, hold that the Florida Supreme Court's interpretation of Florida's election laws impermissibly distorted them beyond what a fair reading required in violation of Article Two." Now, granted, that was the Elector's Clause, and here, we're talking about Article One.

[00:24:06] Jason Torchinsky: But I don't see how you can look at what the North Carolina Supreme Court did and not say that it was beyond the fair reading of the rules. The North Carolina Supreme Court itself said, "We are acting to impose this requirement because the legislature didn't do it, right?" [laughs]. If the legislature didn't do it, they're not interpreting something that the legislature passed. They're saying, "The legislature failed to act, so we're making it up." Which would seem to walk precisely into what Chief Justice Rehnquist said.

[00:24:34] Jason Torchinsky: You know, if we're looking, if you're, if you're counting votes on the court, right, assume for a moment Justice Thomas doesn't change his position, and he still agrees with what Justice Rehnquist said, fairly clear to me that Justice Gorsuch and Justice Alito would concur with what Chief Justice Rehnquist wrote. Justice Kavanaugh when he was in private practice in Florida, he was on the Bush 2000 legal team. I have not been able to locate the, the George W. Bush brief but I would be shocked if Justice Kavanaugh when he

was in private practice, turns out to have been uninvolved in the briefing for George W. Bush in that case.

[00:25:11] Jason Torchinsky: You know, I mean, I think it's fairly clear to everybody, and I think it's been in some biographies that he was on that Bush legal team, you know, in 2000. So, clearly, you know, they advocated that when he was a lawyer, and presumably he or at least hopefully, at least in this case, you know, he probably has some personal knowledge of all the research that went into the arguments in that case.

[00:25:38] Jason Torchinsky: And so, you know, so I get to four for that. And, you know, Chief Justice Roberts has been very concerned about, you know, I think he even, what did he say about the efficiency gap? I think he said, like, efficiency gap, you know, at yada, yada number, or something like that. He sort of made a nod to like the, the math, as if to say, like, "Don't bother us with the math." But yet, that's what the North Carolina Supreme Court essentially did.

[00:26:06] Jason Torchinsky: So I think Justice Roberts is very uncomfortable with what the North Carolina Supreme Court did here. I think Justice Kavanaugh was very uncomfortable with what the North Carolina Supreme Court did here. And clearly Gorsuch, Alito and Thomas, I think are fairly uncomfortable with what the North Carolina Supreme Court did here too. What I don't know and what I couldn't sense out from the argument is where Justice Barrett is.

[00:26:32] Jason Torchinsky: But I think, you know, Justice Kavanaugh was, you know, kept coming back to Chief Justice Rehnquist's concurrence, and that concurrence may well become a majority opinion after this.

[00:26:44] Jeffrey Rosen: Vik, if the Rehnquist concurrence does become a majority opinion, how big a deal would that be? And do you think it would be consistent with the Constitution or not?

[00:26:56] Vikram Amar: Again, yet, again, the Rehnquist concurrence doesn't really flesh out a standard that we know, whose meaning we, know, we don't really, quite, understand what that might mean in practice. To the extent that that standard is tethered to Article One and the use of the word legislature, that makes no sense. It's not to say that some Justices won't do it. But it makes no sense. We've, they've already established that you can take the power away from the legislature altogether and put it in an independent commission.

[00:27:31] Vikram Amar: So the legislature isn't being protected in any way by this there. The question is whether there's a distrust of state courts that is embodied in a particular standard of the kind that Rehnquist's concurrence in. But Rehnquist's concurrence purports to ground that standard in the word legislature, which doesn't do a lot of analytic work in a coherent way.

[00:27:52] Vikram Amar: In terms of nose counting, I would suggest that what positions people take as a lawyer are very different than they take as a justice. And I would hope that's the case. So when Jason said that, that Kavanaugh worked as a lawyer for the Bush team, so did Amy Coney Barrett, in which in the lower courts in Florida, she argued against the ISL theory. She argued that the state Supreme Court should interpret the state constitution, and override what the state legislature says.

[00:28:19] Vikram Amar: So it's hard to know where any of those folks is. I think at the end of the day, I said, the one thing I will agree with Jason on is, it'll matter a lot how this case comes out. If Kavanaugh, Barrett and the Chief Justice, if they decide that what happened below in the North Carolina case here violated some standard of review that they think is appropriate, that's a huge deal.

[00:28:44] Vikram Amar: If they don't, if they say, "Well, you know, this was not completely capricious, but state judges mind your Ps and Qs 'cause we're watching you, make sure you don't do anything that's really capricious." That sends a different message. I'd like to send the most coherent message that the standard for state and federal elections are the same. But I think a lot comes down to how they apply whatever standard they come up with in this case, and I honestly don't think that anyone knows.

[00:29:13] Vikram Amar: Jason counts votes very, very sophisticated, knowledgeable, smart people that were at the argument that I've talked to, count noses somewhat differently. We're just gonna have to wait and see until June to find out what happens. I would not wager a prediction, especially because oral arguments are so hard to read these days, given how long they run.

[00:29:32] Jeffrey Rosen: Jason, let's talk about whether the North Carolina Supreme Court should win or lose. Explain to We the People listeners why you believe that under the Bush v Gore concurrence, the North Carolina Supreme Court acted in an unfair or capricious way and therefore, should be overturned.

[00:29:48] Jason Torchinsky: You know I get back to what I've said over and over again and what was said in some of the briefs supporting the petitioners.

The North Carolina Supreme Court made it up, it was acting more as a legislature than as a court. They literally said, "The legislature and the governor have failed over and over again to, you know, create controls on partisan gerrymandering. So we're gonna take these couple of clauses in our Constitution and define them, right?" If they, if they had said, "Look, you know, they've had this debate, there's been questions about whether this section already controls partisan gerrymandering." That would be one thing. But what they said was, "We need to make it up because the executive and the legislature can't come up with language and can't come up with rules. So we're gonna come up with the rules."

[00:30:36] Jason Torchinsky: I mean, they literally didn't ground what they said in anything other than the Free and Equal Elections Clause. And keep in mind the history of that clause. And I'm gonna go back to history for a minute, [laughs] in light of, in light of Dean Amar's focus on history, the Free Equal Elections Clause comes from and the lower court in North Carolina went through this history, comes from the Virginia Declaration of Human Rights, which was written by Patrick Henry, who tried to gerrymander James Madison out of a congressional seat.

[00:31:02] Jason Torchinsky: So if the guy that wrote those words was like, one of the original gerrymanders, how you can fast forward a couple of a hundred years and say, "Oh, yeah, I'm gonna use that clause to restrict gerrymandering." There's no, there's no historical basis for saying the Free and Equal Elections Clause restricts gerrymandering, when the guy that came up with that phrase was like the original gerrymander.

[00:31:22] Jason Torchinsky: So if there's ever been a case where a state court has literally made it up out of whole cloth, like, this is it. And that's why I think, even if, even if you accept for a moment, the standards, that Neal Katyal and Don Verrilli and the Solicitor General laid out here, I think this crosses it.

[00:31:42] Jeffrey Rosen: And Vik, please tell the We the People listeners why you think that the North Carolina Supreme Court did not cross the line in regulating partisan gerrymandering, and therefore should not be overturned.

[00:31:52] Vikram Amar: So first of all, I'm not an expert in North Carolina constitutional law and I try very much to kind of hue to things that I am deeply knowledgeable about. That's one of the things I think that gives me credibility. So I'm just gonna repeat what's in the briefs to summarize for you. The problem with this is totally made up standard is, that's true of a lot of constitutional law viewed at a high level of generality.

[00:32:20] Vikram Amar: Let me give you an example. The US Supreme Court has said that states enjoy sovereign immunity and can't be sued without their consent in federal court. There's nothing in the language of the Constitution that suggests that. The 11th Amendment clearly says that federal court jurisdiction doesn't extend, when, states are sued in federal court based on diversity, not when they're based on when they're sued in federal court based on, allegation of a federal law violation.

[00:32:50] Vikram Amar: So whether it's sovereign immunity, whether it's standing, whether it's first amendment free speech doctrine, from some level of generality, everything that the courts do in interpreting constitution scenes made up because they're applying principles to new situations all the time. So the North Carolina Supreme Court did two things. A, it held that there is a value in the state constitution against partisan gerrymandering, and then they directed the drawing of new maps.

[00:33:21] Vikram Amar: A lot of this case had focused on the second part before, before the oral argument. That, even if it's okay to invalidate an excessively gerrymandered, excessively partisan set, of district lines, the real problem was that the state court went ahead and directed the redrawing of those lines by somebody other than the elected legislature.

[00:33:42] Vikram Amar: But what Jason's complaining about is not the drawing of new lines, it's the invalidation of the first set of lines to begin with. And if you say that the state Supreme Court's, determination that this value of fair elections, can't have any application to the, domain of increasingly data driven, increasingly sophisticated, increasingly ruthless partisan gerrymandering, I think that would be inconsistent with the tradition of state constitutional interpretation in general.

[00:34:18] Vikram Amar: Remember, the US Supreme Court has said over and over and over and over again, that state courts are the master interpreters of state law. So the interpretation of the North Carolina Constitution as having something to say about partisan gerrymandering has to be so outlandish that the US Supreme Court is saying, "You are wrong as a matter of state law, you are misinterpreting your own state constitution to find value here. You are basically, kind of botching the area of law that you are an expert on and that we the US Supreme Court don't know anything about and that we defer to you on.

[00:34:56] Vikram Amar: That's a high standard to meet, and there's lots of provisions that are capaciously written that play out differently as human experience evolves as technology evolves as legislation evolves.

[00:35:10] Jeffrey Rosen: Jason, is there any possibility that this case might be mooted in light of the North Carolina Supreme Court elections, the changes in the majority and so forth?

[00:35:19] Jason Torchinsky: So I think that's quite a real possibility here. So for your listeners, the North Carolina Supreme Court when it issued the opinion that's an issue in Moore versus Harper, just have some background on the court. It's an elected court and they run with partisan labels. The Justices who issued the Moore versus Harper opinion were four to three Democrats. All three Republicans dissented, including the elected Chief Justice who was, one of the Republicans, and it was the four, Democratic Party Justices who wrote the majority opinion.

[00:35:54] Jason Torchinsky: Subsequently, we had the November 22 elections. And what has happened is starting next month, when the new justices take office, it will actually be a five to two Republican dominated court, there will be five Republican Justices and two of the Democrats who were part of the majority previously, are, are still there.

[00:36:13] Jason Torchinsky: Republicans also retained a majority in the legislature. While there is a Democratic governor, North Carolina is unique with respect to redistricting in that the governor doesn't get a veto over redistricting maps for Congress or for the state legislature. So if the North Carolina legislature were to hypothetically reimpose the map that had been previously struck down or a map similar to it, I assume plaintiffs will sue again. And then the five to two Republican Supreme Court will have to decide whether the previous minority opinion authored by the Chief Justice will instead become the majority opinion and reverse the four to three decision.

[00:36:58] Jason Torchinsky: Now, I don't know that the North Carolina Supreme Court necessarily needs to get everywhere through that process for the US Supreme Court to say, "Dismissed." Because if a new map replaces the court imposed map, you know, even before you get to the litigation, there's an argument there that the replacement of the map with the map that the court had imposed by the legislature, even before you get to the litigation, moots the case. So I think there is a real possibility that we won't actually get a decision out of Moore depending on what the legislature does and how fast the North Carolina courts move.

[00:37:34] Jeffrey Rosen: Vik, what do you think of the possibility that the case might moot out? And more generally, we've moved a very wide distance from the initial claim that legislatures have unreviewable authority in federal

elections, to disputes about whether a particular gerrymander is or is not a dramatic departure from state law. How did we get here?

[00:37:58] Vikram Amar: So two points, you know, I don't know for sure, whether the case would moot, even if the North Carolina legislature were to pass a new law that the state courts, would be in the process of reviewing, but that hasn't happened. So, you know, Jason used the word hypothetically, the new legislature might pass a new law. Certainly until that happens, there's no mootness on the table. So we just have to wait and see if they too pass a new law.

[00:38:23] Vikram Amar: In general, I think there's still gonna be some constraints, I don't think mootness doctrine would necessarily, apply there. It's possible the court could dig the case that is, dismiss it as improvidently granted, if there are developments like that that happen. But remember, the Court granted in this case, because Justice Kavanaugh and others said, "We need to resolve this issue. We need to provide some guidance." It's better to do so in between federal elections. 2023 is a better year to do it than 2024, or 2026. So I don't expect this case to moot. But anything is possible.

[00:38:59] Vikram Amar: Now, on your second question, Jeff, about how we got here, from this big, bold, brash ISL theory to a kind of a narrow inquiry about whether the North Carolina Supreme Court decision was truly outlandish, or truly capricious and completely made up, we got there because all the evidence as a matter of text and history and structure shows that the ISL theory, in its coherent form simply doesn't fly.

[00:39:30] Vikram Amar: That the word legislature doesn't mean an entity, it has to mean a lawmaking system. Just as, and this is an important point I wanna make because I'm not sure if I made last time we, the three of us spoke. The Constitution uses the word Congress about 60 times. Occasionally, Congress means the House and the Senate, which is what most people think of when they think of Congress. But most of, the rest of the time, it means the House, the Senate and the president, not just the House and Senate. And that's true whether the Constitution empowers Congress to act by law or not. So when it says in Article One that Congress may provide for who becomes president when the presidency and the vice presidency are both vacant, it doesn't matter whether it says by law or not. We understand that to mean not just the House and Senate, but the House, Senate, and the president via lawmaking.

[00:40:23] Vikram Amar: That when, when the US Constitution refers to Congress, it's referring not to an entity, but to a lawmaking system. So too,

when the, Article One and Article Two refer to the legislature of the states, it's referring to the state's lawmaking system, which includes courts, as a matter of course, and which is permitted to include courts under the 10th Amendment and the flexibility that states have bounded only by Republican government principles that would prevent a state for example, from creating a monarchy or the like.

[00:40:53] Vikram Amar: States have broadly way to blend judicial and legislative roles if they want to under the 10th Amendment, and subject to this extreme, outlandish capricious standard, whatever word you wanna tease out the Rehnquist concurrence, or Verrilli's formulation, or Katyal's formulation, and as Jason said, I think it's gonna be very important to see how any such standard plays out in this case.

[00:41:16] Vikram Amar: If it affirms the North Carolina Supreme Court, that's still significant, because there's still mischief out there that could be made by lower federal courts, and a future Supreme Courts. But if it reverses the North Carolina Supreme Court, that is a much bigger deal. I'm not convinced it's gonna reverse the North Carolina Supreme Court, but I wouldn't make a bold prediction because I think oral arguments are hard to read.

[00:41:40] Jeffrey Rosen: Jason, in your brief and on the show, you've argued for what we're calling the compromise or moderate position, you argue that the election clause protects state legislatures from being countermanded by state courts, but it doesn't give them unbounded power, and that legislatures have to answer to Congress and federal courts. Did you hear in the oral argument, any Justices sympathetic to the strong version or more specifically, do you think that Justices Alito, Thomas and Gorsuch were sympathetic to the strong version of the Independent State Legislature Doctrine or not?

[00:42:15] Jason Torchinsky: I think Justices Alito and Gorsuch were more open to it than the others. Justice Thomas is just super hard to read at arguments [laughs]. So I don't know that he asked enough questions of enough of the advocates to really give any insight but I think and look Justices Gorsuch and Alito have also written on this, right? They would have granted the stay when the North Carolina legislature asked for the stay when this came up on the what is referred to as the shadow docket. And they wrote about why they would have granted the stay.

[00:42:48] Jason Torchinsky: And you know, Justice Alito when we had the Pennsylvania cases out of 2020, Justice Alito said he would have granted it then

and, and reversed the ... I mean, I think he made fairly clear he would have considered reversing the Pennsylvania Supreme Court.

[00:43:03] Jason Torchinsky: So, I mean, Justice Alito has been pretty outspoken on this in the forums through which judges speak, which is, their written words. And Justice Gorsuch has joined them a couple of times. So I think we know where the two of them are. But I don't know that they have fleshed out the outer boundary of that theory either, right? I don't think that even they think that a legislature could be unbounded by the federal constitution at all. So I don't think they think it is entirely unbounded either, but you know, they haven't really fleshed it out completely.

[00:43:39] Jeffrey Rosen: Vik, do you agree that Justice Alito, Justice Gorsuch and perhaps Justice Thomas, might be sympathetic to some strong version of the Independent State Legislature Doctrine? And were any of them moved by any of the historical arguments offered in the oral argument, including by Neal Katyal, who said he'd been waiting for decades to argue the text in history to Justice Thomas. Were there any exchanges that struck you as significant along those lines?

[00:44:03] Vikram Amar: So as Jason pointed out, Justice Thomas was rather quiet and inscrutable. But I would not be surprised if when he reads the briefs, he reads the amicus brief that Akhil and Steve Calabresi and I wrote that he is gonna be moved by a lot of that, that history because it is so lopsided.

[00:44:18] Vikram Amar: Jason is completely correct in saying that, that all three of those Justices and, and especially recently, Justices Alito and Gorsuch have, kind of voiced support for a strong version of the ISIL theory in their writings in various shadow docket cases. But this is a, here's a very important point. The reason shadow docket cases aren't kind of binding is because they are not fully briefed. And until the briefing in this case, nobody had ever devastated the ISL theory as a matter of text history and structure, the way the briefs do and the way the scholarship that the briefs draw on debts.

[00:44:56] Vikram Amar: Here's a tidy illustration of that, the last time the ISL theory was fully in front of the court was 2015 in the Arizona case where the Supreme Court upheld Arizona's decision to take districting of congressional, lines outside of the elected state legislature and confer it into an independent, unelected, Districting Commission and the Supreme Court upheld that.

[00:45:21] Vikram Amar: And in that case, there were some dissents, including by Chief Justice Rehnquist. But if you looked at the briefing, in that case, there were about 15 briefs. I think there were a dozen or so amicus briefs and then the party's briefs. Not a single brief in that case, cited the Articles of Confederation cited any State Constitution before 1850. None of them did any founding history over what the word legislature in Article One, Section Four means, not a single one.

[00:45:52] Vikram Amar: So it's understandable that this ISL theory, that makes some intuitive sense based on the word legislature, if you ask the person on the street, what does the word legislature mean? They think it refers not to the governor, not to independent commissions, not to the people of the state, but you know, the Assembly and Senate and the state house. But it turns out that when you do the work, the word legislature in this context, just like the word Congress in the Constitution, is not a reference to an entity, but it's a shorthand for a lawmaking system. None of that was briefed in any of the shadow docket cases, or in 2015.

[00:46:27] Vikram Amar: So I'd like to think that Justices Alito and Gorsuch when they read the briefs, they might be moved by some of this additional argumentation. But I don't know that to be the case, and I don't dispute Jason's reading of the oral argument in that regard to the extent that oral arguments can ever be read.

[00:46:44] Jeffrey Rosen: Jason, do you agree with Vik or not that briefing on this theory, revealed that the strong version of the Independent State Legislature doctrine was not well rooted in constitutional history and therefore that there is a consensus emerging around the court, to reject it on originalist grounds? Or do you not agree with that?

[00:47:05] Jason Torchinsky: I don't agree with that. I mean, I'm glad to know that Dean Amar believes in what he wrote and submitted to the court [laughs]. But I think, you know, if you just listen to the oral argument and didn't read any of the briefs, I think each side has their, has their glasses on when they're viewing history, and is seeing what they wanna see in the history. I think Dean Amar is seeing what he wants to see in history. I think the respondents are seeing what they wanna see in the history, and I think you could read this history, in whichever way you think best supports your argument.

[00:47:36] Jason Torchinsky: So I think the Justices are gonna have a hard time here. I think, you know, this goes back to some other arguments that happened, like in the Alabama case, where you had, you know, our newest

Justice, Justice Jackson and Justice Thomas, arguing over original intent and original meaning, and they each think they're looking back to original intent and original meaning, but I think they are gonna see different things when they say that.

[00:48:01] Jason Torchinsky: So I think that this is gonna be a really interesting one. Because, you know, Justice Scalia would probably be doing a little, a little jig or something because everybody's now focusing on text and history, which is what he was preaching his entire judicial career. And I think you know, that says a lot about where Justice Scalia was coming from. But I think, you know, the fact that everybody is trying to frame their arguments into text and history, I think is a positive sign for the judiciary.

[00:48:29] Jeffrey Rosen: Well, maybe one final round on this question, Vik, Jason says that it's a positive sign for the judiciary that people are framing our arguments in terms of text and history. But he also suggests that the history is quite malleable and both sides can reach opposite conclusions based on it. You filed a liberal originalist brief. Based on this case, do you believe that the history constrains judicial discretion or not?

[00:48:52] Vikram Amar: I think it does. I don't think it's malleable in this case, I think often history doesn't yield a single answer. This is an unusual case because the history is so lopsided. I'm gonna give Jason an opportunity right now to explain, if the, if legislature means legislature, how did Massachusetts and New York involve governors and judges permissibly, in 1789, and 1791? I wanna hear, what his answer to that is. And I also want him to hear, to tell me what prominent credible historian has embraced a strong version of ISIL.

[00:49:22] Jeffrey Rosen: All right, Jason, if you don't mind answering those historical questions, that'd be great. And then we'll have closing arguments.

[00:49:26] Jason Torchinsky: So I'm not a historian, and I didn't study any of the original historical documents here. You know, I've read some of the briefs, but I think, you know, the, the two questions that you posed here to me, I think were posed to David Thompson. And he kind of rejected that view of them.

[00:49:43] Vikram Amar: No, I wanna know why and how not that. I wanna get into substance. You keep saying history is not lopsided here. Tell me what Thomson said that convinced you that there's an argument on the other side.

[00:49:54] Jason Torchinsky: I mean, you know, when Thompson in his oral argument, had a count of, of colonies that he thought supported his view, and he had it at like 12 to one. So, you know-

[00:50:06] Vikram Amar: As I said, I just pointed out New York and Massachusetts, that's two, and the other colonies didn't ever, they didn't do anything that contradicts Massachusetts and New York, they just didn't happen to have governors and judges involved. But how could any of them have governors and judges involved if it was open only to the elected legislature? It's a very simple question. Unless those two states were violating the Constitution from the get-go.

[00:50:28] Jason Torchinsky: Look, I mean, [laughs] Vik, I don't know what to tell you, other than everybody's got a different view of this. You have your view-

[00:50:35] Vikram Amar: Yeah that tells me everything.

[00:50:36] Jason Torchinsky: You've written your brief, but everybody has their own view of how to read that history.

[00:50:41] Jeffrey Rosen: All right. Well, I appreciate this thoughtful exchange about history. And I know that We the People listeners can read the transcripts of the oral arguments and read the briefs and make up their own mind. I think it's time for closing arguments in this very good discussion, which has helpfully distilled the areas of agreement and disagreement on the Supreme Court. And now I'd love each of you to make the case to We the People listeners for how you think that case should come down.

[00:51:10] Jeffrey Rosen: Vik Amar, how should the Supreme Court decide the Moore case? And why do you believe that the court should uphold the North Carolina Supreme Court's decision in Moore versus Harper?

[00:51:23] Vikram Amar: Well, certainly the court should as I think, Jason and I agree, it will reject the notion that state legislatures are not bound by the state constitutions, that they're not hemmed in by governors, that they can't be displaced by independent commissions. So this case comes down to how explicit the text in a state constitution has to be before state court can enforce it.

[00:51:47] Vikram Amar: And on that question, and in the context of the North Carolina case, I think most provisions of most constitutions are relatively open ended, due process, equal protection of law case and controversy in the

federal constitution. And that's what courts do, they take broad phrases that embody broad principles and apply them to new and emerging situations. I don't sense that the North Carolina Supreme Court did that in a non-traditional non-judicial way here.

[00:52:15] Vikram Amar: But again, I'm no expert in North Carolina constitutional law, I'm open to the possibility that this was kind of an outlying decision that really isn't in keeping with North Carolina constitutional interpretation. But on the face of it, it seems to me rather garden variety implementation of an old norm to new settings. And if that runs afoul of, whatever standard the court analysis, then that's a big and problematic deal.

[00:52:42] Jeffrey Rosen: And Jason, last word is to you. Please tell We the People listeners why you think the North Carolina Supreme Court violated the Constitution.

[00:52:50] Jason Torchinsky: I think the North Carolina Supreme Court violated the Constitution because it was acting like a legislature. It was not interpreting existing law, it was literally making it up out of whole cloth. And I think that really bothers a majority of the Justices, and I think they're gonna reverse the North Carolina Supreme Court.

[00:53:08] Jason Torchinsky: I think that you know, the most likely path forward is that some version of Justice Rehnquist's Concurrence in *Bush v. Gore*, becomes a majority opinion. And I think that may be where we're headed after listening to the oral argument.

[00:53:23] Jeffrey Rosen: Thank you so much, Vik Amar and Jason Torchinsky for a thorough, comprehensive and illuminating discussion of Moore versus Harper and the independent state legislature doctrine. Really appreciate your convening several times to help We the People listeners understand the arguments on both sides of this case, and dear We the People listeners, thank you for engaging those arguments. Vik, Jason, thank you so much for joining.

[00:53:50] Jason Torchinsky: Thanks for having us.

[00:53:51] Vikram Amar: Thank you both so much.

[00:53:55] Jeffrey Rosen: Today's show was produced by Melody Raoul and engineered by Dave Stotts. Research was provided by Sophia Gardell, Sam Desai, and Lana Ulrich, please rate, review and subscribe to We the People on

Apple, recommend the show to friends, colleagues or anyone anywhere who is eager for a vigorous yet still civil dose of constitutional debates.

[00:54:14] Jeffrey Rosen: And always remember the National Constitution Center is a private nonprofit. The holidays and New Year are coming up, it would be wonderful if you could make a gift of any amount \$5, \$10 or more to signal your support at the end of the year for this meaningful mission of constitutional education and debate. It's so wonderful to learn with you, dear We the People listeners every week, and I'm sending you all sorts of good wishes for the Holidays from all of us at the National Constitution Center. Happy New Year and see you in 2023. On behalf of the National Constitution Center, I'm Jeffrey Rosen.