

The Supreme Court Rejects the Independent State Legislature Theory

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[00:00:00] Jeffrey Rosen: This week, the Supreme Court handed down *Moore v. Harper*, a significant decision regarding elections in America. In a six to three ruling, the court rejected the independent state legislature theory and found that the election clause does not give state legislatures exclusive power over elections.

[00:00:18] 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, nonprofit, chartered by Congress to increase awareness and understanding of the constitution among the American people.

[00:00:38] Jeffrey Rosen: Joining us to discuss the *Moore* decision and what it means for the future of elections are Judge Michael Luttig and Professor Evan Bernick. Judge Michael Luttig, served on the US Court of Appeals for the Fourth Circuit. He is a trustee of the National Constitution Center and he served as co-counsel for the respondents in *Moore v. Harper*, and has written extensively about the case. Judge Luttig, welcome back to *We the People*.

[00:01:04] Judge Michael Luttig: Thank you, Jeff. It's a a pleasure to be on with you today.

[00:01:08] Jeffrey Rosen: And Evan Bernick is Assistant Professor of Law at Northern Illinois University College of Law. He filed a brief in the case in support of *Harper* and is the co-author of *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit*, which he co-wrote with Randy Barnett. Evan, it's great to welcome you back to *We the People*.

[00:01:27] Evan Bernick: Thank you Jeff for the invitation. It's an honor to be here sharing space with Judge Luttig.

[00:01:32] Jeffrey Rosen: Judge Luttig, you have called the Moore case one of the most important cases for American democracy since America's founding. Tell us why and what you think of the decision.

[00:01:43] Judge Michael Luttig: Jeff, in short, this is now the most significant case in American history for democracy and also for representative government in America. That's because at stake in Moore v. Harper was the interpretation of the independent state legislature theory of interpretation, which would apply equally under both the electors clause and the elections clause of the Constitution.

[00:02:20] Judge Michael Luttig: And as applied to under both of those clauses, it would have dramatically altered federal elections in the United States from the way in which those elections have been conducted since the founding of the country. In particular, the most aggressive version of the independent state legislature theory in the context of the elections clause, which was the context in which Moore v. Harper arose. Would give the state legislatures unreviewable power and authority to conduct the federal elections in the states in accordance with the legislature's enactments without regard to the state constitutional provisions that, that might operate on that, those legislative enactments.

[00:03:32] Judge Michael Luttig: And by the way although Moore v. Harper arose in the context of redistricting by the North Carolina legislature, the elections clause applies to all regulations of federal elections in the states by the state legislatures.

[00:03:52] Jeffrey Rosen: Evan Bernick, Judge Luttig has just said that Moore and Harper is the most important constitutional case since America's founding. Do you agree, or disagree?

[00:04:01] Evan Bernick: So, I do believe that it is immensely important case, and I really do want to thank Judge Luttig for all the work he's done as a conservative jurist to highlight the dangers that the independent state legislature claims that the court rejected, presented to democracy, and to name and oppose those who have propagated it, to what Donald Trump and his allies.

[00:04:21] Evan Bernick: Besides being right on the merits, I'm enough of the legal realist to think that arguments like his coming from a conservative judge with a sterling record of defending the rule of law matter more to the court's conservatives who joined the majority opinion than say mine. So, thank you for everything that you've done. And yeah, let's talk about the case.

[00:04:41] Evan Bernick: So, the Supreme Court did not reject independent state legislature theory as such, it rejected a couple of claims, particularly pernicious, I think, claims about state legislative power under the federal constitution. And I wanna talk about exactly what I mean by that.

[00:05:08] Evan Bernick: Independent state legislature theory has always been a they rather than an it. It comes in various forms, which I'm just gonna categorize for the sake of discussion as big, medium, and small. So, big ISL, the worst form of the independent states legislature or the worst independent state legislature theory among independent state legislature theories was the form in which it was defended by the North Carolina legislature. Holds that state legislatures are empowered by the Federal Constitution to make rules governing federal elections, even if they violate their own state constitutions in doing so. They have plenary power to make election rules as they choose, and state supreme courts can't stop that because of the Federal Constitution. Court rejects that.

[00:05:56] Evan Bernick: The medium independent state legislature theory was kind of a fallback position, and it said, "Well, state legislatures are empowered by the federal constitution to make federal election rules, but state supreme courts can review those rules for conformity to constitutional procedure, procedures laid out in state constitutions, but not constitutional substance." Like say the free and fair elections clause that was interpreted in this case by the North Carolina Supreme Court.

[00:06:31] Evan Bernick: But then there's a small form of the independent state legislature theory that says, "Look, state legislatures are empowered by the Federal Constitution, and they can presumptively make federal election rules." But state supreme courts can review those rules and hold them unconstitutional, so long as they don't do anything too wacky. If they do something too wacky, that could provide a basis for federal courts intervention on behalf of state legislatures.

[00:07:04] Evan Bernick: And the courts accepted that. The courts in part five of the opinion says, "We're not rejecting the proposition that federal courts have some role to play in monitoring state supreme court interpretations of their own constitutions in the election setting. We're just not saying that state legislatures are completely untrammelled by state constitutions." And that invites the question, just how big is the Federal Court's role in ensuring that state legislatures are able to exercise what the court says is their Article 1 power to make election laws? Just how wacky does a state court's interpretation of their own constitution have to be to justify federal court intervention?

[00:07:53] Evan Bernick: The court does not say, leaves it open, and therefore the court is going to have to play a role in coming election seasons to determine in the face of claims that will inevitably be raised about state supreme courts going too far, doing things that are too wacky and figuring out whether they have violated the Article 1 elections clause in doing so.

[00:08:19] Jeffrey Rosen: Thank you for flagging the open questions after the majority decision. In understanding how broad the version of the independent state legislature theory the dissenters adopted, why don't we begin with the dissent? And Justice Thomas joined by Justices Gorsuch and Alito with regard to the mootness question say, "The question presented was whether the people of a state can place state constitutional limits on the time, places, and manner of holding congressional election at the legislature. The state has the power to prescribe." And Justice Thomas agreed with the petitioners who said no.

[00:08:56] Jeffrey Rosen: Judge Luttig describe Justice Thomas' reasoning on what grounds did he accept the independent state legislature theory and how broad a theory did he accept?

[00:09:06] Judge Michael Luttig: Jeff, let me first say that Professor Bernick is exactly correct in what the court, in saying what the court did and did not do. Most significantly, the court rejected the version, if you will, of the independent state legislature theory that was advanced by petitioners. It sounds to me as if Professor Bernick disagrees that with their argument to the court, as do I.

[00:09:37] Judge Michael Luttig: Second Professor Bernick discussed essentially the central claim by petitioners that state courts could limit those state legislature's powers on procedural matters procedurally, but not on substantive matters. And as a professor who pointed out the Supreme Court roundly rejected that dichotomy and distinction, which petitioners had argued was most consistent with the court's prior precedents.

[00:10:15] Judge Michael Luttig: The court said, in his opinion yesterday that no, that there are precedents supported no such substance, this procedural versus substance distinction. And then, of course, the professor is also right in what the court did not decide, which we'll get to in a minute.

[00:10:34] Judge Michael Luttig: But turning to your question specifically I think it's fair to say that Justice Thomas to join by Justice Gorsuch agreed with the principle argument made by petitioners that the constitution commits the power and authority to prescribe the time, place, and manner for holding elections to the state legislatures. And in so doing agreeing that, that is a plenary

authority that cannot be limited by any other state official, or institution including the respective state constitutions.

[00:11:22] Judge Michael Luttig: And in that way embrace the arguments by petitioners essentially wholesale. And implicitly, if not explicitly rejecting what I believed and the majority ended up believing was the compelling history since before the founding up to and including the ratification and for almost 250 years since. The consistent unbroken practice of state courts applying their state constitutions to their state legislatures, federal and state election laws.

[00:12:14] Judge Michael Luttig: In summary and I should say Jeff and professor, I've not had a chance to read the dissents. But from all that I have read about them, I believe that it would be fair to say that they accepted the petitioner's arguments in the lion's share of them at least.

[00:12:35] Jeffrey Rosen: They did indeed. I'll read from the three premises that Justice Thomas invokes to support his conclusion and then ask you about them, Professor Bernick. He says the first premise is that the people of a single state lack any ability to limit powers given by the people of the United States as a whole. The second is that regulating time, places, and manners of congressional elections has to be delegated rather than reserved to the states.

[00:13:02] Jeffrey Rosen: And the third is that the legislature thereof does not mean the people of the state, or the state is an undifferentiated body politic, but rather the lawmaking power as it exists under the state constitution. This premise comports with the usual constitutional meaning of the word state and legislature, as well as this court's precedent. Professor Bernick, can you unpack for us why Justice Thomas derives from those three premises the conclusion that he does?

[00:13:29] Evan Bernick: So I wanna flag a remarkable feature about the second premise that Justice Thomas indicates here being that regulating the times, place, and manners of congressional elections is no prerogative of state power. So, that such power had to be delegated to rather than reserved by the states.

[00:13:53] Evan Bernick: In support of that proposition, Justice Thomas cites Justice Story and also *US Term Limits v. Thornton*, a 1995 case from which Justice Thomas dissented on the grounds that the power to regulate the times, place, and manner of congressional elections was not delegated by the Federal Constitution to the states, but was a specification of power that states already had.

[00:14:31] Evan Bernick: How Justice Thomas has come to a view about the elections clause, namely that it grants power to state legislatures rather than specifies the exercise of existing power and empowers Congress to override the exercise of that power is something that goes unexplained in this opinion and to my knowledge isn't explained anywhere else.

[00:14:59] Evan Bernick: I think that Justice Thomas was right the first time. The courts itself, the majority in this case, states what I think is an accurate characterization of what the elections clause, this part of the elections clause concerning times, place, and manner is doing. It says shall. Shall is duty imposing language. The clause takes existing power and directs it to be exercised in a particular way. It does not, and this is why Justice Thomas' second premise fails, it's not given to states by the Federal Constitution, and therefore there is no federal role that you can infer in the part of federal courts to monitor its exercise.

[00:15:51] Jeffrey Rosen: Thank you very much for unpacking that aspect of Justice Thomas' second premise. Judge Luttig, let me ask you about the third premise, which is that the legislature thereof doesn't mean the people of the states as an undifferentiated body politic, but the lawmaking power as it exists under the state constitution.

[00:16:08] Jeffrey Rosen: Is Justice Thomas basically saying the meaning of the word legislature is clear, it doesn't include state constitutional review, and therefore we don't have to look at all of that founding era history, and precedent, and practice, and tradition suggesting that state courts could review legislative decisions? Or do I have that wrong?

[00:16:30] Judge Michael Luttig: No. You have exactly right and so does Professor Bernick. This is the central issue in the case. And for me, it began when I first got into the case and learned that all of the parties, all of them, everyone who had discussed the case to my knowledge were arguing the textual point that the conferral of power to whomever is upon the legislature.

[00:17:06] Judge Michael Luttig: The petitioners were arguing that because it was committed to the legislatures as distinguished from the states, for instance, that, that confirmed that it was plenary authority up on the legislatures that could not be affected much less overridden by the other state actors if you will.

[00:17:33] Judge Michael Luttig: Then for the respondent's part, they were arguing that the term legislature did not mean just the body responsible for an passage of laws in the given state, but rather it referred to the whole of the

legislative process, which they contended included any gubernatorial action that was required or not, and that would be permitted or not, such as a gubernatorial veto. But also, review of the legislature's enactments by the state courts.

[00:18:18] Judge Michael Luttig: So when I came first to the case, and you know this, Jeff I was convinced that neither side was right. And then I eventually wrote that to state the question that way is only to begin to answer it. It's not to answer it at all, contrary to what both parties believe.

[00:18:43] Judge Michael Luttig: And so you know, as I wrote in for the Atlantic in a couple of articles, I said, "Look, you know, I am actually 100% sure that the text of the Constitution is referring to the state body that enacts laws." And then we have to ask ourselves as a matter of originalism, how ... What did the framers of the constitution believe about that conferral of power upon the body responsible for passing laws.

[00:19:18] Judge Michael Luttig: And from that then I designed the argument that in essentially these terms that the framers of the constitution because of the prior practice, not just in the United States, but in Great Britain. They understood and accepted that the enactments by the state legislatures would be reviewed by the state courts for consistency with the respective state constitutions.

[00:19:48] Judge Michael Luttig: But then fast-forward to the argument and I subsequently wrote a piece for the Atlantic where I analyzed essentially every significant question at the argument and one of the points I ... One of the biggest points I made in that article was that there was there was hardly a single question about the meaning of legislature in the constitutional text.

[00:20:16] Judge Michael Luttig: And I said that the most reasonable inference from that complete absence of questions was that all the members of the court were generally assuming that, however legislature is defined, the question becomes one of originalism as to what the framers of the Constitution understood and intended.

[00:20:47] Judge Michael Luttig: And so I think this is one of the most remarkable facts about this case and will be for the rest of history. The court and the majority, of course, did go ahead and define legislature in the way that I believed and petitioners believed is required to mean that, you know, the body responsible for the enactments of law. But then as Professor Bernick says you know, Justice Thomas in dissent with Justice Gorsuch really begged off of that question seemingly unwittingly.

[00:21:24] Jeffrey Rosen: Thanks so much for flagging that central question. We did indeed discuss it. You were counsel to my brother-in-law, Neal Katyal, who argued the case, and we were brainstorming about the central question of the dispute about the meaning of legislature.

[00:21:40] Jeffrey Rosen: And then just help me understand as a methodological question. Is Justice Thomas saying, you know, there may be a dispute among the parties about what legislature meant at the time of the framing, but I, Justice Thomas, I'm convinced that it must have just meant legislature without any judicial review? And therefore, because I think that meaning is clear, I just don't have to look at all of the overwhelming practice, and history, and tradition, and context to the contrary?

[00:22:08] Evan Bernick: The short answer to that question is yes, but let me elaborate it a little bit. So, Justice Thomas with the third premise that legislature means elected representative body consisting of lawmakers is effectively fighting a battle that he and also Chief Justice Roberts lost in a 2015 case. That case I'll just refer to as AIRC for Arizona Independent Redistricting Commission involved the constitutionality of an Arizona ballot initiative whereby voters amended Arizona's constitution to remove redistricting authority from the Arizona elected representative body legislature. Invest that authority in an independent commission.

[00:22:57] Evan Bernick: And a divided court said that the meaning of legislature in the Constitution is broad enough to accommodate the drawing of a congressional map by an unelected body that makes laws in the form of a commission. Why? The majority ... This is Justice Ginsburg. Defined the word legislature to include effectively the law making power of the states through whatever means law is made by the states. It could be a ballot initiative, it could be an unelected body empowered by a ballot initiative. It doesn't necessarily mean elected representative body.

[00:23:48] Evan Bernick: And Chief Justice Roberts joined by Justice Thomas dissented and marshals, you know, an impressive amounts of textual and historical evidence in support of the proposition that legislature means what we intuitively think of as legislature.

[00:24:08] Evan Bernick: Chief Justice Roberts has apparently been persuaded if by nothing else by the then the force of precedent that right or wrong, as a historical matter, the law is that legislature is very broadly defined and include more than Justice Thomas thinks it can.

[00:24:31] Evan Bernick: As a matter of how do we go about this as an original matter, we really can't just look at the word legislature and say, "Hmm intuitively, what does that sound like to us?" We need to immerse ourselves in the founding era in the institutions that's existed during that era, including institutions that don't always look exactly like what we intuitively think legislatures are.

[00:24:58] Evan Bernick: Look at what people were saying, look at what they were doing and come to a conclusion on the basis of that rather than just intuitions about what the word would naturally mean to us. Because what's natural to us might not have been natural to them.

[00:25:15] Evan Bernick: The final point I wanna make about this though, is that even if Justice Thomas is right, even if Chief Justice Roberts was right that legislature means elected representative body, it doesn't get Justice Thomas to where he needs to go to be right on the merits of Federal Court's role in evaluating state supreme court's performance. He's got three premises. The first power is delegated by the Federal Constitution. Okay, fine.

[00:25:45] Evan Bernick: Second premise, it's delegated by the elections clause to state legislatures. If that fails, it doesn't matter what legislatures are. There's no federal constitutional rights that state legislatures can claim to make laws, and I think that second premise is the most vulnerable premise, and it's the one that the Supreme Courts ultimately seemed to reject before then coming back to in part five, which I'm sure we can get into.

[00:26:16] Jeffrey Rosen: Judge Luttig, one more beat on this, because I know that this, of course, is the question that motivated you to get involved in the case to begin with. As an interpretive matter, how is it possible to claim that if the meaning of the word legislature is so clear that it couldn't possibly include state judicial review, that, that can trump all the overwhelming evidence that the original public meaning was something else. How would you characterize this, let's call it new textualism or new formalism that could reach such a conclusion?

[00:26:50] Judge Michael Luttig: Well, you know, to be as charitable as to Justice Thomas as I can be it's not possible to reconcile those. And neither is it a new formalism of the kind you talked about. It is just straightforwardly not textualism. That is the implications that he draws from his interpretation that legislature means the legislative body specifically and only.

[00:27:24] Judge Michael Luttig: I always thought that it was just self-evident that, that textual argument couldn't carry the day as a matter of constitutional

textualism because in so many other places in the Constitution does the Constitution confer power upon a named official entity like the executive, for instance, or even the judiciary? And no one has contended since the day of the Constitution was ratified that with respect to the non-judicial branches of government that I just mentioned. That because the power was conferred on the legislature or on the executive, that their actions are not reviewable under the Federal Constitution.

[00:28:31] Judge Michael Luttig: So, I have never seen this instance which involves obviously federal power that has been accorded the state legislatures any different than the constitutional conferral of powers upon the legislature to promulgate laws and the executive to execute the laws. So I'm mystified that anyone would put that any justice of the Supreme Court would put that down on a piece of paper.

[00:29:07] Evan Bernick: At the risk of turning this into a Justice Thomas versus Justice Thomas podcast, I can't resist that the only arguable founding era authority that Justice Thomas cites for the proposition that legislature being elected, representative body exclusively and nothing else is Joseph Story, who Justice Thomas disparaged as an authoritative interpreter of the Constitution in his dissent in *US Term Limits v. Thornton*.

[00:29:44] Evan Bernick: And the courts, the majority reminds him of that in the majority opinion by pointedly citing Justice Thomas for the proposition that Story is too remote to be a reliable authority with respect to original Meaning.

[00:29:59] Jeffrey Rosen: Well, let's turn to that majority opinion. Chief Justice Roberts mustered many interpretive tools on behalf of his conclusion, including text, original public meaning precedent, historical practice. Judge Luttig, tell us about Chief Justice Roberts' arguments and whether you found them convincing.

[00:30:22] Judge Michael Luttig: Jeff, maybe the first thing I would note is that the majority opinion by the Chief Justice adopted literally every material argument made by respondent's common cause and by your brother-in-law, Neal Katyal straight down the line.

[00:30:41] Judge Michael Luttig: And so as to what I thought about it, I thought it was ... I objectively I thought it was the correct in reasoning to the correct unavoidable, you know, conclusion. You know, I wouldn't call it a particularly masterful opinion because the briefing by all of the parties, not just common cause was extraordinarily a superb briefing.

[00:31:13] Judge Michael Luttig: And so, whoever wrote in the case and in this instance, the chief justice, you know, all he had to do, not that this is nothing to decide, you know, the case and then decide the roadmap for writing the opinion. And once he decided the case, the way he was going to, the roadmap had been presented by the parties.

[00:31:39] Judge Michael Luttig: You know, this is worth noting for this podcast in particular that, ... And you know this, Jeff. From the moment I first came into the case, I didn't think there was any question whatsoever. In fact, after the argument I said publicly though guardedly of course, that I would not be surprised were there nine votes on the Supreme Court to reject the most aggressive independent state legislature theory that was advanced by the petitioners.

[00:32:20] Judge Michael Luttig: You know, yesterday's ruling was exciting for me. But well, I'll tell you what. I did a podcast with Dahlia Lithwick yesterday, [laughs] and she said, "Well, Judge you told us so." You know, I laughed and I said, "Well, yes, Dahlia, I never have had any doubts about this case in the world." And Dahlia said, "I'm going to have t-shirts made up for you that said, I told you so."

[00:32:53] Evan Bernick: [laughs]

[00:32:53] Judge Michael Luttig: So, and she's serious about doing that, so I won't wear them, but I would love to have it.

[00:33:01] Jeffrey Rosen: [laughs] Excellent. Look forward to Dahlia's t-shirts. Evan, there was much that was striking about the majority opinion. Chief Justice Roberts' defense of judicial review struck me as perhaps the most extensive defense of the consistency of judicial review with the original understanding of the constitution that the Supreme Court has ever handed down since Marbury. What do you think of that and what struck you about the majority opinion?

[00:33:28] Evan Bernick: Yeah. So, it's kind of a tour of the legitimate modalities of constitutional interpretation. You've got arguments from history, you've got arguments from text. You've got arguments from first principles that constitutions in the United States, whether they are state or federal, do not repose absolute power in any institution because every power of government under American constitutions is delegated and limited. That judicial review preexisted the constitution.

[00:33:59] Evan Bernick: We first saw it in under state constitutions. That's what served as the pattern of judicial review that Chief Justice Marshall memorably defended. Didn't create because it already existed in *Marbury v. Madison*. We've got lots of precedent too. If there's any modality that I think really dominates the discussion, although the discussion of first principles being front and center is I think, notable. And you know, the most impressive rhetorically part of the opinion is precedent. We just got precedent, precedent, precedent. Even precedents that Chief Justice Roberts himself was on the wrong side of.

[00:34:40] Evan Bernick: And finally, we have state practice, institutional practice sustained over the course of time. So, pick your modality. Chief Justice Roberts is kind of conveying with this opinion. Big ISL loses against it badly. And even medium ISL you know, the substantive procedural distinction loses badly under it.

[00:35:05] Evan Bernick: So, I agree with Judge Luttig that it is not. It's not an opinion that really calls attention to itself a ton. You know, it gets the, it gets the job done, but I think that might be kind of the points. And, you know, it's early in the week for me to be identifying it as the theme of this Supreme Court term. This idea that, "Hey, we're kind of still following precedents and hearing to first principles and doing law here."

[00:35:32] Evan Bernick: But to the extent that is a theme of some decisions. You know, I'm thinking of the precedent heavy decision to uphold the Indian Child Welfare Act last week. This opinion is consistent with that theme.

[00:35:47] Judge Michael Luttig: Jeff, may I just add a point?

[00:35:49] Jeffrey Rosen: Please.

[00:35:50] Judge Michael Luttig: If I had been writing the majority opinion for the court I can't imagine that I would have ever referenced *Marbury* against *Madison* and the power, you know of the judiciary emphatically to say what the law is. I just think that's singularly inapt in this case. It's just a straightforward interpretation of the Constitution drawn into question was never a power of the Supreme Court of the United States to declare what the law is.

[00:36:31] Jeffrey Rosen: That raises the question we've deferred until now. And then the question of mootness. And I gather that Neal Katyal and common cause persuaded the majority not to allow the case to moot on the ground, that this would allow challengers basically to get advisory opinions out of the

Supreme Court and then moot them out by changing the facts. And this would be a challenge to the court's ability to be the final word on the law. Evan, any thoughts on the mootness question?

[00:37:03] Evan Bernick: So I am not a fed courts expert, and I'm not as adept of these doctrines governing jurisdiction as others might be. I will say, however, that the debate that Justice Thomas and Chief Justice Roberts are having about mootness is it's barely a debate. They're talking past each other.

[00:37:28] Evan Bernick: So, Chief Justice Roberts says, "Look we've got a judgment here. We have a judgment that this statute or this map was unconstitutional." And even though the Supreme Court below has reversed the reasoning that underpinned that judgment that the map was unconstitutional, the judgment is still there, and that gives us jurisdiction. It's not moots.

[00:38:01] Evan Bernick: Justice Thomas responds, "Well, look there's a map." Yes, the court said it was unconstitutional and couldn't go into effect, but that constitutional reasoning has been overruled. So, all that's left is the can't go into effect part, and that part is meaningless. The map is still there, it's still a statute. Nobody erased it from the books. And now, there's no rule saying it's unconstitutional.

[00:38:23] Evan Bernick: No legislators are gonna be liable to contempt, sanctions, or jail time. Nothing prevents the state from either enacting or implementing any districting plan. There's actually no judgments that affects the interests of any individual parties, and therefore this is not a case or controversy that we can take up and judicially review.

[00:38:48] Evan Bernick: Citing *Marbury v. Madison*, I think pointedly, he says that is beyond the judicial power. So, there's just a basic disagreement about the scope of the judicial power that's going on. I think that Justice Thomas scores some points in this regard, but I also think that to the extent that I do understand these just disability doctrines, they're very malleable. There's a lot of play in the joints, and he's not obviously right in a way that makes me doubt the, you know, the prudence or the legality of what the court decided to do here.

[00:39:24] Jeffrey Rosen: Judge Luttig, unless you have further thoughts on the mootness question, if you do, please share them. And if not, I wanna turn to the question of the standard under which federal courts are free to review departures from the legislative scheme that the legislature has enacted. Chief Justice Roberts is a little vague about what exactly that standard is. Justice Kavanaugh stresses that he thinks that there is federal power that remains.

You've criticized the malleability of the standard that the court ended up adopting. So tell us about why.

[00:40:02] Judge Michael Luttig: Jeff do let me make this one comment about the mootness discussion in the court's opinions. There was no grand thinking going on there at all. The majority applied, you know, one of the most traditional analyses for mootness that the court has had for, you know, two centuries namely as Professor Bernick said. You know, is there still a judgment left for us to review? That is, will there be consequences for the two parties if we proceed to decide the case?

[00:40:42] Judge Michael Luttig: And in this case, there certainly was. As the professor mentioned, it was the 2021 map, which by its decision yesterday, the Supreme Court of United States resurrected [laughs] and as of today applies. So I think of Justice Thomas' arguments as really probably an angry and unthinking assault on one of the most traditional definitions of mootness in the court's history.

[00:41:19] Judge Michael Luttig: Turning then to the standard of review. First you know, as I had written in the Atlantic article, first Atlantic article, this is the hardest issue in the case. And in the article, I explained it all and I explained first that the reason there is no discernible standard is because the Constitution never intended for there to be a federal judicial review of a state supreme court's decision interpreting its own state constitution. And I'm as convinced, more convinced of it today than I was then.

[00:42:00] Judge Michael Luttig: Fast-forward to the argument and the court, the court didn't even broach the issue. It was I won't say an embarrassing moment, I'll just say it was an unfortunate moment for the court, but understandable because the court did not then have any earthly idea what standard it might impose. And the decision yesterday confirms that they don't have any earthly idea today what standard they would impose.

[00:42:43] Judge Michael Luttig: So remember, an argument, it was bordered on the silly the court and the parties discussed whether the standard should be sky-high or astronomically high. And that was the summon substance of the so-called serious discussion.

[00:43:08] Judge Michael Luttig: Now, to the extent that they even talked about the Bush v. Gore standard, then there was very little discussion of that too. I had written and still believe today that standard is singularly inappropriate in a constitutional context where the federal courts are reviewing a state

constitutional decision. And whereas the Bush v. Gore, of course, concerned a state statutory provision. And, of course, we all know the state statutes are drafted much differently than broad open-ended glorious constitutional provisions.

[00:43:52] Judge Michael Luttig: So they will never apply the Bush v. Gore standard in the constitutional context. And it's for all these reasons is the majority didn't even purport to articulate a standard. For your listeners. All that the court said was that state supreme courts in applying their state constitutions in the ways that they traditionally do should avoid irrigating unto themselves. The power that's conferred on the state legislatures by the Federal Constitution.

[00:44:34] Judge Michael Luttig: That of course is not a standard at all. To the extent that they, that they were suggesting anything there, the court was suggesting that a distinction between the state supreme court's, acting judiciously and acting legislatively. And as I said in the one of the Atlantic articles, that's been a very powerful, effective figure of speech that has meaning in the context in which has been used. Which has been to curb judicial activism for the past 25 or 30 years.

[00:45:21] Judge Michael Luttig: But as I said in that article it's not a standard of for judicial review at all, because it is a matter of constitutional fact that when a court rules, it is acting judicially, it is not acting legislatively. The court never acts as a legislature, even though it's that phraseology has been very useful in the past.

[00:45:53] Judge Michael Luttig: So this is the next case. I, for one, don't think that the court will take another case you know, on this question in particular until or unless a state supreme court issues an opinion that is so egregious in that it cannot be said that it was judicially interpreting its own constitution.

[00:46:21] Judge Michael Luttig: I can't even imagine that situation at all, especially given what this state supreme court in North Carolina did. And to the conservatives, I will say this was about as egregious a case as they could have ever imagined, and the Supreme Court affirmed that decision, granted without reaching the question of whether the state supreme court had had misapplied state constitutional law. Nonetheless, it's very significant that the Supreme Court yesterday affirmed that particular state supreme court decision.

[00:47:08] Jeffrey Rosen: Thank you for sharing your critique of the majority's judicial review standard, the ordinary bounds of judicial review. Justice

Kavanaugh clarified that by saying he would adopt the straightforward test of *Bush v. Gore*, which would hinge on whether a state court impermissibly distorted state law beyond what a fair reading required. I had the sense that Justice Thomas' critique of this part of the majority decision may have been influenced by your writings, Judge Luttig. And I wonder Evan Bernick, do you agree with Judge Luttig's critique of the judicial review standard, or not?

[00:47:45] Evan Bernick: I would go even further. Not only do I agree with the lack or the critique of the lack of the standard that the court articulated, but I would say that there was no reason for the court to say that there is a role for federal courts in determining in the context of the election clause, whether state supreme courts have gone so beyond the reasonable bounds of judicial review as to functionally be legislating or doing something else without articulating a standard at all.

[00:48:23] Evan Bernick: So, there is basic agreements about the proposition that there are some things that state supreme courts could do that would trigger an obligation on the part of federal courts to intervene. If a state supreme court interprets state law in a way that abridges the obligations of contracts or that takes property without just compensation. Well, those are federal constitutional rights. And state supreme courts can't interpret their own state constitutions in ways that violate federal constitutional rights.

[00:49:01] Evan Bernick: And the courts, you know, states those basic propositions and says, "Everybody agrees that there's some role for federal courts in ensuring that state courts don't do whatever they want." But it doesn't follow from that, that it can do what the *Bush v. Gore* concurrence intimates it can do under the authority of the elections clause, which is determine whether the state supreme Court has acted in a sufficiently unjudicial way in evaluating a state selection laws to justify the federal the federal courts in getting involved.

[00:49:39] Evan Bernick: If federal right is at stake, of course, the federal courts can get involved, but the court doesn't establish that there is a federal rights on the part of state legislatures to make federal election laws at stake at all. Earlier, in the opinion, Chief Justice Roberts describes the elections clause as imposing a duty on states, not conferring a power which could, in theory, give rise to a right to make election laws. But all of a sudden in part five, it's a power now.

[00:50:13] Evan Bernick: The elections clause expressly vest power to carry out its provisions in the legislature. All of a sudden, some form of, you know, call it ISL, call it not quite ISL but similar enough to raise concerns about

federal intervention in state supreme court interpretation. We got something here, and the court didn't have to say that something. It could have just said, "State courts don't have free rein if they violate federal constitutional rights like contract rights or property rights." But it didn't do that. It said this additional stuff and cited the Bush v. Gore concurrence.

[00:50:52] Evan Bernick: And all of a sudden, we're litigating, we will be litigating claims in the future that state supreme courts have in the context of election laws go above and beyond whatever the ordinary rules of judicial review the court has in minds in interpreting their own state constitutions.

[00:51:14] Evan Bernick: And this goes to what I think is, you know, a cogent argument within the dissent about effectively inviting litigation and nebulous judicial review of state supreme court judgements. To be clear, the Gorsuch-Thomas alternative is much worse, but this isn't great either. And even though the opinion in general I think is very important for the reasons that Judge Luttig has discussed and meets, you know, my most optimistic projections about what the court might do with big ISL, this is an unforced error, and it's one that's gonna be litigated, and it's not one that I expect to be entirely harmless or uncontroversial.

[00:52:01] Evan Bernick: Justice Kavanaugh is obviously staking out some initial ground that I think leans in the direction of more rather than less federal court intervention and state supreme court interpretation. And so, you know, stay tuned and be a little bit concerned.

[00:52:19] Jeffrey Rosen: Well, it's time for closing thoughts on this extremely illuminating and productive discussion. And Judge Luttig, I'll ask for yours first. When we began discussing the case, I suggested that some of the confusion arose from the fact that Bush v. Gore itself was impossible to reconcile with the original understanding of the equal protection clause whose framers never intended to cover political rights at all.

[00:52:44] Jeffrey Rosen: And the efforts of the court to make up standards flowed from that era. Having studied this so closely and made such a powerful contribution to the disposition of the case, Judge Luttig, do you feel that the same error is arising out of unoriginalist construction of the elections clause? And more broadly, how should our listeners think about this extraordinarily important case?

[00:53:12] Judge Michael Luttig: Well, I think if anything that the majority's opinion yesterday is a reaffirmation of the restraint that adheres in originalism.

And it's the Rehnquist concurrence in *Bush v. Gore*, and the court's decision in *Bush v. Gore* that represented the departure from that traditional traditional and originalist interpretation of the Constitution.

[00:53:49] Judge Michael Luttig: So then if I may, I'll just return to Professor Bernick's final point in my closing. I think he is exactly right that properly interpreted the only limits on the state supreme courts in their interpretation of state legislative enactments is the Federal Constitution and the federal constitutional rights that are provided for in our constitution.

[00:54:25] Jeffrey Rosen: Thank you so much. And last word in this memorable discussion, Evan Bernick, to you.

[00:54:32] Evan Bernick: So, I think everybody should be happy about this decision. It's an important decision. It does not, you know, cure all that ails American democracy and I feel obliged to note that the Supreme Court has not always contributed to its health. It doesn't get Chief Justice Roberts off the hook for writing *Shelby County* or joining *Brnovich*, but it does prevent election law from getting appreciably worse, and it does so in a way that I believe is consistent with the original meaning of the Constitution as I articulated in my brief. And that's worth, you know, maybe not three cheers, but two. I had part five not existed, or at least said a lot less that was concerning. It might have been three cheers, but it's good.

[00:55:24] Jeffrey Rosen: Judge Michael Luttig, Professor Evan Bernick, for increasing the awareness and understanding of the Constitution of We the People listeners, and all Americans. Thank you so very much.

[00:55:35] Evan Bernick: Thank you.

[00:55:36] Judge Michael Luttig: Thank you, Jeff.

[00:55:42] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollock, Sam Desai, and Samson Mostashari. It was engineered by Bill Pollock. Research was provided by Yara Derese, Lana Ulrich, Sam Desai, Samson Mostashari, Thomas Vallejo, Connor Rust, and Harlan Katyal. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination and debate.

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