



## What is the “Independent State Legislature” Doctrine?

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**[00:00:00] Jeffrey Rosen:** Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the constitution among the American people. Earlier this month, the Supreme Court issued orders that preserved new congressional maps in North Carolina and Pennsylvania.

**[00:00:29]** Both of the maps were drawn by their state Supreme Courts overriding maps that had been enacted by the state's legislatures. In concurring opinions, justices Alito and Kavanaugh indicated that they ready to address the doctrine at the heart of the cases, the independent state legislature's doctrine. Uh, there's a lot to unpack here. And we're joined by two of America's leading experts on the independent state legislature's doctrine and the original understanding of the 14th Amendment.

**[00:00:58]** Um, and I'm much looking forward to learning from both of them. Vikram Amar is dean and Iwan Foundation, professor of law at Illinois College of Law. He's co-author of the case book, Constitutional Law, Cases and Materials. Vik, welcome back to We the People.

**[00:01:12] Vikram Amar:** Thank you, Jeff. Thank you so much for having me.

**[00:01:14] Jeffrey Rosen:** And Evan Bernick is assistant professor at the Northern Illinois University College of Law. He's co-author of the great new book, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit, co-written with Randy Barnett. Uh, and it came out last year. Evan, it's wonderful to welcome you to We the People.

**[00:01:33] Evan Bernick:** Thanks, Jeff. I'm glad to be here.

**[00:01:35] Jeffrey Rosen:** Vik, you have written a six part series, uh, a very illuminating one on the independent state legislature doctrine. What is it and why should We the People listeners care about it?

**[00:01:46] Vikram Amar:** Well, this series that I just published on Justia.com draws, uh, heavily on a co-written article that I have with Akhil Amar, um, my older brother who's a Yale law professor that some listeners may know that's coming out in the Supreme Court review. A peer review journal from the University of Chicago. And it also builds on work that Akhil and I

have done over the past 20 years. I actually started writing about this independent state legislature idea in 1999 before even Bush versus Gore when this, uh, idea got aired more.

[00:02:17] So the notion is this, that in Articles 1 and 2 of the constitution the word legislature or legislatures of the states is used. And the claim is that because those provisions refer to state legislatures rather than to states more generally, that the actions by state legislatures in passing election regulations for federal elections cannot be second guessed by, uh, state courts, uh, even in the name of the state constitution.

[00:02:52] So the idea is that when state legislatures pass laws regulating congressional districting or presidential selections, that they are untethered by the state constitutions that created them. And they're not really reviewable by the state Supreme Courts that ordinarily would enforce those state constitutions. So for example, if a state legislature says nobody can vote in the following manner in election, and they say that for both federal and state elections...

[00:03:21] The, the state law, uh, applies to all elections. Uh, the state Supreme Court could invalidate that state enactment as applied to state elections because u- under state, for state elections the state constitution applies. But for federal elections, there's nothing the state Supreme court could do even in the name of the state constitution. That, that the legislature in Article 1 and Article 2 is this freestanding entity untethered to the, the state constitution that created it and state ju- judicial review that, that, uh, ordinarily would confine it.

[00:03:55] **Jeffrey Rosen:** Thank you so much for explaining, uh, the doctrine. Evan, what do you have to add to an explanation of what the doctrine is? And then give us a sense of its practical consequences. In, in Bush v. Gore, the US Supreme Court held that the state's recount conflicted with deadlines set by the state legislature for the election, um, and sort of looked at the independent state legislature doctrine. Well, if, if it were adopted, what would its consequences be for, uh, the next presidential election?

[00:04:25] **Evan Bernick:** So the long and short of it is that, it would give state legislatures a great deal more control than they presently have over the course of elections. And possibly, um, create a rule of law according to which in determining, um, what state legislatures are doing in respect of elections. Departure from what the Supreme Court considers to be good statutory interpretation, good textualism, um, could get, uh, Supreme Court decisions that review state legislatu- uh, state Supreme Court decisions that review states, uh, legislative actions, um, basically tossed out, such that state Supreme courts decisions that don't use textualism to determine what state legislatures have done with respect to elections are just gonna get overdone or overruled by the Supreme Court every time they happen.

[00:05:25] But it does depend upon the strength of the independent state legislature doctrine. If it does become a rule of law, which right now it's not. Uh, from its place in a concurrence in Bush v. Gore written by chief justice Rehnquist it is somehow been after a period of, uh, years and is now, um, you know, receiving a lot of attention. And the Supreme Court is asking for briefing and arguments about it.

**[00:05:55]** When I say it's a little bit difficult to pin down exactly what it would do, it's because it's defenders... And they are few. And frankly, I am not one of them. Um, toggle between several different possible positions with respect to what it means. On one view, it really is this plenary power on the part of state legislatures to do what they want with respect to time, place and manner, uh, regulations without regard to the state constitution absolutely at all. Uh, so that's this plenary undisciplined power.

**[00:06:29]** On more modest readings, it imposes procedural constraints on what state legislatures can do. So if there's a, a threshold, a majority threshold that isn't passed and a law is under reviewed by the state Supreme Court and the s- state Supreme Court says, "This isn't the law." Um, the state legislature can't ignore that. But if the state Supreme Court says, "You haven't conformed with the substantive requirements, like, uh, don't engage in gerrymandering." that might be something that, um, they could count as something that would be, uh, tossed out by the Supreme Court.

**[00:07:10]** So you have to pin the doctrine down, which is difficult. And defenders of this independent state legislature doctrine do like to emphasize, that this doesn't mean that legislatures can do whatever they want. They're still bound by the federal constitution. But the degree to which they're bound by state constitutions is, is the, the point of real contention.

**[00:07:30] Jeffrey Rosen:** Thank you very much for that. Vik, before we delve into the merits of the doctrine, describe for us what version of it justices Alito, Thomas and Gorsuch take in a Pennsylvania election case in 2020, where Pennsylvania Republicans wanted to fast track their challenge to a Pennsylvania Supreme Court ruling that required state election officials to count mail-in ballots received after election day.

**[00:07:58]** Justices Alito, Thomas and Gorsuch suggested that this might violate the independent state legislature doctrine. And in the recent Pennsylvania and, and North Carolina cases, justices Alito and Kavanaugh had, had separate statements. So beginning with justice Alito, who seems to a- adopt the strongest version of it, what, what is his vision of the independent state legislature doctrine?

**[00:08:20] Vikram Amar:** So in 2020, um, justices Alito, Thomas and Gorsuch, uh, indicated agreement with the independent state legislature doctrine in the context of presidential elections under Article 2, that was what was at issue in, um, October of 2020 and then thereafter. Uh, and in that, um, at, at that moment, they f- let, uh, kind of identified a version of, of, of ISL, um, in-independent state legislature that was pretty extreme.

**[00:08:50]** Namely that, uh, the, the state courts could not, uh, in the name of the state constitution second guess what the, uh, what the state legislature had done. Uh, in, in Pennsylvania, for example, the state, uh, uh, Supreme Court had ruled under the state constitution that because of COVID certain voting timelines had to be extended. And what the, the three justices said is, "The state Supreme Court cannot rewrite the, this state statutes."

**[00:09:17]** So going back to Evans point, there's a kind of a, a literalism that's, uh, uh, uh, at stake here. That, that the state Supreme Court should be applying the state legislative enactments

with regard to even federal elections, uh, kind of just as they're written without taking into account state constitutional values. Now, last week in the North Carolina case the... As you mentioned, there were cases from North Carolina and Pennsylvania. Their ISL was invoked by Republicans in the congressional setting.

**[00:09:46]** Um, state Supreme Courts in those two states had invalidated under the state constitution excessive racial, uh, partisan gerrymandering. So the state legislature in drawing congressional lines was heavily influenced by partisan considerations in, uh, in arguable violation of state constitutional provisions. We all know that the US Supreme Court a few years ago in *Rucho v. Common Cause* said that the US constitution doesn't say much about partisan gerrymandering. But the court there said that state constitutions may very well speak to the issue.

**[00:10:19]** And in North Carolina and Pennsylvania, the Supreme Courts found that that was true under their state constitutions. And they therefore invalidated the work product of the state legislatures in those two arenas. And three justices, but importantly not justice Kavanaugh. We really only have three justices so far who, uh, who seem to be, uh, interested or not interested but, but, uh, provisionally accepting of ISL theory.

**[00:10:45]** Justice Kavanaugh, uh, Jeff, as you pointed out, did indicate that this is an issue on which the court should grant review, uh, and take up. But he was non-committal about whether he thinks the theory he works. Whereas Thomas, Gorsuch and Alito, uh, expressed at least provisional approval for the theory. And, and, and last week it was in the context of congressional elections, whereas in 2020 it was in the context of presidential elections.

**[00:11:10]** So this would have implications in both realms. I think the implications in presidential elections are greater, um, partly because presidential elections are a bigger deal. Uh, but partly because Congress ultimately has backup power to regulate congressional elections. Article 1, Section 4 says, "The time place and manner of congressional elections shall be prescribed, uh, by the state legislatures in the first instance, but that Congress may at any time make such regulations if it wants to."

**[00:11:40]** So Congress can always oversee congressional election regulation. But under Article 2, uh, if you are an originalist, um, and a textualist there doesn't seem to be nearly as big a role for Congress to regulate presidential elector selection processes. So I think the ISL theory has the most bite and the most consequences in the context of presidential elections. And let me just give you one example of this.

**[00:12:03]** So right now all 50 states quite understandably pick their electors for the, the electoral college, uh, via, uh, uh, a general election. Um, but there is a move in some states, especially states with red state legislatures and blue to purple electorates. After 2020 in those states, the legislatures are considering reclaiming the power to, uh, to pick electors from a direct election and move it into the state legislature itself.

**[00:12:33]** So for example, uh, there are proposals that, that would say, especially, in the case of contested election, uh, if the, if the general election outcome isn't clear then the state, uh, legislature, rather than the state courts trying to, uh, uh, unravel the state election would be just

the ones to pick the electors. There are provisions in some state constitutions, like Colorado that say explicitly that the electors to the electoral college shall be selected by the people v- via a general election.

**[00:13:03]** Now, if you buy the ISL theory then, uh, then those provisions and state constitutions like Colorado would not be enforceable. If ISL is, as I think it is, bunk then state legislatures in those states could not override the state constitution and claim power to pick presidential electors on their own. That's just one illustration of the stakes that we're talking about.

**[00:13:27] Jeffrey Rosen:** Evan, uh, do you agree that only justices Gorsuch, Thomas and Alito have adopted a strong version of the independent state legislatures doctrine? How do you read the positions of justices Barrett and Roberts? And, uh, do you agree also that the consequences of a strong adoption of it in the next presidential election would be to allow state legislatures to change the election results in the event of close election?

**[00:13:55] Evan Bernick:** Yeah. So I basically agree with everything that Vik said. Uh, the only thing that I would add to it with regards to Roberts is that, although he is not on the record as endorsing the independent state legislature doctrine, um, there's a notable dissent in a recent case called, uh, Arizona Independent Redistricting Commission, in which he takes a very strong position that legislature in the relevant text really does mean the institutional body and not other entities.

**[00:14:29]** He distinguishes state legislatures from, in this case, an independent redistricting commission. Now he doesn't specifically say, and therefore not courts, um, and therefore not state Supreme Courts. And therefore state Supreme courts interpreting their state constitutions don't get to, uh, veto state legislation governing elections or governing the appointment of electors. Um, but he does cite Michael Morley who is a, uh, probably the most notable defender in the academy of the independent state legislature doctrine.

**[00:15:04]** And although he was in descents it was a five, four decision. The author of the majority opinion, justice Ginsburg, is obviously has passed away. And I think that he would be open to this arguments. Um, with respect to justice Barrett, I really don't know. I don't know. I do know that there is currently a conc- uh, concerted effort, um, being made right now to draw justice Barrett's attention to the relevant text in history here, and to persuade her not to go down this road to the extent that she is committed to textualism and originalism.

**[00:15:44]** So a flurry of very learned scholarly articles have then published it just in the last couple of weeks. And I expect that to continue as we get closer to next term when the Supreme court is going to address this issue.

**[00:15:59] Jeffrey Rosen:** Will that lead squarely to Vik's, uh, forthcoming article? And, Vik, why don't you tell We the People listeners why you, and, uh, Akhil Amara have concluded that the text and history of the relevant election clauses do not support the independent state legislature doctor.

**[00:16:20] Vikram Amar:** Before we leave the, the court watching, uh, and those counting, um, point, uh, let me just come back to chief justice John Roberts for a moment. Because as Evan

pointed out, he did write a very loud dissent in the Arizona case from 2015. In that case, the voters of Arizona passed an initiative that took, um, districting power, both for federal and state, um, districting away from the elected legislature and put it in the hands of an independent state redistricting commission because the people of Arizona presumably were sick of partisan gerrymandering.

**[00:16:50]** The Arizona State legislature sued invoking a, a ISL and Article 1, Section 4 and says, "Look, the time place and manner of congressional elections is supposed to be decided by us, the state legislature, not by anybody else. And therefore this initiative violates the federal constitution." In a five, four opinion, uh, justice Ginsbu- authored by justice Ginsburg the court rejected that saying, um, "Nothing in Article 1, uh, or this court's jurisprudence has ever permitted a state to do, uh, congressional districting in a way that violates the state constitution. And this initiative whereby the power was given to this independent commission was part of a state constitutional amendment."

**[00:17:29]** So the, the court respected the state constitution and it rejected the claims of, of the, uh, uh, state legislature. Justice Roberts dissented. Um, and, uh, although he dissented in 2015 in the 2019 Rucho case, uh, which he authored the majority of opinion, he then cited approvingly two initiatives in Michigan and, uh, Washington that were in all relevant respects identical to the one that, um, uh, was upheld in the Arizona case.

**[00:18:00]** So he seems to have acknowledged that this is settled law. And, uh, indeed he cited to both those initiatives that were identical to the one that he thought was problematic in Arizona and said, "These are things that states can do." And he also cited to a Florida Supreme Court case from 2015, in which the Florida Supreme Court had invoked the Florida State constitution to invalidate a measure by the Florida legislature in congressional districting. So he along with other conservatives who signed onto that mutual opinion are already on record saying, states can do this stuff. Um, uh, uh, state Supreme Courts can do this stuff and state peoples can do this stuff.

**[00:18:40] Jeffrey Rosen:** Evan, before we dig into the substantive arguments against the impended legislature doctrine, what's your read about whether justices Barrett, Kavanaugh and perhaps Roberts might converge around a softer version of the independent state legislature doctrine? And, and if so, what, what might that look like?

**[00:18:59] Evan Bernick:** So it might look like something like a clear error rule governing state court, Supreme court interpretations of their constitution in a context where one of the election clauses is implicated. What the, uh, Rehnquist concurrence and subsequent opinions by ISL friendly justices seem to be gesturing towards is a rule of absolutely no deference whatsoever. This kind of austere textualist approach to what the legislature is doing.

**[00:19:36]** And if the state Supreme court seems to be doing anything that strikes them as methodologically odd, then the state Supreme Court is in infringing upon the power that they are delegated through the election clauses to the state legislature. An intermediate position would be to say, "Well, yes, state legislatures do have primary authority to make the rules." But since they are bounded by state constitutions, which provide the context in which we should understand

what a legislature is and how it's properly operating a state Supreme Court decision that doesn't strike us as completely and obviously like a president can be younger than 35 years old wrong.

[00:20:26] Um, we should defer to that state Supreme Courts. That way we still legislative primacy. Uh, and we do have a fallback if a state Supreme Court does something totally wacky. But we don't have this undisciplined plenary outside state constitutional power on the part of legislatures on the basis of what is, I think, very weak text and history.

[00:20:50] **Jeffrey Rosen:** Okay, Vik, it is time if you would, uh, please share with We the People listeners your three arguments, text, history and precedent against the independent state legislature doctrine.

[00:21:02] **Vikram Amar:** So actually text and history are, are, are together in the first of the three arguments. So again, ISL wrenches the word legislature out of Articles 1 and 2, and says, "That's a reference to a particular, uh, institutionist state government that is supposed to have the power. These all other aspects of state government, state court, state people, state constitutions.

[00:21:23] And that's just bad originalism, bad textualism. Because the legislature of each state at the founding was understood to be a body that was created and bounded by the state constitutions and the state peoples that created them. So when the federal constitution refers to legislatures of the states it's not referring to some platonic untethered group of people, it's referring to a group of people who are empowered but also limited by the state constitution.

[00:21:51] The founders have well understood that state constitutions were Supreme over state legislatures just as the federal constitution is Supreme over Congress. So as a matter of just textual understanding, uh, and the actions of state legislatures right around the founding, um, uh, it's clear that there's, uh, the, the history do- cuts against, um, uh, reading the word legislature in this, uh, this textual vacuum.

[00:22:16] So that's kind of a historical and textual argument. The second argument is that state legislatures themselves have enlisted the, uh, help of state courts in administering, uh, uh, federal elections. States have to run state elections at the same time they run federal elections. And we all know, everyone concedes that state constitutions apply to state elections.

[00:22:37] So it makes perfect sense for the state legislatures to have laid out a uniform set of rules and a uniform set of state judicial review procedures to, to manage both federal and state elections. So that even if state legislatures are the ones here that make the call, um, they've chosen to include state courts and state judicial review as part of the manner of running congressional and presidential elections.

[00:23:01] And by the way, that's an argument that was harder to make in the Arizona case, because the voters wrenched power away from the state legislature in that setting. That's different than ordinary state judicial review by state Supreme Courts pursuant to state statutes providing for jurisdiction in state courts that have been enacted by the state legislatures themselves. So Roberts might have been more offended by the Arizona episode than he is by what's, what happened in North Carolina and Pennsylvania, which is just ordinary judicial review, uh, by the state courts.

[00:23:34] Um, uh, which is, which is why he wa- he didn't join the three last week, even though maybe he still has some misgivings about what happened in Arizona, which leads to the third point. And that is the cases have repudiated ISL, um, in the, in the last 100 years. Uh, in, uh, uh, Davis versus Hildebrandt the Supreme Court said that, the, uh, referendum power of the people could be used in congressional districting. It's not just up to the state legislature.

[00:24:00] Uh, in Smiley versus Holm in 1932, the Supreme Court said that governor can participate in congressional redistricting, it's not just the house and Senate or the, the two elected branches of the state legislature. The Arizona case we've already talked about. And then Rucho versus Common Cause where even the dissenters in the Arizona case blessed, constitutionally speaking, the ability of state courts to enforce state constitutions in congressional district. And, and even the power of state peoples to take, take, take this away from the state legislature altogether.

[00:24:31] So you've got precedent as well as the affirmative partnership, uh, by the state, uh, legislatures themselves, uh, uh, and, of course, perhaps most important to some justices text and, and original understandings in historical settings.

[00:24:45] **Jeffrey Rosen:** Evan, let's focus on the originalist case for and against the independent state legislature doctrine. In his, uh, article and post Vik really digs in and says that at the time of the founding a, a state legislature was an entity created by a state constitution. He gives examples of state constitutions like the Delaware constitution of 1792, that explicitly required voters elect congressional representatives at the same place and manner as state representatives with three other state constitutions required all elections to be by ballot.

[00:25:25] Are you persuaded by Vik and Akhil's originalist case against the independent state legislature doctrine or not? And, and if, if, if you are persuaded, maybe you could help channel the, the strongest originalist case for it.

[00:25:33] **Evan Bernick:** I am persuaded to the point where one reads these opinions authored by professedly textualist and originalist judges concerning the independent state legislature doctrine and how they're open to it. And one wonders kind of, "Okay, well, what's going on here." And it really does seem to be grounded in an intuition that legislatures were at the time of the founding more democratic, more representative than other institutions at the founding. And that's why this text delegates power specifically to legislatures.

[00:26:12] So far as I can tell, there's not really anything more to this than intuition. Looking at the ratification debates and the public campaigns for the ratification of the constitution and against ratification, the text in question really just isn't just discussed very much. And the primary focus is on the empowerments of Congress to pass federal laws regulating congressional elections that as everybody on all sides of this debate concede automatically displaces or preempts any state statutes to the contrary.

[00:26:47] And what really seems to be animating this grant of power is the sense that state legislatures might establish unfair election procedures or attempt to undermine the national governments. So when you consider that and you consider the widespread suspicion on the parts



of influential framers of what exactly state legislatures were doing during this period, the more plausible explanation for this choice of text.

**[00:27:12]** It doesn't really seem to have some thick theory of the representativeness of legislatures attached to it, but really just, you know, simple efficiency. There's a great deal of diversity in state institutions at the time of the founding. And it might have been unclear in some states who's gonna play the default rule for directing the manner of appointments of electors and doing time place and manner regulations of congressional elections.

**[00:27:35]** So the constitution says, "Here's the default. It's state legislatures." So what I hope is that as we get closer to actually hearing the merits of these arguments, that we have more engagement by the originalist justices who have indicated that they are open to this argument on the basis of just this bear, what seems to be a specific delegation to a particular institution. And really get into the history and try to figure out what was going on here.

**[00:28:03]** Because it certainly seems that Vik and Akhil and others who have written on this subject are right on the merits. And the only thing that I would add beyond what Vik has already said is that there's also like 200 years worth of historical practice at the state level that's relevant here. Since the founding state constitute have regulated nearly every aspect of federal elections.

**[00:28:28]** And the Supreme Court has in a couple of recent cases, uh, Noel Canning and Chiafalo, the faithless electors case said that, "To the extent that there's any ambiguity about this history at all, practice." Uh, what originalist call liquidation by settled understandings across institutions across time, it counts for something. So that's an additional reason, um, to think that there's something amiss with ISL.

**[00:28:57] Jeffrey Rosen:** Vik, if you were making, uh, the case to justice Barrett, uh, about the anti originalist basis for the independent state legislature doctrine, what would it be? Maybe you can distill your originalist arguments for justice Barrett and for We the People listeners and, and also maybe a beat on practice. We just had a great Town Hall with Ed Larson and Lindsay Chervinsky about the election of 1800. A bunch of Federalist state legislatures had considered sort of overturning the election result by changing the rules after the election took place. In the end, they decided not to do that. Is that relevant? And what about the practice of the subsequent 100 years?

**[00:29:35] Vikram Amar:** Well, there's a lot there. So, um, first, um, if I were, uh, uh, had an audience with justice Barrett I would, I would direct her attention to the text, but not just the word legislature. Also to the supremacy clause whose sequence, uh, makes clear that state constitutions are Supreme overstate enactments. Just as it makes clear that the US constitution, which comes first is Supreme overall else. Just, that's the point justice, uh, Marshall made in Marbury versus Madison, that the order matters.

**[00:30:03]** I would also direct her attention to the understandings of what state legislatures were at the founding. The theory behind state constitutionalism and state legislatures, Gordon Wood, uh, and other historians have written about. I would point out that state judicial review under state constitutions preceded federal judicial review as in Marbury. And I would direct her to what

Evan, uh, mentioned a moment ago, the absolute absence on the other side of any suggestion by anybody that state legislatures were supposed to be untethered from, uh, state constitutions when they were referred to in Articles 1 and 2.

**[00:30:42]** And there's really no theory there. If the theory, as Evan points out, is the state legislatures are, are close to the people and democratic, well, state constitutions are closer to the people and more democratic. Um, uh, and so then you can't very well elevate the state's, uh, legislature over the state constitution. Um, I would also point out as a textual matter that, even though ISL adherence lump Articles 1 and 2 together, as I wrote in part six of my, uh, series of Collins on Justia there's actually important differences.

**[00:31:11]** And, and Akhil And I write about this in our, our essay as well. Article 2 is different than Article 1. Article 2 says each state shall appoint electors, not each state legislature. The subject of the sentence is each state. O- And as to manner it says only that the legislature may direct the manner. Not that it shall, not that it must, not that it will. Um, which really leads to, as Evan pointed out, the default reading that we advance, namely the federal constitution wants to make clear that state legislatures can perform this role.

**[00:31:42]** There is nothing in the federal constitution that prohibits them from doing it, um, unless, and until states decide otherwise in their state constitutions. But this was a way to get things up and running efficiently and cleanly because the founders knew that in every of the 13 states there was a thing called a legislature that could get to this job right away. So those are the things, uh, I w- I would say to her.

**[00:32:02]** I, I have a, a point about, about, uh, how this whole theory came about and what it tells us about constitutional th- uh, adjudication. But, but we can come back to that when, uh, when you wanna talk about it.

**[00:32:12] Jeffrey Rosen:** Uh, that sounds great. And you've, you've tantalized us. So I'll definitely ask you about that. Um, Evan, what would you say to justice Barrett if you were making, you know, an originalist case against the independent state legislature doctrine? And what, if anything, uh, did you learn in the course of writing your important new book about the original understanding of the 14th Amendment that might be relevant to this question?

**[00:32:32] Evan Bernick:** Ooh. Well, so, uh, like Vik I would focus on not just reading the text in isolation. Originalists like to emphasize and textualist like to emph- emphasize that you have to understand the text in context. Not just the semantic or the grammatical context, but also the political and historical context, which includes things like Vik is talking about, about the political theory behind the idea that constitutions and the institutions that are structured by those constitutions both come from the people.

**[00:33:10]** And in respect of connection to the people as a matter of democratic theory, it's the constitution that structures the institution, not the freestanding institution itself that is prior because it's closer to the people. All power is delegated and therefore limited. There is no, um, impotent parliament that can do no wrong. And the theory behind the independent state legislature looks disturbingly similar to Blackstone's theory of parliamentary power and has less

in common with the idea of delegated and limited power that you have even amongst the most extreme broad government power framers like, uh, Hamilton and James Wilson.

[00:33:56] With respect to the broader question of like, okay, how do we do this as a matter of originalism? I do think that one limitation of the debate thus far over the ISL has been a near exclusive focus on the founding era. And to one extent, that's totally understandable. These are constitutional provisions that were initially frames in 1787 rather than 1868, which is where I'm going to direct attention in a minutes.

[00:34:29] But 1868 was a big deal. Uh, the antebellum period saw a lot of changes in how people understood the constitution and the proper relation between federal governments and the states. In the common theme of what the court says it's doing in cases touching voting rights more generally is federalism. Okay. Federalism, which federalism? What distribution of power between the federal government and the states do we actually have as a matter of the constitutional structure?

[00:35:04] Um, if like the majority of the court claims to be, you're an originalist and you want to answer the question of what federalism do we have with respect to text in history, you need to be talking about the history of not only the elections clauses, but the 14th Amendments, the 15th Amendment, the 19th Amendments and the 24th Amendment, which all set limits on what states can do particularly with respect to the right to vote.

[00:35:32] We should also be thinking about how even during a period of time following the Civil War when the Supreme Court was very hostile to congressional efforts to enforce the 14th and 15th Amendments. It was actually more deferential to efforts to enforce the election clause. Uh, the court was consistently rejecting efforts to enforce the reconstruction amendments, but it was more deferential to enforce the elections clauses which the Republicans did rely upon in the enforcement acts of 1870 and 1871.

[00:36:04] So there's a whole history here that is post ratification, post founding that is relevant to how we should be understanding the distribution of power. And we should not be relying upon ideas about the federalism that are totally located in the founding era as informed as they might be in certain respects.

[00:36:22] **Jeffrey Rosen:** Thank you very much for that and for putting the 14th Amendment on the table and for casting light on it in your new book. Vik, what are your thoughts about Evan's point that the 14th Amendment changed the federalism equation and set limits on what states can do with respect to the right to vote and his suggestion that the court was more deferential to, uh, state efforts to enforce the elections clause including perhaps the case of McPherson and Blacker, which you described, which was dis- discussed in Bush v. Gore.

[00:36:50] And then if I can flip the lens about the 14th Amendment, tell our listeners whether or not you agree with the conservative justices on the US Supreme Court that the 14th Amendment as originally understood imposes a colorblindness requirement or not with respect to voting.

[00:37:06] **Vikram Amar:** Let's start with the 14th Amendment. As an originalist matter, I, I don't think the 14th Amendment has a lot to say about voting rights outside of Section 2, um,

which allows Congress to enforce, um, voting equality. But section one is equal protection and due process and privilege and immunities clauses I think applied to the realm of civil and economic rights rather than so-called political rights. Like the right to vote, the right to serve on juries, the right to hold office, the right to be unmalicious.

**[00:37:35]** Um, that's why we needed a 15th Amendment because the 14th Amendment was clearly racial equality. If it was also about voting, um, then you wouldn't need a voting, uh, a, a racial equality amendment in the 15th. So I think the jurisprudence of the court beginning in the 1960s in cases like Harper versus, uh, Virginia finding this right to vote in the 14th Amendment probably are not particularly historically grounded.

**[00:37:57]** Now, it turns out that most of the time might not matter because a lot of the 14th Amendment voting decisions could easily be justified under another clause of the constitution that has not been given the life that it deserves. And that's the, the Republican guarantee clause provision that assures that majorities get to rule. Um, and that means that people get to vote because they gotta be part of the relevant majorities.

**[00:38:20]** The one area where the Republican guarantee clause does not apply is presidential selection. Because Article 2 makes clear that you don't have to hold general elections, um, to pick your state's electors. States have done that because it made sense politically, but they don't have to use elections. For the first handful of years, state legislatures did pick the electors directly, and there's nothing under the federal constitution that prohibits that.

**[00:38:46]** Even though going to your other point a moment ago, um, there is federal law that says the electors have to be selected on and by election day. So changing the mode of elector selection after election night is problematic, uh, because it violates a federal statute that Article 2 gives Congress the power to enact namely, um, the time of selecting electors.

**[00:39:09]** Uh, but beyond that, uh, I don't know. The 14th Amendment really dealt with voting, uh, very much. The guarantee clause does. And of course, the 15th, 19th, 24th and 26th that Evan mentioned clearly do. Uh, although we're not always respecting those, um, laws as well. I, I wrote a couple of columns in Justia about how the 26th Amendment's prohibition on age discrimination in federal voting is being completely ignored, um, in ways that have, uh, el- big effects on elections because age as well as race is a very important, uh, in- indicator of party preference these days.

**[00:39:44]** The only age group that Trump won was people over 65. All the others were either even or voted for Biden. Um, now on your, your second question about the 14th Amendment, this notion of a colorblind constitution, I don't find much support for that in the, in the history of the 14th Amendment. The people who, who, uh, who, who brought us the 14th Amendment engaged in race-based affirmative action in the Freedmen Bureau and a few other instances.

**[00:40:12]** So I think this is an example of... And Evan talked about this earlier. I don't wanna hypocrisy, but originalist justices not really applying originalism at key moments in constitutional interpretation. Whether we're talking about affirmative action, uh, in the upcoming Harvard, North Carolina cases, whether we're talking about the 11th Amendment and sovereign

immunity, which has no basis in originalism, whether we're talking about the independence day legislature theory that we've been, um, abandoning about now.

**[00:40:40]** Um, and even when we're talking about enforcement power under the 13th, 14th, and 15th Amendments. Cases like *Shelby County versus Holder* and others. The court... Again, when the stakes are high, the, the, the originalist justices don't seem to rally around originalism. *Sebelius*, uh, *Obamacare* is another example. This idea that the commerce clause distinguishes between activity and inactivity.

**[00:41:05]** They never even tried to argue that in originalist terms. Why? Because in cases like *Gibbons versus Ogden* and, and *McCulloch versus Maryland*, the court spoke much more broadly about what commerce means, uh, under the, under Article 1. So I, I, I, I think there, there is a problem with originalism when push comes to shove and cases like *ISL*, um, kind of shine a light on that.

**[00:41:26] Jeffrey Rosen:** Thank you so much for that. Uh, you and, uh, your brother Akhil Amar have been among the leaders of the so-called liberal originalists who argue that the conservative justices are inconsistent with original understanding across a range of areas. Evan, I wanna focus on Vik's strong claim that the court is being consistent on originalism when it comes to voting rights.

**[00:41:47]** In particular, Vik just said that the 14th Amendment was originally intended to apply to civil rights and not political rights. Indeed Section 2 of the 14th Amendment anticipate that the states might deny voting rights to African American, uh, men, and, uh, says what happens if they do. Do you agree or not with Vik, the, the court's voting rights jurisprudence including cases like *Shelby County* and also cases involving Section 2 of the Voting Rights Act are inconsistent with the original understanding of the 14th Amendment or not?

**[00:42:22] Evan Bernick:** So broadly, yes, they're inconsistent with the original meaning of the 14th Amendments. Although I do think that a number of the decisions that the court has made, emphatically not *Shelby County*, are defensible with respect to features of original meaning that the court did not discuss at all. Whether it is the Republican guarantee clause, um, or in my view, and this is I think the only point of disagreement that I have with Vik about this, the privileges or immunities clause.

**[00:42:52]** And let me be very specific about what I mean by this. Because it is virtually incontestable that even the most radical of Republicans did not believe that they were securing voting rights through the 14th Amendment, although they later made arguments to the effect that actually we were. Charles Sumner's a good example. He campaigns for ratifications saying, "This doesn't touch voting rights. Look at Section 2. It allows Southern states to disenfranchise Black people."

**[00:43:16]** Then after ratification, he says, "Well, actually it's guaranteed by equal protection." I mean, he's, he's not being totally honest there. Um, however, the concept of privileges or immunities was basically a way of referring to rights that were widespread in the states, deeply entrenched and associated with citizenship and associated with equality and natural rights.

[00:43:43] So after ratification of the 14th Amendment, the importance of voting rights to citizenship, uh, a right that was necessary to secure all of those other civil rights that everybody represented would be guaranteed by the 14th Amendment really began to become more pervasive in Republican circles and within the broader national community. And what we see in the 15th Amendment and then the 19th amendment, which is at, for my purposes, the point at which the right to vote becomes the privilege or immunity of citizenship is an understanding that that concept deeply rooted, widespread connected with citizenship now applies to the right to vote even if it didn't at the time of the ratification of the amendment.

[00:44:33] So we get to a privilege or immunity of citizenship that is a right to vote, but we don't get there at ratification because of an impoverished understanding of the importance of the right to vote. Okay. Um, so I think that you can get to certain of the decisions that the Warren court made with respect to voting and respect to discrimination in the context of voting through the 14th Amendment.

[00:45:00] But it's not through the equal protection clause, which is primarily about the duty to, and the part of government to protect people against violence rather than a generalized anti-discrimination guarantee. But you cannot get to Shelby County, which sees the court invoking a principle equal state sovereignty that had nothing to do with reconstruction and everything to do about the terms on which you admitted states into the union, to impose an understanding of the present state of race relations and an understanding of federalism that really has more in common with antebellum understandings than the changes that were designed to be brought by the 14th and 15th Amendments.

[00:45:42] And the only thing that I would add to this, like, create, uh, horrible things that the validly originalist court does in this respect is that it actually applies to statutory interpretation too. So in *Brnovich v. DNC*, the courts having essentially redacted, uh, 4B of the Voting Rights Act and Sections 5's requirements of pre-clearance for voting rules that are imposed on s- uh, that are enacted by states with long histories of discrimination.

[00:46:14] Um, then dilutes the last remaining legal tool for protecting minority voters in federal courts by adopting a standard governing denials or abridgments of the right to votes that fly in the teeth of the disparate impact standard that Congress very deliberately wrote into the text of, uh, Section 2. So justice Kagan and his, his extensive and, you know, impassioned dissent just takes the majority to task. You know, textualist, a vowed textualist a- all for just neglecting the text to get to avoid to a avoid iradical results that they're uncomfortable with. And it's really a problem. It's a deep problem. And I wish as an originalist it wasn't, but that's the state of things.

[00:47:05] **Jeffrey Rosen:** Uh, We the People listeners, there's a lot going on here and I hope you're listening, uh, closely. Evan just said among other things that even though the 14th Amendment was originally understood might not have imposed a colorblindness requirement. The right to vote might be considered a privilege or immunity of citizenship because it's been enjoyed as a fundamental right as a consequence of positive constitutional statutory or common law by a super majority of the states over a period of time.

[00:47:34] Which in his new book with Randy Barnett, uh, on page 29, he says is the way for identifying unenumerated rights. In other words rights that weren't written down in the constitution are originally understood at the founding, but should be considered deep rooted in history and tradition. Vik, because we're focusing on this crucial question of whether the court's voting rights jurisprudence is inconsistent with the original understanding of the 14th and 15th Amendments, tell us about the congressional power side.

[00:48:05] Shelby County and the recent, uh, Section 2 cases involve Congress power to require a degree of race consciousness in voting. Would the framers of the 14th and 15th Amendments have agreed with the court's decisions like Shelby County and Brnovich or not, and why?

[00:48:22] **Vikram Amar:** I, I don't think so. Brnovich is, um, less important than Shelby County. But I think, um, nonetheless wrong in important ways. I mean, go back to Evans, uh, uh, I think, uh, proper invocation of the essence of Shelby County. This notion of, uh, equal state sovereignty. Uh, it goes back to the, um, Romano case, um, a, a while back, uh, before that.

[00:48:43] The idea is that Congress is somehow violating the 14th Amendments enforcement provisions and the 15th Amendments enforcement provision when it treats some states differently than others. That, that this is somehow an, a violation of this norm. Um, that states need to be treated the same. If there's one thing that you would not have said during reconstruction is that states are situated equally, right? States had rebelled. They had, they had left the union [laughs]. They had to be readmitted to Congress, uh, and had to, uh, y- you know, m- meet certain conditions in order to do so.

[00:49:19] There was nothing equal [laughs] about the way the federal government was treating states, uh, right after the Civil War. So this, this equal sovereignty notion like Congress and proportionality in the City of Bernie, uh, uh, Flores versus Bernie, uh, case, they, they, they, they just made up things. Um, and, and the court floats them in one case. And then, uh, a little while later, um, the court refers back to the first case and said, "Well, we said it then. So now it's kind of a clearly established traditional notion."

[00:49:49] The same is true of ISL. ISL was floated by three justices in Bush versus Gore after a century of kind of just laying there, um, uh, b- uh, uh, uh, in, in McPherson versus Black-Blacker in the 1890 as you mentioned. And, and, of course, the court in the 1890s is not known as, uh, a particularly intellectually great court. It's the court that brought you Plessy and, and, and Lochner and everything else.

[00:50:13] But there's, there's this, uh, kind of crosscutting dicta. And complete dicta it is in McPherson versus Blacker. McPherson has nothing to do with ISL on its facts. Uh, but the court offhandedly talks about the broad power the state legislatures have. There it sits for 100 years and then three justices pick it up in Bush versus Gore, without any briefing, without any resort to scholarship. They float it, uh, and then there it lies for 20 years. No one cite it.

[00:50:37] And then we have a heated election in 2020. And all of a sudden a few justices say, "Well, in Bush versus Gore we said, "X." This stuff takes on a life of its own. And the, the politics overcome the analytics and that's the problem with constitutional, uh, adjudication today.

Sebelius is another good example. This activity inactivity line would not have drawn any support from people 10 years before Sebelius, but people cared about Obamacare.

[00:51:03] And then, uh, and there's not a lot of writing about it. Uh, and, and then the court just floats it and then all of a sudden it's now a constitutional principle. Same is true with this equal, uh, equal state respect e- equal state sovereignty. So I, I, I don't think it, it, it, it jives with the 14th and 15th Amendments very well.

[00:51:20] **Jeffrey Rosen:** Evan, any other thoughts about the originalist integrity of the congressional power parts of Shelby and Brnovich. And more broadly, I, let's open up the conversation to talk about congressional authority to protect voting rights more. Generally, tell us about Section 2 of the 15th Amendment and section five of the 14th Amendment as a potential response to the Supreme Court's deference to state legislatures.

[00:51:42] **Evan Bernick:** So, first one quick point about Shelby County and the amounts of congressional authority that is in fact reco- that it is in fact recognizing and what the standard is going forward. Um, one of the many, many, many, many problems with Shelby County is that that's not all together clear at all. Um, for our 14th Amendment enforcement we have the congruent and proportional standard.

[00:52:06] Which I think as an original matter is insufficiently deferential to Congress given the history and Republicans commitment to expanding congressional power and having Congress take the lead with respect to protecting civil rights in the states. But let's just take that as given. Um, we don't know whether congruent and proportional is the standard governing, uh, Section 2 enforcement under the 15th Amendment 'cause Shelby County doesn't tell us.

[00:52:32] So, you know, to add confusion to historical injury, the court not only departs from the texted history, but doesn't say what the new standard is going forward. And, um, the other quick point that, uh, that just occurred connection with, uh, with Vik's complaints about, you know, where does ISL come from? It's buried for 100 years and now it's a thing and people are talking about it. Um, this is not the only example of this in election law. Recently, what's gotten a lot of attention is what's called the, the Purcell principle, which is now being described by justices as a bedrock tenants of our election law.

[00:53:14] Even though the Purcell principle, which says basically, um, that when, uh, emergency relief is sought in election cases, in connection with a district court or a state Supreme Courts changing the rules of an election shortly before it happens, um, the court will depart from its typical balance of likelihood of success on the merits and hardship analysis, and just stay the decision below.

[00:53:46] This principle, which is now being deployed all over the place was articulated in a percurium short unsigned opinion in 2008, involving a strict voter ID requirements. And has now metastasized to the point where it's reliably in votes in virtually every election related emergency relief petition, including petitions related to redistricting plans that are not going to go into effect for several months.



**[00:54:16]** The court has never fully explained the source of this principle, how it interacts with its typical formula for, uh, doing emergency relief. We just know that it's there and there are string sites to a bunch of unsigned, short opinions that are made on the basis of emergency relief. So there's just a tremendous problem with transparency here, independently of all the merit stuff we've just discussed.

**[00:54:43]** Okay. With respect to what we can do about any of this stuff? Uh, it's tricky because the same court that is disparaging voting rights in the teeth of text and history in one setting is also in the teeth of text and history narrowing what Congress can do with respect to the protection of voting rights. Um, if Congress were to, you know, reenact the coverage formula that was held unconstitutional in Shelby county, the court is going to hold it unconstitutional again, and then we're just gonna keep doing this forever.

**[00:55:20]** So what are the options? Well, one option is like just to keep doing that and keep talking loudly about it. One of the virtues of our constitutional system is that it does set up a bunch of institutions in which actors who can act on the basis of their own constitutional convictions can yell at one another about failing to adhere to their understanding of the constitution. That's one thing.

**[00:55:44]** The other thing, more dramatic and this would, um, you know, hopefully set the Supreme Court on the right path is just to, very explicitly draft a constitutional amendment that guarantees the right to vote, sets down the relevant standards. And basically says, you know, "You've misinterpreted the 14th and 15th Amendments enough, we now have a new one that repudiates your understanding." The problem is that the constitution is, is very, very hard to amend.

**[00:56:11]** So I don't have any easy solutions to this problem. Um, you know, there are, uh... You know as long as we're talking about dramatic ones, uh, besides enhancing the size of the court to, you know, appoint justices that are more favorable to broad interpretations of voting rights, what you could do is you could engage in what's called targeted jurisdiction stripping. You could say that Congress does have the constitutional power to limit the Supreme Court's jurisdictions.

**[00:56:38]** And single out voting rights cases as cases in which you, the Supreme Court either does not have review, or you need a super majority to veto a congressional act. But these are definitely outside the box proposals. For the short term, things are just not good.

**[00:56:53] Jeffrey Rosen:** Well, it's time for closing thoughts in this fascinating discussion. It's so meaningful to learn from two of America's leading liberal originalists and libertarian originalists, and look forward in future shows to putting you in conversation with some conservative originalists. Uh, but it's very important to learn from text and history. Uh, Vik, the, the first, uh, closing thoughts. So do you first share with We the People listeners, uh, the point that you gonna make, which we're all, uh, eagerly waiting for about where this may have been coming from on the, on, on the court. And then your final thoughts about why the independent state legislature doctrine is inconsistent with the original understanding of the constitution.

**[00:57:36] Vikram Amar:** Three points, I guess I wanna make. First, um, uh, on your question, Jeff, about congressional enforcement power under, um, the 14th and 15th Amendment. One thing that's really important to remember is the text of the 14th Amendment Section 5 and the 15th Amendment Section 2, that is Congress has the power to enforce by appropriate legislation. Those words weren't coming outta nowhere. That is an explicit echo of the necessary and proper clause of Article 1.

**[00:58:05]** And the necessary and proper clause of Article 1, of course, for anyone who's gone to law school and for many people who have not was explicate in *McCulloch versus Maryland* in a very clear and broad way to say that as, as long as the, the ends are legitimate and the means are helpful or conducive towards those ends, that's what necessary and proper means. So that's what appropriate means as well under the 14th and 15th Amendments.

**[00:58:29]** And there's no acknowledgement of the origin from where the, for the reconstruction amendments enforcement provisions, uh, uh, language comes. So that's point number one. The second point is one, uh, the, the bigger point. I think I try to, uh, advert to it earlier, and that is, you know, we're in a, a moment where... Let me go back. Uh, John Hart Ely, author of *Democracy and Distrust*, famous liberal, um, originalist of sorts.

**[00:58:54]** He wrote a *Roe versus Wade*, uh, in 1973 in a very famous Yale law journal article, the *Wages of Crying Wolf*. Uh, and I'm paraphrasing here 'cause I don't have the exact quote, but he said, "Roe is not bad because it's bad constitutional law. It's bad because it's not constitutional law. And, uh, gives almost no sense of an obligation to try to be." In other words, that justice Blackmun who, for whom I, I worked 20 years later and whom I adored, didn't really try to, to frame *Roe* in constitutional terms.

**[00:59:25]** I think today we see a flip side problem. We see conservatives try to make arguments that fit into constitutional discourse. Festal textual arguments. Um, kind of wrenching things out of, out of context from old cases. Uh, and they try to dress up bad constitutional law in constitutional terms. And that's just as p- troubling as cases like *Roe*, that don't speak in constitutional language.

**[00:59:51]** So, so e- y- you can, you can really mess up the constitution, um, not just by not talking about it, but by talking about it in inco- inconsistent and, and, and really cursory ways. And that's what I think we have going on in *Sebelius*. That's what we had going on in *Shelby County*. That's what we have going on in the, uh, the missives surrounding *ISL*. Uh, and that's what we had going on in *Bush versus Gore*.

**[01:00:15]** I'd say those four cases and settings are really illustrative of the modern problem, um, uh, where, where the justices are not ignoring constitutional discourse, but they're, uh, they're employing it in really, really simplistic unpersuasive ways. Those are a few closing thoughts. Um, and, uh, I hope that the relevant people are listening and, and will, will take into account what Evan and I have suggested here.

**[01:00:40] Jeffrey Rosen:** Evan, last words in this fascinating discussion are to you. What should We the People listeners know about the independent state legislature doctrine, and whether or not it's consistent with original understanding?

**[01:00:52] Evan Bernick:** Uh, first of all, they should read, uh, Vik and Akhil's article. I think persuasively demonstrating that ISL is bunk. Um, but more broadly, I think that... Well, just at a very high level, when election law is working well it's because like the constitution itself, it's structuring political conflict in its, in a way that's consistent with some reasonable construction of contested values, democracy, quality federalism.

**[01:01:22]** But also enabling the centers from whatever construction is, is hegemonic, is, is winning to have some reasonably democratic means of challenging that hegemony. And when it's not working well, it's because either there's no reasonable construction of contested values or because there's no reasonable way of challenging that. And right now we have reason to be concerned about both of those things.

**[01:01:45]** Because we have a conservative majority that is implementing some vision of equality, democracy and federalism without telling us a great deal about what it is or what it has to do with the constitution. I mean, they're supposed to be textualist and originalists and they're doing stuff that doesn't seem to be supported much less dictated by any text or history. And they're also giving a great deal of deference too.

**[01:02:06]** And this is where ISL comes in. State legislatures. That themselves seem more interested in suppressing than in structuring political conflict. So instead of like an agonistic framework in which you have adversarial but generally peaceful political life in which people yell at each other but they all acknowledge and affirm one's existence as part of the body politic, we have this antagonism, we have efforts to ensure that enemies never hold power in our marginalized and civic life.

**[01:02:36]** Um, in certain respects that, this is not new in American politics. And only for a relatively brief period during reconstruction have Black people in particular been permitted to participate in any significant way in American democracy. But whether new or not it's, it's a reality. And it should really cause us to look at scans at any claim that what the court is doing is just the good work of democracy, when state legislatures are often not particularly representative or democratic. And the values that the court is invoking to justify deference to these legislatures don't have much to do with the texture history.

**[01:03:14] Jeffrey Rosen:** Thank you so much. Uh, Vik Amar and Evan Bernick for, uh, a absolutely fascinating discussion of the original understanding of the elections clauses and the 14th Amendment. We the People listeners your homework is clear, read Vik's series on the independent state legislature doctrine in Justia, and also Evan Bernick and Randy Barnett's important new book, The Original Meaning of the Fourteenth Amendment: It's Letter and Spirit. Vik, Evan, thank you so much for joining.

**[01:03:44] Vikram Amar:** Thank you for having us.

**[01:03:45] Evan Bernick:** Thank you, Jeff. It's been a great pleasure.

**[01:03:50] Jeffrey Rosen:** Today's show was produced by Melody Rowell and engineered by Dave Statts. Research was provided by Kevin Closs, Ruben Aguirre, Sam Desai and Lana Ulrich. Please rate, review and subscribe to We the People on Apple podcasts. And remember, always that the National Constitution Center is a private nonprofit. Our crowdsourcing campaign continues. I haven't been bothering you with the plugs on the intro and outro, but we're still seeking your support so that we can reach our goal of \$234,000 to celebrate the 234th anniversary of the constitution.

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[01:04:51] I also really appreciate your emails and notes saying what the podcast means to you. So keep those coming. Thanks for listening. Thanks for learning. And on behalf of the National Constitution Center, I'm Jeffrey Rosen.