

Imani Gandy: Hello, fellow law nerds. Welcome to another special reaction episode of "Boom! Lawyered" a Rewire News Group podcast hosted by the legal journalism team that just doesn't really know what's going on when it comes to democracy in this country anymore. Like, what the hell, man? I'm Imani Gandy, Rewire News Group's editor-at-large.

Jess Pieklo: And I'm Jess Pieklo, Rewire News Group's executive editor. Rewire News Group is the one and only home for expert repro journalism that inspires you to settle in, folks, we have a meaty episode for you today, and the "Boom! Lawyered" podcast is part of that mission. So big thanks to our listeners and a welcome to our new viewers, subscribers. Hello everyone, we have so much democracy to talk about today.

Imani Gandy: So much democracy. So you know, this whole term, every time we do one of these episodes, we talk about how horrible the case is and how it's gonna destroy the country and democracy. And it just keeps getting progressively worse. And then here we are with Moore v. Harper. The Supreme Court heard oral arguments in Moore v. Harper today, and this is- it's not an exaggeration to say that this is a case that could forever change the way that elections happen in this country.

Jess Pieklo: It's true, and look, so much is on the line that in this episode, you are gonna see me read a lot. Look how meaty this script is, folks. Pages, because, really, what we have is a cooked up case to try and unravel how elections, federal elections, specifically, in this country happen. So let's talk about it.

This is a case that stems from a North Carolina Supreme Court ruling that tossed a gerrymandered congressional map that had been drawn by the Republican-controlled legislature. So that's where we start. In that opinion, the court found that it violated the state Constitution, that the gerrymandered map was unconstitutional. Republican lawmakers are challenging that ruling, claiming that the state court lacked the authority to review the legislature's work. Let me say that again.

Imani Gandy: Yes, say that again.

Jess Pieklo: They're challenging it on the grounds that the state legislature can't review—or I'm sorry, the state court can't review the state legislature's work. OK?

Imani Gandy: That's a new one.

Jess Pieklo: It's a new one. The North Carolina Supreme Court rejected this argument, by the way, that the election clause forbids state courts from reviewing a redistricting plan like this for violating its own Constitution. So like, they had been there, went through and issued a nearly 200-page opinion. And the argument that the Supreme Court heard today was so novel, so out of left field that in this opinion by the North Carolina Supreme Court, they dealt with it in three paragraphs. All right, so Imani?

Imani Gandy: Yes?

Jess Pieklo: We need to explain to the people what the hell is going on here. What are petitioner's arguments about the election clause, exactly? This is the nubbit of the Constitutional fight here.

Imani Gandy: OK, well first let me tell you what the Elections Clause says, right? Article one of the Constitution essentially says that legislatures are the ones that can set the time, place, and manner of federal elections, right? And so that's what it says. It makes sense, legislature. You set the time, place, and manner of elections, makes sense. What petitioners are arguing is that when the Elections Clause says legislature, the framers, the founders, the people who wrote the damn Constitution meant exclusively the legislature, exclusively the members of the state legislature, they can set the time, place, and manner for federal elections without review by the state supreme court, which is absolutely bonkers to me. But they have several theories.

This is called the independent state legislature theory. The state legislature is independent of the checks and balances that normally attach when you're talking about lawmaking, right? State legislature when it comes to federal elections, they're not behold, they don't answer to nobody.

Jess Pieklo: Nobody. Not a damn person.

Imani Gandy: Not a single damn person. And so there're three theories about this, right? The first theory is the one I just said, that state legislatures are not beholden at all to the state constitution or the state courts that interpret the state constitution, right? I mean, it's the same on the federal level. What do federal courts do? They interpret the federal constitution. States do the same thing. That's their one theory.

Their second theory is, OK, fine. If you're gonna say that state legislatures are beholden to the state constitution and are subject to judicial review by the state courts, the state courts can only enforce procedural rules related to the federal elections and not substantive rules. And if your first question is what the hell is the difference, that's the question that we all have. That's the question that no one really seems to be able to answer. Procedural and also, it's a question that is not found anywhere in the Constitution. The Elections Clause does not make a difference or does not say that there is a difference between procedural rules and substantive rules. It's nonsense. So that's the second theory, right? First one, state legislators not beholden at all. Second theory, if they are, only when it comes to procedural rules. The third theory, it gets even dumber, is that-

Jess Pieklo: No, stop it!

Imani Gandy: State courts can enforce specific rules but not open-ended rules. And somehow that's different than the procedural versus substantive differentia- I mean, OK.

Jess Pieklo: What the fuck?

Imani Gandy: Yeah, exactly. They can enforce specific rules. So a specific rule, for example, about how maps should be drawn so that they're contiguous, right? That would be a procedural rule, just the sort of mechanics of how maps are drawn. A non-specific rule, an open-ended rule is what state, what most state constitutions say, which is something like, we guarantee free and fair elections in this state.

That's apparently too open-ended for Republicans, because what does free mean? What does fair mean? We don't know. Again, let me repeat, there is nothing in the Elections Clause in the Constitution or Supreme Court precedent that supports this bizarre reading of the Elections Clause. And in fact, Supreme Court precedent supports the exact opposite reading of what North Carolina Republican lawmakers want to do.

Jess Pieklo: Can I take just a beat here for a second? I wanna focus in on the first of these three theories, just in a quick reaction here, because I love the idea of Republicans in these, like, gerrymandered-to-the-hilt states saying, "You know what, a couple of white guys in 1770 said is that this is how it stays forever." These folks who are in charge now aren't actually beholden to pretty much anybody. They're not beholden to the courts because apparently the courts don't have any power. If this was California, if this was Colorado, can you imagine putting the independent state legislature theory to work in Gavin Newsom's administration?

Imani Gandy: Well, no, because the independent state legislature theory only applies to Republican-controlled legislatures. It applies to red states, and it applies to purple states where Republicans are trying to get them to turn red. It doesn't apply to Democratic states. These hippie liberals with their hairy armpits, they don't get an independent state legislature theory. They have to run everything they do through the normal course of things, state constitutions, state courts, federal Constitution, federal court.

But Republicans, they get to go rogue and do whatever they want. And according to petitioners, right, when the Election Clause assigns authority to set the time, place, and manner of federal elections, when the elections clause assigns that authority to the state legislature, under petitioner's theory, it is authorizing these state legislatures to violate their own state constitutions as interpreted by their state courts. And when they violate their own state constitutions, those state courts can't do anything about it, because under this ridiculous theory, state legislatures are not beholden to how the state courts interpret the state constitution.

Even just saying it out loud is to just understand how freaking ridiculous it is to think that a bunch of legislators can just do whatever they want when it comes to federal elections, and no one can tell them otherwise. Here's what they say. They argue that, quote, "the power to regulate federal elections lies with state legislatures exclusively," end quote, and that when state courts enforce state constitutions, quote, "the state has reallocated a portion of the authority assigned specifically to its legislature and parceled it out instead to courts." Let me repeat that. What they are saying is that under the normal rules, the way lawmaking works, when a state court interprets the state constitution and then overturns a state legislative action, the

Republican lawmakers in North Carolina are arguing that what the court is really doing is abrogating for-arrogating, excuse me-for itself power that was assigned specifically to the legislature, and they're taking that power for themselves. That's nonsense. That's nonsense because checks and balances is how it works. It's not the court taking some of the jobs of these legislators, it's the court doing their job by judicially reviewing the acts of the legislature.

And that doesn't change just because the Elections Clause says that legislatures have the power to set the time and place. And you wanna know why? Because when the founders wrote all this crap, they assumed that the legislature included the entire legislative body, including the governor's right to veto, including a state court's right to say, "Hey, man, this doesn't comport with the state Constitution and it's unconstitutional under state law." That's how it's always worked. That's how the framers intended it to work. But, here we are with these novel arguments with this corrupt ass Court, and you know.

Jess Pieklo: My head is spinning. I love the law. I weirdly still love the Supreme Court in all of its terrible iterations. And this is so much just for me, even, to get my arms around. And okay, so I got a really basic question for you that I bet I share with some other folks. Right? What are we, Imani, a podcast that mostly focuses on repro issues, even doing talking about this case? Like, can I get a drink instead?

Imani Gandy: We can get a drink, but we also have to talk about this. Because how is it possible for people to elect representatives that will represent their interests, that will uphold bodily autonomy, that will somehow make it so that women and people capable of becoming pregnant are no longer second class citizens in a particular state? How is someone in North Carolina who is a big repro enthusiast supposed to have any confidence that they will be able to vote out people who want to relegate them to second class citizens and vote in people who don't wanna do that?

Because this is all about partisan gerrymandering and sprinkling people across districts so as to dilute their votes and ensure that Republicans are always going to win. If Republicans are always going to win, then people like you and I, if we're living in red states, there's nothing we can do about it. And the Supreme Court may just say, "Sure, that's fine." So basically, if bitches can't vote, how are bitches supposed to vote for repro?

Jess Pieklo: Fine, I'll pay attention.

Imani Gandy: But we gotta talk about it, it's messy, but-

Jess Pieklo: No, Imani's completely right. And it's one of the reasons why, you know, this term, we've been talking about cases that maybe we wouldn't have covered in some other time on the podcast. It's because there really is such a connection between the shenanigans that the conservative legal movement is, you know, like, unleashing across the country writ large, and the repro issues that we have been talking about for six, seven years now over at Rewire News Group. But we're gonna have a little fun now and actually talk about just why the Republican,

the North Carolina Republicans' claims are such nonsense. All right? A legislature is constrained by the Constitution that empowers it to make laws. Let me say that again, like, the legislature, any legislature, its power is limited by the constitution that creates it and grants it that authority. Like, this is Schoolhouse Rock-level common sense of how our civic institutions work. The Constitution grants the authority to legislatures and that authority is limited. I sound like a conservative.

Imani Gandy: Right? Right! Right, normally this is the conservative position, right? Like states' rights, states get to do things, state courts get to look at state constitutions and interpret state constitutions. And then if a state legislature is going far afield from what the state constitution as interpreted by the state court says it can do, then the court's like, they step in and they fix it somehow. But when it comes to running federal elections, somehow, these Republicans want the state courts to have no say.

Jess Pieklo: Yeah.

Imani Gandy: That means that they want the Constitution that creates the legislature that is doing all this crazy shit to have no say and to be able to reel in the state legislature. And that is absolutely cuckoo bananas.

Jess Pieklo: It is cuckoo bananas and I wanna talk about the Elections Clause again, just for a second here, because Imani's been going off about this. And honestly, like, she knows this case inside and out. I was distracting her on Slack during oral arguments. None of it was helpful. I apologize for that. But truly, so the election clause, as Imani has been saying, says the times, places, and manner of holding elections for senators and representatives, right? So that's federal elections in states, right? You're voting for your U.S. senator, you're voting for your representative to Congress. Shall, OK, shall, that's a permissive word, right? Permissive, not must, not, you know, shall, permissive, shall be prescribed in each state by the legislature thereof. That's what it says, OK? Permissive language and it ends.

But guess what? Congress can also act, folks. So that right there is another reason why North Carolina Republicans are just high on their own supply in this case. Like, it just doesn't make sense. The Election Clause does not say, "And in figuring out how to run elections, feel free to violate your own state constitution, guys." Totally cool.

Imani Gandy: Like, imagine. Like, it's a ridiculous position. It's an absolutely ridiculous position, and it boggles my- I'm frankly baffled that we have to sit here and try and explain this complicated shit to people, most of whom were intelligent enough not to go to law school.

Jess Pieklo: Right.

Imani Gandy: Right? Like, and for those of you who did, you're doing great, sweetie.

Jess Pieklo: Yes. We're all in it together, guys.

Imani Gandy: It's absolutely absurd to think that Congress, in creating this Election-or that the Constitution in creating this Elections Clause said, "By the way, go ahead and ignore your state constitution. It doesn't matter."

Jess Pieklo: Yeah.

Imani Gandy: But also, the framers? You know, you know, these people love the framers. The FedSoc Six love, conservatives love the framers. They're like, humping all the framers' legs, like, little dogs in the street. Love the framers. But they only love them when they agree with the framers, right? When the framers disagree with whatever neo-Republican nonsense is going on, then all of a sudden it's, "Ah, fuck the framers." Framers, what's a framer? I don't even know what framers are. Founding father found, "Found this!" Why didn't I just do that motion? Wow.

Jess Pieklo: Found this?

Imani Gandy: Oh my god. For the people who didn't see, I just did a waking off motion. Inappropriate, but it happened. Let's just move on from it. Okay, so during the constitutional convention, you know, back in the day when all the white dudes in all the white wigs and their little tights were making up rules for the country, James Madison recognized that quote, "A law violating a Constitution established by the people themselves would be considered null and void." Right? So that means if state legislatures are mucking about with federal elections- stop laughing, Jess.

Jess Pieklo: I'm pulled together. I'm so sorry.

Imani Gandy: So, you know, when states create constitutions, they prescribe certain laws, right? Certain regulations. And if a law violates the Constitution, then it's null and void. That's part of the framework of government.

Jess Pieklo: Yeah.

Imani Gandy: Right? And also, you know, you said the Elections Clause says that, you know, the time, place and manner shall be prescribed in each state by the legislature thereof. It doesn't define what "legislature thereof" means. At the time of the writing of this particular clause, the legislature meant the founding, the representative, the representative body, which makes the laws of the people, and the laws of the people are expressed through the Constitution and through the ways in which the state court interprets the Constitution.

So in fact, the legislature includes that whole apparatus. It doesn't just mean the however many, you know, members of the House of Representatives in a particular state there are. That's just not how it works. And the Elections Clause, the Elections Clause's reference to legislatures prescribed in each state by the legislature. The founders understood this phrase, understood the legislature to be a lawmaking body constrained by the Constitution that created it. Let me

say that again. State legislatures are constrained by the state constitutions which create them. If they go out of pocket, the state court comes in and says, "Hey man, you're out of pocket. You're violating our state Constitution. Knock it the hell off." That's what the framers intended. They didn't intend this business where, you know, MAGA loons get to just do whatever they want and steal elections and be, and take over the government and storm the Capitol. That's not at all what the framers intended.

Jess Pieklo: Absolutely not. So the ways in which the framers understood how the states, right, 'cause this is just one big federalism debate that we've got going on right now. How do states work versus how did the federal government work? The way the founders understood how states would work is inline with, well, you know what? How they've been running federal elections this whole time. But, this'll be fun, Imani.

Imani Gandy: Yeah.

Jess Pieklo: Conservatives also have a Tenth Amendment problem here.

Imani Gandy: But they love the Tenth Amendment. What are you talking about, states' rights? That's conservatives' jam. Did you know the Civil War was fought because of states' rights?

Jess Pieklo: If anybody remembers the Obama years, everything was a Tenth Amendment problem, except when it wasn't and that's where we find ourselves here again. So like we've been talking about all episode, this is a federalism issue, functionally before the Court. The federalism principles embodied in the Tenth Amendment underscore that the Election Clause does not override restrictions in state constitutions. Why is that? 'Cause it's open-ended. It says, "Hey, federal government has this little pocket of power and here's what it can do under these three articles." Right? This is like the most basic con law class ever right now.

Imani Gandy: Yeah.

Jess Pieklo: And then, if the federal government can't do it, that power's reserved to the states. Like, figure out how to run federal elections within the bounds of their own state constitution.

But it's more than that, actually. Empowering state legislatures to act contrary to their own constitutions would have marked a radical, radical departure from the most fundamental principles of the very constitution the framers had conveyed to write. I mean, they fought the Brits, right, to say we want to construct a cooperative style of governing, went through and was like, the Articles of Confederation, no, that doesn't quite do it. We're refiguring out the relationship between the federal government and the states knowing that we don't want the federal government to come in and dictate all the business of the states. Like, this is very basic stuff. Am I speaking to the Federalist Society right now? What is happening? Why am I explaining separation of powers like this?

Imani Gandy: I mean, the only answer is because these Republicans pick and choose the parts of the Constitution that they like. These Republicans know that their policy positions are unpopular across the board and that they cannot win elections in the future without either cheating, trying to overthrow the fricking government, or rewriting wholesale the Elections Clause of the Constitution. Article one of the, it's like the first article! And they wanna rewrite it. Because they think that the framers were like, "Yeah, go ahead states, do whatever you want when it comes to federal elections."

It doesn't even make logical sense. And accepting this theory, this independent state legislature theory, would require overruling nearly century-old precedent. Nearly century! Okay, there's a case called *Smiley v. Holm*. Smiley, right? It's a 1932 case. In this case, the Court directly addressed whether the Elections Clause allows a state legislature to enact laws that don't comport with the state constitution, and the Court unanimously said, "No." Let me say that again. In this 1932 case, somebody walked in and said, "Hey man, does the Elections Clause allow a state legislature to just do whatever it wants, even if it doesn't comport or comply with the state constitution?" And the Supreme Court said, "No, of course not, you ding-dongs." Right? The Smiley case held, and this was also a case about redistricting, about maps. The Smiley Court held that a congressional redistricting plan that was passed by the state legislature, but that was then subsequently vetoed by the governor, was invalid under the state constitution and quote, "cannot be sustained by virtue of any authority conferred by the federal Constitution." Again, the plan was invalid under the state constitution because it was vetoed by the governor, and it could not be sustained by virtue of any authority conferred by the federal Constitution, like the Elections Clause.

That's what they're trying to do. They are trying to say that the federal Constitution confers authority on the state legislature to ignore the state constitution so that it can play like, it can do really bizarre things when it comes to federal elections, like, for example, saying mail-in ballots are no longer valid, or absentee ballots are no longer valid, or poll closure times. All of these little issues that states just have to decide for themselves based on local reasons, these ding-dongs want the federal courts to get involved in that.

Jess Pieklo: Yeah, but precedent, schmehcedent. Am I right, Imani?

Imani Gandy: Yeah, that's true. Precedent, and can I just say precedent schmehcedent? I read a ProPublica article that talked about how the left progressive legal scholars and whatnot were being melodramatic about the *Moore v. Harper* case because it's not really going to mean that someone like Donald Trump can just replace the slate of electors and put in his slate of electors and then overturn the will of the people. The author of this article said that's not gonna happen because there's precedent that says the electors have to be chosen on such and such a day and blah, blah, blah, blah, blah. Did you just use the word precedent in saying that people who are looking at this issue and are concerned to poo-poo our concerns based on some claim about Supreme Court precedent when all term we've been dealing with cases, and last term, the Court just overruled 50 years of precedent and wasn't even asked to in the original cert petition.

Jess Pieklo: I was just gonna say, Roe v. Wade has entered the chat.

Imani Gandy: Exactly. So please, for the love of God, if you want to make a claim that I'm being melodramatic by saying that this is a really, really dangerous case for democracy, do not say I'm being melodramatic and then cite some Supreme Court case. I will seriously come to your house and knock you out. No, I won't.

Jess Pieklo: No, she won't. She won't.

Imani Gandy: But I'll bring you a cup of coffee and then we'll sit down and chat about it and I'll tell you. But you need to stop believing in these institutions because the Supreme Court as an institution is corrupt. It's corrupt.

Jess Pieklo: Imani, why are we here?

Imani Gandy: I don't know! I don't want to be here. This is ridiculous. This is a case of- this is actually gonna blow your mind. So strap in, this is gonna blow your mind. We don't need to be here and do you wanna know why?

Jess Pieklo: Why?

Imani Gandy: Because even if all of the North Carolina Republicans' arguments are true about the independent state legislature theory, the North Carolina legislature specifically authorizes judicial review of congressional redistricting plans. Let me say that again. North Carolina, the legislature in North Carolina, specifically says that the state that state courts in North Carolina can review congressional redistricting plans.

What is this case about? The review of congressional redistricting plan? The Supreme Court of North Carolina, get back into your chair! The Supreme Court of North Carolina looked at this redistricting plan, said no, and now North Carolina Republicans are complaining about it. So just as Congress can invest the federal judiciary with jurisdiction, the state legislature can do the same thing. And that's what North Carolina's legislature did. They did that when it created, literally, a specific procedure. I'm saying it over and over again just so you'll get it. A specific procedure authorizing judicial review of congressional redistricting plans under the state Constitution. And the legislature specifically authorized state courts to adopt interim plans when the legislature fails to remedy a Constitutional violation.

Again, that is what happened here. The state court said, "Hey, this map is bullshit. I need another map." The legislature was like, "Eh, well we're not really gonna do that. We don't wanna draw another map." So then the state court was like, "Fine, I'll draw the map and y'all are using this goddamn map." So when the North Carolina Republicans are claiming that somehow the judiciary has usurped the role of the state legislature in running federal elections, even if that's true in other states because they're not North Carolina and they don't have these specific precisions, it is not true in North Carolina because the North Carolina cannot- the North Carolina

judiciary cannot have usurped authority that the legislature explicitly gave it! What are we doing here? What are we doing here? I don't understand. Goddammit, I'm gonna lose my mind.

Jess Pieklo: It is so bad, it's so bad. Imani, and I like fanning ourselves with the script. But truly, the takeaway that I want everyone to know about this case is that this is the "Danger Will Robinson" case for our democracy. Truly, like five-alarm fire that Imani and I are cracking the kind of jokes that we are right now because of what's at stake. If any of the independent state legislature, legislature, I can barely even say it, I'm so upset, theories are adopted, it's a big problem. Not great Bob! Not great.

Imani Gandy: Not great, Bob.

Jess Pieklo: So bad. And we, so, you know, we talked about them a little bit ago at the upfront, and I'm gonna run through again just because it's a lot. So substantive versus procedural theory. We heard a lot about that. Is it a substantive change? Is it a procedural change? Well, one is fine, one is the other. Regulations that could have been implemented to make voting easier, for example, you know, mail-in ballots, like Imani was describing, or you know, here in Colorado, we have an extended early voting period. Things like that could all be invalidated, right?

So if you happen to live in a state where the Secretary of State's office has made it easy for you to exercise your right to vote, that is under threat in this case, The specific versus general theory that they were floating around, which we'll get to.

Imani Gandy: It's the same goddamn theory.

Jess Pieklo: It is the same theory.

Imani Gandy: Specific versus general. Substantive versus procedural. What the shit are you talking about? Oh my god.

Jess Pieklo: Basically. Basically, that's actually, had I filed a reply brief in this case, it would've been one line that was, "What the shit are you talking about?"

Imani Gandy: See, e.g.

Jess Pieklo: But this specific versus general theory, so like, let's put some meat on the bones here. Specific rules regarding how districts are drawn could be enforced by state courts, right? So like, a very specifically wildly gerrymandered map, totally cool for the state court to take a look at. A broader question of whether or not that gerrymandered map was in violation of free and fair elections, though? Bridge too far, Can't possibly do that. How could the judges ever come to an analysis? A model? They might have to make a test.

Imani Gandy: Oh god, a three-prong test?

Jess Pieklo: I mean, it's just, it makes no sense at all. So like, you know, it could mean that a state court could find a voter ID law unconstitutional because it runs contrary to the state constitution, right? Like, that? No, apparently we're not doing that anymore. OK, well, I guess that was fun while it lasted, like, you know.

Imani Gandy: It doesn't make any sense, right? Like, if a state court finds that a voter ID law is unconstitutional because it's not free and fair, North Carolina Republicans are saying that that state has violated the federal Constitution. Let me say that again. By finding voter ID laws unconstitutional under its state constitution, that state court is then in violation of the federal Constitution because these ass clowns think that only the state legislature can decide whether or not a voter ID law is constitutional. What? Ugh! And then, and then let's talk about the litigation tsunami that's gonna result, this opening of the floodgate.

Jess Pieklo: Oh, god!

Imani Gandy: I mean, if you think there's a lot of election litigation in federal courts now. How many lawsuits did Trump file? Something like 40, 50? I don't even know. When he was trying to overturn- imagine if the federal courts had to get involved in every little detail involved in running federal elections in a particular state. That would be ridiculous. Complaints about what the State Board of Elections official did would then be heard in federal court. Every minuscule thing, every administrative decision, every interpretation of state law would be open for judicial enforcement in federal court. Every advisory opinion from a state attorney general opining about how a state law applies to an election issue, that's gonna end up on the Supreme Court's shadow docket.

Rick Hasen wrote an amicus brief that just laid out, he's a professor at one of the Cal schools. I'm not sure which one, the University of California at something, but he's, I mean he's an elections law expert. And in his amicus brief, he talked about just the enormity of the litigation that would just start flooding through. And the courts are already borked. There's not enough room for the cases that are on there now. You're gonna add 50, 60, 100 elections cases to the fricking shadow docket? My goodness.

Jess Pieklo: So I'm gonna get a little conspiratorial here and say what if that's part of the point? I mean, Republicans didn't spend a decade plus stacking the federal courts with ideologues like Aileen Cannon, for example. Or, you know, David Strauss, any of these folks that we have on the courts now to just hand them partisan victories. And so what if part of the idea is to create a theory that you get to retain power as soon as you've tilted the scales in enough of your favor, and then make sure you've backstopped that theory with a federal judiciary in your pocket.

Imani Gandy: Yeah.

Jess Pieklo: Seems terrible for us, great for them.

Imani Gandy: Yeah, it is great, it's great for Republicans. So let's talk about oral arguments now, now that we've given you a smooth 30 minutes on this ridiculous.

Jess Pieklo: There's not a quiz, I promise.

Imani Gandy: State legislature theory. There's not a quiz. Let's talk about the oral arguments. Jess, who's shone for you today?

Jess Pieklo: OK, so the women of the Court minus Amy Coney Barrett, were not going down without a fight. And while Imani was so diligently live tweeting these arguments from the Rewire News Group main Twitter account, I was in her Slack yelling things about like, "Yeah! Get 'em!" Truly, it was amazing. The degree to which the veneer of, of oh, I don't know, just being polite to your colleagues was kind of dropped, was stunning from the women justices and I think it's a reflection of their understanding of just how much is on the line. I mean, we functionally had Justice Sotomayor call bullshit to the Republicans outright and say on the record, they're trying to rewrite history in this case in order to get the legal opinion that they want.

Imani Gandy: That was remarkable. I mean, the way she said it, she was like, "Well, yeah, I mean, if you wanna get the way you want, you have to rewrite history." It was very much like, it was very like Sonia from the block.

Jess Pieklo: Definitely. Right?

Imani Gandy: Right. And then Kagan. Kagan basically just came right out and said, you know, and she was not talking to the lawyers that were arguing before her. She was clearly talking to her colleagues about the precedent and how precedent is bad for ISL theory because this is a woman who knows that these clowns are more than happy to overturn precedent. So it seemed like she just wanted to make sure that they knew that what they were about to do goes against every precedent leading up to this day.

Jess Pieklo: Every one, every one. She was phenomenal. And I think really, you know, I have on this podcast talked about some of what I see as Justice Kagan's underappreciated gifts on the bench and the ability to serve as the foil to Chief Justice John Roberts in this case, I think, and all of the elections cases, is really one of her strengths. She meets him where he is at intellectually and bests him every time, and he can't stand it. And today she was just like, "Hey look, I've got all the receipts. I have all y'all's priors because I've been doing these cases with you and you're just about to contradict yourself, John. Can you hear me, John?" Like, that's basically what she was doing. And can we just have a moment again for Justice Jackson and the originalism, textualism work that she did today?

Imani Gandy: Yes, please. After you.

Jess Pieklo: It's an entire word. Like, the idea that we have the first Black woman justice on the Court taking on, in case after case after case, the originalist lane is, I mean, it's just fuckin' baller. I don't know what else to say about it, like, truly.

Imani Gandy: It's brilliant.

Jess Pieklo: 'Cause she's better, she's better!

Imani Gandy: She's better at it! She's, I was thinking that today. I was like, this woman is so smart. She's so smart and she's so much better than Kavanaugh. And she's really good at asking pointed questions and forcing lawyers to answer the question that she asks.

Jess Pieklo: Yes.

Imani Gandy: Which I found amazing.

Jess Pieklo: Yeah, she is a really good foil. This is clearly a thing I have with the Court, to Amy Coney Barrett, who also, I will say, I think asks very good questions from the bench. Like, we knock her for very good reason on this podcast quite a bit, but she's not like Kavanaugh that she like, actually asks informed questions, which is why she's dangerous because she bailed out conservatives time and time, and time again in this argument, and, you know, look, we all know that the confirmation hearings are just nonsense. It's garbage theater, like, we know that.

And for all of her insistence that she has a fidelity to precedent and that understands the limited role of the courts, like, she was basically like, "Yes! Let's do it. YOLO, precedent what?" Like, she was maybe more excited than even Justice Gorsuch to hand Republicans a victory in this case. And I think we should be paying attention to that.

Imani Gandy: Can we talk about Gorsuch for a minute? Gorsuch, trying to make a claim that somehow antebellum Virginia saved the Civil War because of the Elections Clause. Like, it's the same, it's using what they- you know, I was on the radio with Elie Mystal this morning and he made a good point is that the worst thing that these people can think of is something that they did to Black bodies, right?

The worst thing that Alito could think of was a Black kid in a KKK outfit. The worst thing that they could think of is that, well actually the Virginia, the Elections Clause helped end slavery. And he tried to argue that somehow Neal Katyal, who was arguing on behalf of one of the private respondents was somehow defending the Three-Fifths Clause. Like, that's, you know, Katyal was like, "Excuse me?"

Jess Pieklo: I know.

Imani Gandy: He was really good. Can we talk about him for a second?

Jess Pieklo: He was really good. He was basically defending the voice of reason, the voice of anybody on this podcast who's like, "What the hell is going on and why are we here?" He was very, very good. I mean, look, I still am mad about his whole New York Times op-ed that was like, "Neil Gorsuch, not so bad."

Imani Gandy: He's not so bad.

Jess Pieklo: But, you know, he did a very good job. And what I think Katyal was excellent at, and I saw a couple people make this point, is look, this was a, today's argument was a who's who of Supreme Court litigators like, for the last 10 to 15 years. And one of the benefits to that, and I don't always think that there are a lot of benefits to that, but in this case, one of the benefits to that was that Neal Katyal has all of the records, all of the priors, all of the opinions of the previous justices pretty much tattooed to memory at this point and is able to quote them back to them. So it is powerful to hear an advocate quote Justice Thomas' own words back to him as a rebuttal. And so that's where I think he was really effective. Will it get the votes? I doubt it, but it was excellent advocacy.

Imani Gandy: Right, he was calling Thomas out. I mean, it was actually a pretty funny exchange where he said something like, I've been waiting 20 years to ask you these questions. And then he actually quoted Thomas back to him from the Palm Beach case. I'm not sure what the name of the case is, but it's Palm Beach versus somebody where Thomas actually wrote, "Sovereignty is at its apex when it comes to state courts."

Sovereignty is at its apex when it comes to state courts. But yet here he is, he's a person who has signed on for this independent state legislature theory. So again, "sovereignty's at its apex when it comes to state courts," except when it comes to serving his Federalist Society masters, right? Except when it comes to mucking with the way elections have been run in this country since the founding of this country. That stuff doesn't matter and Katyal was there to call him out on it.

Jess Pieklo: Yep. It was good to see.

Imani Gandy: Yeah, yeah. So my question for you, Cassandra, what's gonna happen? How's this all gonna play out?

Jess Pieklo: I dunno. I have no idea. It's so much, it's so much. So I will say like, look, there are clearly a handful of votes to nuke democracy, like, truly. We have Amy Coney Barrett super stoked to be there, Alito.

Imani Gandy: I mean, Alito. Alito, leaker of opinions, Alito.

Jess Pieklo: Well I'm gonna work on a nickname related to that. Stay tuned folks. Thomas is there. Like, I loved that Justice Thomas for every single question was basically like, "I don't understand why we're here, but I need you to explain what I should do to get you the outcome that you would like."

Imani Gandy: And he was on the Bush v. Gore, I mean, he was part of the Bush v. Gore 2000 debacle. Right? And that's something that I forgot to mention earlier. The independent state

legislature theory featured heavily in Bush v. Gore in 2000. Rehnquist wrote about it, right? And it wasn't part of, it wasn't a ruling. I mean, it was barely dicta. It was just like- I gotta stop making that motion. What's wrong with me? Especially after saying barely dicta, Imani. Oh no!

Jess Pieklo: This what I say, the Bush v. Gore decision appeared everywhere in today's oral arguments, which should trouble all of us because there are three Bush v. Gore alumni currently on the bench, right? Justice Amy Coney Barrett, Brett Kavanaugh, John Roberts.

Imani Gandy: I mean, when we talk about the ways in which these, these locuses, loci of power are sort of corrupt from the beginning, this is what we're talking about, right? Going back to Bush v. Gore, which is pretty much among all legal scholars known as just a shitty opinion, just a real crappy opinion, even the people who wrote it were like, this is only applicable to this little situation.

Jess Pieklo: Please, whatever you do, don't read this again after today.

Imani Gandy: Certainly, don't pose this theory as something that we should adhere to and make Constitutional law going forward.

Jess Pieklo: Oh, but we're about to, we're about to.

Imani Gandy: Yeah, they're about to. So who, so Roberts is probably not on board with this, do you think?

Jess Pieklo: I mean, you know what, here's the thing. John Roberts was having a hell of a lot of fun today and I'm sorry, John. Why? What is fun about what is happening right now? Like, I, you know, I joke to Imani that this was maybe the worst Aspen Ideas Festival ever, and truly, I think it was. I don't think it matters where John Roberts is on this case, right? Like, if there, unless he is going to be a deciding vote, which I don't know if he is. You know who I think it matters more is Kavanaugh.

Like this, This man, might, this man might decide the future of how federal elections are run in places like Louisiana.

Imani Gandy: And it's distressing too, if you think about his shenanigans, his outbursts at these confirmation hearings. Like, it seems like he wants to stick it to Democrats. And what better way to stick it to Democrats than to say, "Hey, Republican controlled legislatures can do whatever they want when it comes to federal elections."

Jess Pieklo: Yep, yep. So...

Imani Gandy: Well, that's fun.

Jess Pieklo: It's fun, it's great, wild times. Love it here.

Imani Gandy: Wild times at the Supreme Court. If you made it through this entire podcast, congratulations because honestly, this is probably one of the most difficult subjects we tackled in our seven years of doing this.

Jess Pieklo: Truly, one of the most complicated ones.

Imani Gandy: It is, and and if you have any questions about it, if you wanna talk about it, you can find me on Twitter @AngryBlackLady. You can find Jess on Twitter @hegemommy, H-E-G-E-M-O-M-M-Y. You should, can, must follow Rewire News Group on Twitter and on YouTube. That's youtube.com/RewireNewsGroup. And yeah, ask us questions because if you're confused, there are no dumb questions, there really aren't. Because this is a comp- There never are.

Jess Pieklo: Only Justice Kavanaugh's. No, I'm... That was terrible, I'm so sorry.

Imani Gandy: Not from you, our fellow law nerd. So please feel free to hit us up, ask us questions. And go get a drink because you deserve it. You deserve it. It's day drinking time, right?

Jess Pieklo: It really is.

Imani Gandy: And what else are we gonna do besides day drink?

Jess Pieklo: We'll see on the tubes, folks.

Imani Gandy: We're gonna see you on the tubes, folks.