

Common Law S5 Ep 2: Bertrall Ross Episode Transcript

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Risa Goluboff: Today on Common Law, the independent state legislature theory with UVA Law Professor Bertrall Ross. Could it change election district maps across the country?

Bertrall Ross: One can imagine extreme distortions of our democratic process by state legislatures. And that is a very troubling potential future that we face. And I worry about it.

[THEME MUSIC UP, THEN UNDER]

Risa Goluboff: Welcome back to Common Law, a podcast of the University of Virginia School of Law. I'm Risa Goluboff, the dean.

John Harrison: And I'm UVA law professor John Harrison.

Risa Goluboff: We are now in our fifth season of Common Law, and I'm so pleased to welcome John back as one of four co-hosts helping choose and interview our guests, connected with their individual fields, ranging from constitutional law to corporate law. It's a second take on our prior season, which was so much fun, we're doing it again. We call it Co-Counsel: the Appeal.

John Harrison: Risa, it's great to be back. I do hope that we didn't commit too many errors last year that need to be corrected on appeal.

Risa Goluboff: Ha Ha Ha.

John Harrison: Today, I'm looking forward to our interviewing our next guest, UVA Law Professor Bertrall Ross. Bertrall teaches and writes in the areas of constitutional law and theory, election law, administrative law, and statutory interpretation. He's also a director of the Law School's Karsh Center for Law and Democracy.

Risa Goluboff: Bertrall joined the faculty last year and he has some really interesting insights on the inclusion of marginalized communities in democratic processes. I can't wait to hear what we'll be talking with him about today. Tell us more, John.

John Harrison: Bertall is going to talk with us about a highly anticipated case in this term of the Supreme Court, Moore against Harper, then we'll be turning to some of the broader issues associated with the role of state legislatures in federal elections.

[THEME MUSIC CREEPS IN]

Risa Goluboff: And who better to help us parse the ins and outs of all of this than Bertrall? We'll be right back with Bertrall Ross.

[THEME MUSIC UP FULL, THEN UNDER AND OUT]

Risa Goluboff: Bertrall, thank you so much for being here.

Bertrall Ross: Oh, it's great to be here. Thanks for having me.

John Harrison: Well, we're here to talk about the role of state legislatures under the federal constitution and what's sometimes called the independent state legislature doctrine, which is before the Supreme Court this term in a case from North Carolina in which they've granted certiorari, and that'll be argued later in the term. Bertrall maybe you could start us off by telling us what's going on in that North Carolina case.

Bertrall Ross: Yeah, for sure. So, North Carolina, the state legislature engaged in the redistricting process after the census. And that's required by the constitution. They have to reapportion their districts or redistrict according to the new shifts in population that occur over the course of a decade. And so they engaged in that process and the legislature, which is controlled by Republicans, drew the districts in a manner that's quite favorable to the Republican party. It would've resulted in a disproportionate number of Republicans potentially getting elected in a state that was, you know, relatively evenly divided between Democrats and Republicans. So the map was challenged in state court, and the lower court and then the state Supreme Court, ultimately found that the map violated the state constitution because it failed to provide for free elections. And so that's kind of the background to the case. Now, what the challengers argue with respect to the Supreme Court's decision – state Supreme Court's decision, is that it violates the federal Constitution.

John Harrison: Right.

Bertrall Ross: And what they're relying on is a reading of Article I, section IV of the Constitution, which says that the time, place and manner of elections shall be prescribed by the legislatures of the states thereof. And then it gives Congress oversight authority. So that's kind of the premise and the buildup to this particular case. And the court – Supreme Court – has taken cert on the question of whether the court has the authority to override a state legislature's decision with respect to districting maps, whether the state courts have a role with respect to the time, place, and manner of elections.

John Harrison: Are the petitioners who don't like what the Supreme Court of North Carolina did here, arguing that a state court can't have any role in districting or that there are limits on what state courts can do and that the North Carolina court went beyond those limits?

Bertrall Ross: Yeah, it started off as a simple argument, but then it got a bit more complex.

John Harrison: Okay.

Bertrall Ross: And so the simple argument is that Article I, Section IV says nothing about courts, and therefore courts have no authority with respect to the time, place, and manner of elections. But then, that argument runs into a problem, and that problem is associated with the other parts of the Constitution and the role of federal courts. So the petitioners do not argue that the federal courts do not have a role with respect to time, place, and manner of elections. Rather, they instead recognize that Article III of the Constitution gives to the federal courts the role of adjudicating federal questions, which also implicates the state courts, since state courts have general subject matter jurisdiction, and so they would also have the authority to adjudicate federal questions.

Risa Goluboff: By that logic, it seems unlikely the petitioners would argue successfully that the state courts have NO role with respect to the time, place and manner of elections, right? So what ARE they arguing then?

Bertrall Ross: So instead, what they're arguing, which is a more complicated argument, is that those courts have a role but they cannot use their power – state courts cannot use their power – to enforce state constitutions, and to use the state constitution to override state

legislative provisions, regulations of the time, place, and manner of elections.

Risa Goluboff: Okay.

Bertrall Ross: And now that argument is not derived from the text itself because the text itself says nothing about the source of law.

Risa Goluboff: Right.

Bertrall Ross: And so what they're instead arguing is that the Article I, Section IV sets forth a federal function and gives to the state legislatures a federal function with respect to time, place, and manner of elections. And insofar as it gives to the states a federal function, that federal function cannot be overwritten by the state constitution.

John Harrison: Do they need an argument that strong?

Bertrall Ross: They don't need an argument that strong. I think that there could be other arguments that could be made here. One would be more tailored for this particular case. And that would be an argument that the court – state court – exercise a form of lawmaking power when they hired masters to draw new maps.

John Harrison: Yeah, yeah.

Bertrall Ross: And the argument could be that that is a state legislature power and that cannot be taken away by the courts. That would not implicate judicial review. It would still say the state courts can exercise judicial review under the state constitution, but there are limits on what they can do.

John Harrison: Mm-hmm.

Bertrall Ross: They can say that what the legislature has done is unconstitutional, but they cannot go any further. That could be the more narrow argument that the petitioners could have brought.

Risa Goluboff: So the idea that courts are legislating or somehow lawmaking as opposed to interpreting, that gets leveled at courts all the time, right? So what makes this instance of that special, or particularly important to redress?

Bertrall Ross: Yeah, that's a, um, a great point in terms of lawmaking. A distinction petitioners could draw in this case between lawmaking that courts are typically accused of, and the redrawing of the maps here, it's usually a claim that they have interpreted a statute in a way that's inconsistent with the intent or text of the legal instrument. And that argument is that they have, in a sense, read into the law something it wasn't designed to do, right?

Risa Goluboff: Sure.

Bertrall Ross: That, sure, is a form of lawmaking, and a form of lawmaking that certainly has an effect. Here though, there is, in a sense, a procedure of lawmaking that's occurring here, in the sense that the legislature is engaging in an active lawmaking process. So what they did was they hired a set of experts to help them draw a map that would be less partisan and would be more fair or free in accordance to the state constitution. And that process of drawing a map, that process of making a law, is something that is delegated to lawmaking institutions and state and federal constitutions. And so the argument could be made that this is something distinct. It's a matter of degree perhaps, but it's something distinct that is occurring here, that goes too far and goes beyond what authority the courts have under the state constitution.

Risa Goluboff: So I hear that, but I guess I think of prison reform litigation or school desegregation.

Bertrall Ross: Yeah.

Risa Goluboff: Courts have had experts, they've had consent decrees, they've engaged in, you know, ordering taxes to be raised.

Bertrall Ross: Yeah.

Risa Goluboff: Maybe the petitioners here would say those exercises of power are illegitimate too, but I'm just trying to figure out where the lines are.

Bertrall Ross: Yeah. I mean, it's exercise of remedial authority there, right? And I think that once you get into those categories of remediation, I think that it starts to ultimately blend into what the court is perhaps doing here, with respect to identifying a remedy that would address the

problem of an unfair or unfree map according to the North Carolina constitution.

Now, another issue that's raised is, if the court doesn't play this remedial role, and the legislature continues to resist, and the time runs out before the election, then what you're going to have in place potentially are maps that violate the constitution, maps that are inconsistent with either the federal or state constitution, as would be applied by the courts. And so there's an important role that remediation plays here. It's why courts have traditionally exercised this remedial authority as a means to ensure that elections operate in accordance with the Constitution or law.

John Harrison: One of the things I was wondering is whether it's possible to draw the line between what's permissibly judicial and what would be impermissibly legislated if done by a court, is with the line between finding that a map is unlawful and then the remedy of providing another map, and it, it seems to me that what you're saying is the problem with drawing the line that way, is that if what a court can do is say "What the legislature has done is impermissible, but we can't say what the right answer is because that would be us acting like the legislature" and then the state ends up with no lawful way of conducting its elections. Is that the problem?

Bertrall Ross: That is the problem, and that's especially the problem when it comes to congressional elections. So you could say, well, there could be a default remedy. And one of the default remedies that's been applied in the past is that all the elections have to be run at large. There'd be jurisdiction-wide elections for all legislators, all Congress members in this particular case. The problem is that there is an act – a federal statute – that requires that all congressional districts be single-member districts, and that all representatives be elected from single-member districts. So any remedy cannot fall into the default. And so therefore, there has to be some sort of single-member district map that accords with law. And if the courts do not have the authority to offer a remedy that accords with law, and the state can be recalcitrant and resistant — in a sense, run out the clock — then you're going to have cases in which elections will be run that have been found to be contrary to constitutions and or the law. And that's a troubling scenario to imagine.

John Harrison: Do you think there's any appeal to the remedial line saying that the role of the courts as courts is fundamentally negative, to

say what kind of laws the Constitution doesn't allow, but that the kind of weighing of judgmental factors that goes into drawing a map is something that is more legislative, and so, but for this problem, would that be a sensible way to try to implement the idea that courts can't be legislatures?

Bertrall Ross: I think it would be sensible, and it's certainly, um, better than the worst-case scenario in which the court adopts wholesale the independent state legislature theory, because I think that that would be quite detrimental to future elections and to democracy.

Risa Goluboff: Can you say what you mean by the court adopting wholesale?

Bertrall Ross: I mean by the court saying that state courts cannot adjudicate, or cannot enforce state constitutions against the time, place, and manner restrictions and regulations.

Risa Goluboff: Got it.

John Harrison: No state constitutional limits ...

Risa Goluboff: Not even in the negative?

Bertrall Ross: Not even in the negative.

John Harrison: Right, right.

Bertrall Ross: Why that's particularly troubling from a democracy perspective is that the court with respect to gerrymandering, the U.S. Supreme Court, excuse me, with respect to gerrymandering, has already said that there is no role for federal courts with respect to enforcing the federal Constitution.

Risa Goluboff: For partisan gerrymandering.

Bertrall Ross: To police partisan gerrymandering.

Risa Goluboff: Yeah.

Bertrall Ross: And what they said in that case of *Rucho v. Common Cause* is that the state courts can always step in and enforce the state constitution to regulate partisan gerrymandering. But what the independent state legislature theory would mean if it was adopted by the [Supreme] court is that now state courts cannot step in and enforce the state constitution to check partisan gerrymandering. And so that would lead to essentially unregulated partisan gerrymandering unless Congress stepped in.

John Harrison: Unregulated, partisan gerrymandering as to congressional districts, not ...

Bertrall Ross: As to congressional districts, absolutely.

John Harrison: Not state legislatures. Yup.

Bertrall Ross: So state courts would still have the authority to enforce the state constitution against state legislative line-drawing.

Risa Goluboff: Line-drawing in state elections.

Bertrall Ross: In state elections, whether it be state legislative elections or even local elections at the city or county level.

John Harrison: That's not based on a federal grant of power, so that's just not covered by this theory.

Bertrall Ross: Exactly. Not based on federal grant of power, and so those would be, um, subject to regulation and review under state constitutions. But federal elections and federal district lines would no longer be subject to review under state constitutions. And you would have to essentially rely on Congress to step in when the states have gone too far, or perhaps to adopt an overarching piece of legislation like the For the People Act that provides for the regulation of line-drawing through the creation of independent redistricting commissions.

John Harrison: Right.

Bertrall Ross: You would have to have some piece of legislation put forth by Congress to check partisan gerrymandering if state courts aren't able to step in to enforce the state constitution.

John Harrison: Has there been any discussion of congressional legislation under Congress' power here that would be targeted specifically to partisan gerrymandering?

Bertrall Ross: Yeah, so there has been historically a set of laws that have been applied to congressional districting as a constraint on what state legislatures can do. In the Apportionment Act of 1929, for example, there was a set of laws that provided that districts had to be compact and contiguous and equally apportioned. Um, then there was the law in '67 that required that districts be single member districts. So Congress has, before, stepped in, and ultimately limited what state legislatures can do. But then with respect to this round what you would have to do – we have a Congress that's a bit different and sees districting a bit differently than past congresses. It's become a hotspot for political controversy. And as a result, there's little agreement between Democrats and Republicans as to the proper means of reform with respect to state legislative redistricting. So I'm not confident that Congress would step in as it has in the past to adopt a reapportionment act, unless it was under the full control of the Democratic Party, which seems more interested in reform, and perhaps the filibuster is eliminated. Then perhaps they pass something like the For the People Act, which would constrain state legislatures in drawing district lines.

John Harrison: The statute you mentioned from 1929, if I'm remembering right, that was after Congress spent the entire 1920s unable to respond to the 1920 census, so ...

Bertrall Ross: That's exactly right, right.

John Harrison: A little congressional gridlock is not a recent invention.

[LAUGHING]

Bertrall Ross: No, fair enough. Fair enough. It's not a recent invention and, and you're right to point that out. And what that led to was tremendously and dramatically malapportioned districts at that time, that were, um, constitutionally troubling, at least.

John Harrison: I was thinking about trying to explore if there's a more limited version of this and sort of beginning with: Are there any constitutional limits? What if a state constitution just said, "The Supreme Court shall decide the time, place, and manner"?

Bertrall Ross: So in this case, yeah, there is another limit. So aside from limiting the remedial power of the court, to say that it can only invalidate, but it can't redraw a map, another potential possibility is that here what we have is North Carolina law that specifies a role for the court in redistricting matters, right?

John Harrison: Mm-hmm.

Bertrall Ross: It essentially says that the court should have judicial review authority. That presumably includes the authority to review what the legislature has done under the state constitution. And what you can imagine is that to the extent that states have a law like this on the books that gives the courts a role, then the court should have a role with respect to checking the exercise of authority under the state constitution. But if the legislature does not specify a role for the court, then, you know, the question is, well, maybe the court's power should be limited to merely checking under the state constitution, but not having that remedial authority. Perhaps you could divide it at that point. But that would give the court a way out with respect to this particular case. It could say, "Look, this is all specified in state law, this role for the court. We're not going to step in insofar as the state law provides for this. And if the legislature wants to amend this law or repeal this law, then we'll revisit this particular case of the independent state legislature theory if the court doesn't feel prepared to address this particular matter in this term."

Risa Goluboff: In a, an article in the Atlantic Magazine, former federal judge Michael J. Luttig, he said, "The Supreme Court will decide before next summer, the most important case for American democracy in the almost two-and-a-half centuries since America's founding." And the case he means is *Moore v. Harper*. Why would he say that this case about the independent state legislature theory is the single most important case in two-and-a-half centuries for democracy? It sounds like a strong claim, and I'm curious why he thinks that, and if you agree with it.

Bertrall Ross: It is a strong claim. And I guess I'll start by saying I do agree with it and the reason why I agree with it is mainly because of the context that we're living in. Partisan manipulation of politics is at an extreme moment. And we are requiring on, some checks that are built into the system to stop that extreme partisan manipulation of our politics. And if we remove one of those checks, such as the role of the state

courts enforcing state constitutions, which could also remove other checks with respect to the electors and the electoral college system and the certified elections and review of state legislative process with respect to electors, we remove the state court role from that potentially as well. What this would mean is that the state legislatures would almost be essentially unconstrained unless Congress steps in.

Risa Goluboff: Sure.

Bertrall Ross: Now, Congress could step in, but it would have to overcome the gridlock that impacts the institution right now.

Risa Goluboff: Which, admittedly, seems increasingly unlikely. So, what happens if Congress can't step in?

Bertrall Ross: One can imagine extreme distortions of our democratic process by state legislatures. Both parties would take full advantage of their essentially unconstrained discretion to gerrymander maps to such extremes that you would have states in which the congressional delegation from a state would be comprised of only one party in a state in which there would be many members of the other party residing in it. And that is a very troubling potential future that we face. And I worry about it.

Risa Goluboff: Sure.

Bertrall Ross: I guess the only thing I would say in terms of pushing back against Luttig, there is another check, and that goes beyond Congress, and that would be relying on state elections and hoping for divided government.

The only thing we could hope for is that in those states in which the governors may have a role in districting, that the governor is elected from the other party to, in a sense, check the extreme forms of gerrymandering that would occur with respect to Congress in the absence of, of a role for state courts enforcing the state constitution.

John Harrison: How much do you think the court sees this case as a follow onto Rucho? That is to say, they tried to get the federal courts out of the business of saying partisan gerrymandering is subject to, to constitutional limitations. And now a state court, as several have, have

said, “but our state constitution does impose limits.” Do you think that's what's driving the cert grant here to some extent?

Bertrall Ross: Yeah. So it's interesting, right, because I think that Justice Roberts is the one who wrote into the *Rucho* decision, that yes, there is still a role for state courts, with respect to enforcing the state constitution. And so for him, I think that, you know, the independent state legislature theory, insofar as it's adopted by the court, would conflict with that statement. And so I think that he should have been less inclined to vote for cert on this particular matter. And I think the three more liberal justices should have been less inclined to vote for cert because I think that they would be inclined to reject the independent state legislature theory. But then you have the five, uh, more conservative justices, some of whom joined Justice Roberts' opinion, but it's not clear in terms of whether they support that particular point that he made. And so, I'm curious as to what the motivations might have been for taking cert. And it's not entirely clear to me. It could have been just a curiosity, right? As a simple textual argument, it makes some sense, but then when you kind of look deeper and under the hood, it starts to fall apart. And then you start to develop and see this more complex argument that is being put forth with respect to federal functions and whether federal functions exercised by state legislatures override state constitutions. That's when it gets a bit complicated. And I think it might have been more than what the court might have been willing to take on if they had known the complexity of the issue. Cause if you look at the cert petition brought by the petitioner, it relies more on the simplified textual argument than the more complex functionalist argument, for lack of a better way of describing it.

Risa Goluboff: So just to clarify, when you think about the relationship between *Rucho* and this case, you can think of it either as there are justices who don't want the courts involved in reviewing partisan gerrymandering at all. And *Rucho* is the first step that says federal courts can't. And then this would be the second step that gets state courts out of the business. The alternative view would be, getting the federal courts out of the business of reviewing partisan gerrymandering was based on the idea that state courts would be doing it, and that this would therefore undermine some of the arguments that the court was assuming were true in *Rucho*. Is that right? That those are the two options?

Bertrall Ross: Yeah, and that's right. I think the conservative justices might be divided on that, which of the two options, right? I think there

might be some conservative justices, maybe Justice Thomas falls into this camp – maybe Justice Alito, I'm not sure – fall into the camp that there should not be any role for the court in policing these matters, right? And so this is an opportunity to get courts – both federal courts and state courts – out of the matter of reviewing time, place, and manner regulations, right? That's something that's delegated to the state legislatures by the Constitution. Full stop. Right? And then, um, there's the other conservative view that's led by Roberts. I don't know who else joins. I, I'm not sure where Kavanaugh stands on it necessarily, or where, um, Barrett stands on it, or Gorsuch. But it's this other view that, yes, federal courts should be involved in this cause there's no real federal constitutional provision that gives us any guidance on how to apply, or how to regulate or how to, um, adjudicate matters involving gerrymandering, right? What is the standard that should be applied? Where does that standard come from in the Constitution itself? And so there are, however, state constitutional provisions that are on the books that are more applicable perhaps to gerrymandering disputes, insofar as there are constitutional provisions providing for fair and free elections. Perhaps that could provide more guidance to state courts enforcing their constitutions to adjudicate the limits on partisan gerrymandering. Part of the conservative justices seem to be aligned in that way. It's just a matter of what's the ratio, what proportion of the conservative justices are on one side versus the other.

John Harrison: Do you think that there's anybody who thinks that only Congress can act with respect to partisan gerrymandering?

Bertrall Ross: Yeah. It would be an extreme view, but I, you know, looking to the textualists on the court, perhaps Justice Thomas would be a person who would align himself with that view. I guess we'll see, forthcoming. And what that view would require is that the court not only find in favor of the petitioners in this case, but they would also have to overrule a 1932 case called *Smiley v. Holm* ...

John Harrison: Right.

Bertrall Ross: ... that said that the governor exercising veto authority with respect to congressional maps is permissible under the Constitution, even though the Constitution prescribes to the state legislature the time, place, and manner of election. It would be challenging, although possible, to distinguish that *Smiley v. Holm* case; they could argue that governor veto is part of the legislative process and

therefore it's distinct from the exercise of judicial review. So you'd have to make that move. But it would open the door to a broad interpretation of the independent state legislature theory such that it not only excises the courts, but also the governor and, and ultimately leaves to Congress the only review authority with respect to state legislatures in prescribing the time, place, and manner of elections.

Risa Goluboff: Doesn't it prove too much – the simpler textual approach? Don't we infer judicial review of all kinds of clauses that seem to give initial power to some other body?

Bertrall Ross: That's absolutely right. I mean, Article I starts off, “Congress shall have the power,” and then it specifies the powers that it has under Article 1, Section VIII of the Constitution. And in that part of the Constitution, it never specifies that the court shall have the authority to review the exercises of these powers under the Constitution. Instead, what the court has looked to, um, Article III, Section II, which gives the court's federal questions jurisdiction, or you just look to *Marbury v. Madison*, which is a broad assertion of judicial power with respect to reviewing, um, laws that are made by Congress.

And it would seem that looking to Article I, Section IV, perhaps is doing the same thing, right? It's not necessarily specifying judicial review, but judicial review is assumed to be a part of that provision as it is part of Article I of the Constitution as well. And that could be supported by the same logic that *Marbury v. Madison* relies on and even looking to the text of Article III of the Constitution. And once the federal courts have power with respect to reviewing the prescription of time, place, and manner of elections, you can't really excise state courts from doing that because state courts are courts of general subject matter jurisdiction, and so they will have also power to adjudicate matters under the federal Constitution as well.

And so the simple argument from text starts to fall apart there unless you're willing to go with a rather extreme view that insofar as Congress is specified as having authority or any legislative body or anybody is specified as having authority, and the other body that's supposed to review that exercise of authority is not specified, that body that's reviewing that exercise of authority does not have the power to do so.

Risa Goluboff: And that's why we then end up with narrower versions of the argument?

Bertrall Ross: Yeah, the narrow, more complex version of the argument. Yeah.

[THEME MUSIC CREEPS IN]

Risa Goluboff: Well, this was absolutely fascinating, Bertrall. Thank you so much for joining us today. I'm going to look forward to seeing what happens at the court and have your voice in my head as I watch it all unfold.

John Harrison: This stuff is just so good, Bertrall. Thank you for talking to us about it.

Bertrall Ross: Thanks, John. It's great being here.

[THEME MUSIC UP, THEN UNDER]

Risa Goluboff: So John, I'm curious, do you agree with Judge Luttig and Bertrall that this is the most important case for democracy in two-and-a-half centuries?

John Harrison: I confess, I think that's a little strong. I think it's especially unlikely that the Supreme Court would decide this case in a way that has really broad implications, especially for selection of presidential electors and state legislative control over selection of presidential electors. I think that's sort of the specter that is haunting people here and that makes them think that this case might have really large, practical implications. I think that's conceivable, but probably unlikely.

Risa Goluboff: The politics of elected judges does seem to haunt all of it, right?

John Harrison: Mm-hmm.

Risa Goluboff: Do think this is, you know, a major case at the Supreme Court if we didn't live in a world where state judges were elected? Would we still be having these conversations, or is this really about a partisan conflict between partisan state legislatures and perceived – at least perceived, if not actually – partisan judges. Does that change if state judges are appointed?

John Harrison: I think that is certainly an undercurrent here. The idea that you have one partisan institution in a state, the legislature, and another partisan institution, maybe its highest court, in what is basically a partisan political conflict, and that that may be what's bothering people about what's going on in some of these cases. I'm going to say that there is a link between partisanship and election of judges, but it's only a link. There are judges selected in all sorts of different ways, including the way in which federal judges are selected by appointment by the president with confirmation by the Senate, that can nevertheless produce partisan — sometimes, unfortunately— decision-making.

Risa Goluboff: Right.

John Harrison: So, I – I think the real story is partisanship and that election is important because it exacerbates partisanship on the courts.

Risa Goluboff: But it doesn't create it. Either actual or perceived partisanship on courts exists regardless of the method of, of selection.

John Harrison: Yes. I think that's right.

Risa Goluboff: Yeah.

John Harrison: How much in the reporting about the Supreme Court do we hear about which president's party appointed which judge?

Risa Goluboff: Right, so the existence of that conversation at the Supreme Court, which is obviously not elected, shows that elections might exacerbate this question, but they aren't the key to the problem.

John Harrison: Mm-hmm.

Risa Goluboff: The conversation that we just had was so interesting in part because, you know, it raises federalism questions, it raises separation-of-powers questions, it raises these questions about elected versus appointed judges and the role of courts generally. And that then I think, leads into the, the large conversation at the back of all this about the interpretation versus lawmaking or interpretation versus legislative uh, behavior by courts, which is obviously, you know, a huge question many of us spend much of our academic careers thinking about.

John Harrison: It is a very important topic. Is any principle that requires distinguishing actual judicial adjudication from judicial lawmaking of any use other than as a purely political principle?

Risa Goluboff: Right.

John Harrison: I think one of the key questions here is, is it possible, to come up with sort of polar cases of judicial legislation that almost everybody would agree was a polar case of judicial legislation, that's not just a law professor's hypothetical, that is something a court might actually do.

Risa Goluboff: Sure.

John Harrison: If that's possible, then I think there's at least some hope for saying, well, there's some limits. But maybe not even that is possible. I don't know.

Risa Goluboff: I don't know if that's possible. It's a good question. It's a good law professor's question, actually.

[LAUGHTER]

[THEME MUSIC CREEPS IN]

John Harrison: Well, thank you Risa. This has been a really wonderful episode. We had some great issues.

Risa Goluboff: I absolutely agree. Just a fascinating conversation, John. Thank you for leading it.

John Harrison: Thank you.

[THEME MUSIC UP FULL, THEN UNDER]

John Harrison: That's it for this episode of Common Law. If you'd like to learn more about Bertrall Ross' work, please visit our website: Commonlawpodcast.com. There, you'll find all of our previous episodes, a link to our Twitter feed, and more.

Risa Goluboff: We hope you'll join us next time and throughout the season with our Co-Counsel hosts for more explorations of how law shapes our lives. I'm Risa Goluboff.

John Harrison: And I'm John Harrison. See you next time.

[THEME MUSIC UP FULL, THEN UNDER]

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