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More on *Moore*: Part Two in a Series on Originalism in the ISL Case

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The latest filing in the Supreme Court's biggest pending case is a perfect illustration of how not to do serious originalism.

The case, *Moore v. Harper*, revolves around the "Independent State Legislature" (ISL) theory, which posits that ordinary elected state legislatures operate independently of state constitutions and state courts when fashioning rules for congressional and presidential elections.

In their recently filed reply brief, Petitioners—Republican state legislators in North Carolina—make a number of bad originalist moves in parsing the Article I, section 4 clause at the heart of the case: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."

As we saw in Part One of this series, ISL runs counter to deep principles of American constitutional democracy and federalism and to definitive Supreme Court case law. But let's put all that aside for a moment.

From a strictly textual point of view, here is the nub of the case: What does the word "Legislature" in Article I, section 4 mean? Does "Legislature" here refer to a particular *institutional body* in each state, or instead to an entire *lawmaking system* as defined and delimited by the *state's constitution*?

Petitioners never acknowledge, much less engage, this key textual question. They simply assert that their reading and only their reading—the institutional-body reading—is "plain and obvious."

But is it? Consider the word "Congress"—the federal counterpart to the "legislature" of each state. "Congress" is in fact mentioned a mere four words after each state's "Legislature" in Article I, section 4 itself: Congressional election laws "shall be prescribed in each State by the Legislature thereof; but the Congress may . . . make or alter such Regulations." More generally, the word "Congress" appears dozens of times in the Constitution, and sometimes this word does indeed refer to

an *institutional body*—the House and Senate that sits on Capitol Hill. (In Article II, when the President gives "Congress" information on "the State of the Union," he is giving information to the House and Senate on Capitol Hill.) But in fact, much more often than not, the word "Congress" as used in the Constitution to empower federal policymaking means the House, Senate, *and President* acting together a federal *lawmaking system* as defined and delimited by the federal government's *master Constitution*. And this is true whether or not the provision in question empowering "Congress" to act includes a "by law" qualifier or anything like it.

By the same token, a state's "legislature" in Article I, section 4 clearly includes the governor, in any state where the governor has a veto pen akin to the President's. Today, every one of the fifty state governors has such a pen, which makes each governor part of the *lawmaking system* as defined by the *state constitution*. Veto-pen-wielding governors have everywhere and always been part of the Article I, section 4 "legislatures" that have regulated federal elections. And the Supreme Court unanimously endorsed such practice in case law that is almost a century old.

But all of this is textually permissible only if we reject Petitioners' flatfooted textual argument. In Article I, section 4, the "legislature" must mean—and has always meant, everywhere—the *lawmaking system* as defined by the *state's master constitution*, a system that of course includes governors if a state constitution so provides. In other words, if a state constitution so provides, the state *executive* is undeniably part of the Article I, section 4 "*legislature*," via the veto. And if a state

constitution so provides, the state *judiciary* is likewise part of the Article I, section 4 “legislature,” via state-court judicial review to ensure conformity with state constitutional norms limiting the state lawmaking system. (It makes no difference whether these state constitutional norms are deemed “procedural” or “substantive.” Even if it were possible to draw a clean and principled distinction between “substance” and “procedure” in this context—and in fact it is not possible—a state constitution can empower its state judiciary to be part of the “legislature” in virtually any way the states see fit, provided republican government principles are respected.)

Here, then, is our *first* key originalist lesson Petitioners ignore: The Constitution’s text must always be read in a holistic context. Thus, we must understand how state legislatures are often akin to the federal legislature; how all American legislatures are subordinate to their respective master constitutions; and how words (like “legislature” and “Congress”) that might at first seem “plain” to legal naïfs are not always so.

Let’s now consider a *second* originalist goof in Petitioners’ reply brief. This one’s quite troubling too.

Petitioners’ most recent filing doubles down on their earlier claims about the so-called “Pinckney Plan.” Petitioners have cited to the Court language that they contend was a potential first draft of what became the Elections Clause. This Pinckney Plan draft, they assert, conferred power to regulate congressional elections on “states” rather than state “legislatures.” Petitioners then argue that the Philadelphia framers’

decision to use the word "legislature" in the ultimate version of the Elections Clause reflects a deliberate decision to deviate from the Pinckney Plan draft and to empower legislative bodies in particular, rather than the entire state lawmaking systems as structured and restructured from time to time by state constitutions.

As explained in Part One, drafting discussions behind closed doors are no proper part of public-meaning originalism, which attends to information available to the public that ratified the Constitution and made constitutional text the supreme law of the land.

In fact, the meaning of the state "legislature" that the public had access to in 1787 in the context of congressional-selection regulation ran directly counter to ISL. In words that directly foreshadowed the words of Article I, section 4, the Articles of Confederation (the charter under which the nation operated after the Revolution but before the Constitution) said that delegates to the Confederation Congress shall be appointed in such manner as the "legislature of each State shall direct." Between the time this text in the Articles of Confederation was finalized and the time the Elections Clause's essentially identical text in the Constitution was unveiled (about a decade later), there were three, and only three, states that adopted or revised their state constitutions. Each of these three state constitutions expressly regulated its state legislature in the selection of Confederation congressmen. Thus, in all three of the states that engaged in state constitution-making in the wake of the Articles of Confederation, the elected state legislatures were emphatically NOT independent.

Under proper originalist principles, the *private* Pinckney Plan (and other private drafting developments that Petitioners cite, such as those involving Edmund Randolph's handwritten markup in secret Philadelphia Convention committee deliberations) surely cannot compete with overwhelming and widespread evidence of *public* understandings of the language that ultimately found its way into Article I, section 4.

But Petitioners have another problem concerning their invocation of the Pinckney Plan, namely, that *the specific language Petitioners presented to the Court in their opening brief (and doubled down on in their reply) is fake*. This language was very likely not part of the authentic Pinckney Plan actually presented to the Philadelphia Convention. Beginning around 1819, a bogus document masqueraded as the Pinckney Plan, and Petitioners erroneously quote from this bogus document in their filings.

Professional historians have known about the 1819 Pinckney switcheroo for over a century. The documentary appendix that Petitioners cited to the Court in their opening brief itself makes emphatically clear that the words that Petitioners quoted to the Court simply cannot be relied upon. Petitioners apparently never read to the end of the (short) appendix before citing it!

Any honest and skilled originalist would openly acknowledge this blunder and move on. Mistakes happen. And, as noted above, private drafting discussions never communicated to and understood by the public don't carry significant weight in public-meaning originalism anyway. But Petitioners' reply brief does not acknowledge error at all.

Instead it tries to sweep everything under the rug and confuse the matter with all sorts of ridiculous and irrelevant asides. Petitioners' initial filing can be forgiven as mere inexperience and carelessness. But since that filing, several leading opposition and amicus briefs have exposed Petitioners' Pinckney Plan gaffe.

Petitioners' refusal to confess error on this point in their latest filing thus moves us into a different register altogether. Let's hope that at oral argument someone holds Petitioners to account for their shabby behavior, behavior that should trouble members of the Court who are serious about originalism and professionalism. (For more evidence of lawyerly shabbiness in earlier stages of *Moore v. Harper* see this earlier Verdict essay. One piece of evidence discussed there, concerning language in the 2019 *Rucho v. Common Cause* opinion, is also something on which Petitioners inexcusably double down in their reply brief.)

This brings us to a *third* lapse in Petitioners' reply brief, a lapse that also involves playing fast and loose with historical evidence. Petitioners argue that the three key state constitutions adopted under the Articles of Confederation that did not treat ordinary legislatures as "independent" are irrelevant. These documents, say Petitioners, show only that the Articles of Confederation weren't respected or obeyed. But Petitioners cite *nobody* who at the time contended that state constitutions were violating the Articles of Confederation by infringing on the independence of elected legislatures. And it's not as if the Constitution's founders were shy about pointing out the ways the Articles of Confederation were being flouted and were thus ineffectual. Federalist #15, which Petitioners

themselves cite in their opening brief, contains a laundry list of alleged violations of the Articles of Confederation by the states, and there is no mention on that long list of improper interference with ordinary state legislatures in selecting congressional delegates.

Principled originalism can't be about merely asserting pseudo-historical stuff; it has to be about documenting factual claims and legal interpretations with primary-source evidence. And Petitioners simply don't adduce any. I call BS.

All of this leads to a *fourth* illegitimate move Petitioners make: They dismiss the large number of state constitutional provisions adopted shortly *after* ratification of the federal Constitution that by their express terms regulate, rather than leave it to the ordinary legislature to regulate, *all* elections. Petitioners say these provisions are "best" read as applying to state but not federal elections. But why is that the best reading? Surely the policies behind such regulations were wise for both state and federal elections. Surely there is no policy reason state constitution makers would want all state elections to be "free" and "fair" but not want the same for all federal elections!

The only sense in which Petitioners' reading is the "best" is that it does not contradict the ISL theory that Petitioners assert but haven't proven with any other originalist evidence. As with their treatment of the Articles of Confederation, Petitioners cite *no one* who in the early post-ratification period said that "all elections" in a state's constitution means "all state elections but not any federal election." If ISL were the understanding under which people made their state constitutions

immediately after federal ratification, wouldn't you think somebody would have been careful enough in all these states to explicitly distinguish between state and federal elections, both in the drafting of state constitutional text and in the dialogues surrounding its enactment?

In addition to these four large originalist sins of commission, Petitioners' reply brief also includes an enormous originalist sin of omission: The brief simply ignores decisive evidence from the first set of congressional elections under the new Constitution.

In those 1789 elections, both Massachusetts and New York involved the state governor and (in the case of New York) various state judges as part of the Article I, section 4 "legislature" that regulated federal elections. In other words, when these two states in 1789 had to decide what the word "legislature" meant in Article I, section 4, both states decided that it meant the entire *lawmaking system* as defined by the master *state constitution*, even though such a system involved *executive* and *judicial* officers who were not part of the "*legislature*" as Petitioners define it. (The issue did not arise in any of the other states in 1789; only Massachusetts and New York had executive/judicial veto procedures as part of their state-constitutional lawmaking systems.) New York is especially on-point: state judges are the very folks Petitioners claim cannot be part of the Article I, section 4 congressional-election process; yet state judges were central actors in this process in New York from Day One! And these judges played an undeniably *substantive* role in the 1789 congressional districting—the very thing Petitioners argue is strictly off-limits to judges, everywhere and always.

When New York and Massachusetts embraced their sensible anti-ISL reading of "legislature" in 1789, no one screamed at the time that they were somehow violating the Article I, section 4 Elections Clause. No one thought that the "plain and obvious" meaning of "legislature" was the one Petitioners flat-footedly and fist-poundingly assert more than two centuries later. Almost one century ago, in *Smiley v. Holm*, the Court unanimously relied on these key pieces of originalist evidence from New York and Massachusetts in 1789 to reject ISL.

Thus, the first question at oral argument for Petitioners in *Moore* should be: "If 'legislature' means institutional body and not lawmaking system, how, as originalists, can we account for the actions of Massachusetts and New York at the Founding, and the *Smiley* Court's originalist reliance on those actions in its unanimous decision?" That Petitioners don't even try to answer this devastating, fundamental originalist question in any of their briefs demonstrates just how non-originalist their theory really is.

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