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LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

What the ISL *Moore v. Harper* Case Can Tell Us About Principled Originalism

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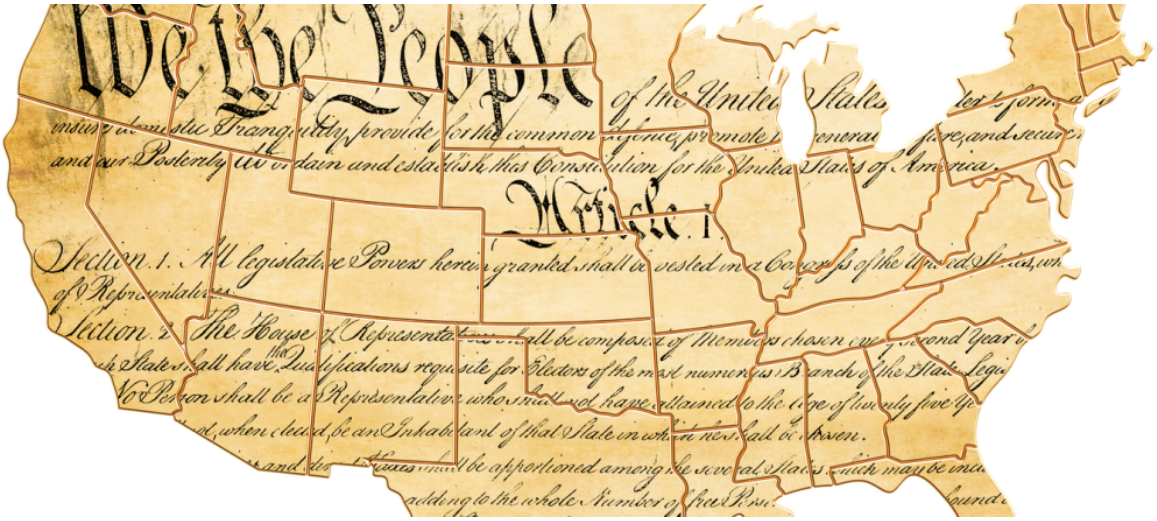

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Some have called *Moore v. Harper* the biggest democracy case in centuries. Whether or not one goes that far, the case undeniably implicates first principles of federal election law, and a wrong decision by the Supreme Court Justices—who will hear the case on December 7—could have enormous repercussions.

Petitioners urge the Court to proclaim that state legislatures operate independently of state constitutions and state courts when fashioning

rules for congressional (and presidential) elections. Were the Court to embrace this dubious "Independent State Legislature (ISL)" theory, various state legislatures could draw partisan congressional districts in defiance of state constitutional limitations. A pro-ISL ruling would also invalidate independent redistricting commissions that some states have established via voter initiatives and referenda. In addition, given that state courts and state constitutions undeniably govern various *state* elections on Election Day (for example, where and how to vote for state legislators and governors), considerable confusion—even chaos—could well result if federal elections held in the same places and on the same days were governed by different rules and different courts. Even more ominously, under ISL any state legislature in 2024 and beyond simply could (if it announced before an election that it was going to do so) directly pick presidential electors on Presidential Election Day—even if its state constitution assigns this momentous choice to the state's voters.

Moore also raises important questions about constitutional interpretation more generally, far beyond election law.

Granted, in a sane world, *Moore* should be viewed as an easy case—a proverbial slam-dunk. In a line a cases stretching back over a century the Court has rejected ISL theory in the federal-election context every time the theory has been raised and resolved on the merits. All but one of these cases have been unanimous on the relevant ISL issues addressed. ISL is also foreclosed by originalism, properly understood. The more one knows about the Constitution's text, history, and deep structure, the clearer it is that ISL must lose. So whether one is a precedentialist or an originalist, *Moore* should come out the same way.

But ISLers say that originalism in fact supports their views. And as last term made clear, today's Court is willing to repudiate precedents if these precedents are egregiously wrong as a matter of originalism—that is, if the precedents disregard the Constitution's letter and spirit and distort the historical events that generated the Constitution's text and glossed that text in its early years.

So let's take a closer look at ISL through the prism of proper originalism.

Start with the text. Article I's Elections Clause provides that the "Times, Places and Manner [of congressional elections] shall [in the first instance] be prescribed in each State by the Legislature thereof."

What exactly does "Legislature" mean in this Clause? Consider the federal legislature—Congress—which is also mentioned elsewhere in this Clause. The word "Congress" in the Constitution sometimes means the House and Senate, and other times means the House and Senate *and the President*. In other words, sometimes "Congress" refers to a body of persons—Congress members on Capitol Hill—as when, pursuant to Article II, the President gives "Congress" information on the state of the union. Other times "Congress" refers a lawmaking system—the Federal Legislative Power—as when Article II allows "Congress" to determine the "Time of chusing [presidential] Electors" or when Article IV empowers "Congress" to regulate the territories and other federal property and admit new states, in a process that has always involved presentment to the President for his signature or veto, even though (unlike elsewhere in the Constitution) these parts of Articles II and IV do not mention that "Congress" must proceed "by law."

Thus, the same word can mean different things in different places in the Constitution. In a 1994 *Harvard Law Review* article (an article, interestingly enough, cited by the Court's conservative wing in a 2015 ISL case, *Arizona Legislature v. Arizona Independent Redistricting Commission*), Akhil Amar explored the more general phenomenon of words and phrases that recur in the Constitution. Akhil showed in some detail that sometimes the same word bears different meanings in different constitutional provisions. One such "chameleon" word (Akhil's term) is "person." Corporations are "persons" entitled to fair procedures under the Due Process Clauses, but are not "persons" for Census Clause purposes.

And as we have just seen, "Congress" is also a chameleon word. Sometimes "Congress" includes the veto-wielding executive, sometimes not. The exact same thing, it turns out, is true of Congress's state counterpart, the state "legislature." It too sometimes means a body of persons (in a unicameral or bicameral institution) but other times means the state lawmaking system—its Legislative Power—which today includes its veto-pen-wielding governor in every state.

So how do we know what a particular chameleon word means in a given provision? By carefully analyzing historical understandings and textual context. And when we do this proper originalism, it becomes clear that the Founding generation understood "legislature" in the Article I Elections Clause and in precursor language to mean, in effect, "a state's lawmaking system—its Legislative Power—as delimited by its parent state constitution."

Petitioners' originalist case in *Moore* invokes what they call the Pinckney Plan, which, they say, was a first attempt to draft what became the

Elections Clause. And, Petitioners argue, this alleged Pinckney Plan vested power to regulate congressional elections in "States" rather than state "legislatures." Petitioners further contend that the fact that the ultimate version of the Elections Clause used the latter word—"legislatures"—means that the framers deliberately made a change from the Pinckney Plan and chose to empower legislature entities in particular, and not the entire state lawmaking systems as structured and restructured from time to time by state constitutions.

But Petitioners have egg on their faces. The alleged Pinckney Plan language they present to the Court is phony. This language was no part of the real Pinckney Plan actually presented to the Philadelphia Convention. Beginning around 1819, a bogus document (the one Petitioners offer) masqueraded as the Pinckney Plan. This bogus document was immediately questioned by James Madison and definitively discredited more than a century ago—facts well known to expert historians.

All this surely bears on Petitioners' credibility and reliability as would-be historians. But the Pinckney Plan that Petitioners invoke (and indeed label as "crucial" to their theory) wouldn't be especially relevant to proper originalism even if it weren't fake. Whatever the Plan was, it was a secret document presented behind closed doors to persons who might have drafted the Elections Clause. But this secret piece of paper was never presented in 1787-88 to We the People who ultimately ratified and enacted the Elections Clause and whose actions made the Constitution the supreme law of the land during that fateful year. Originalist interpretations today purport to have normative force primarily because they reflect the public understanding of the words at the time of enactment, not the private subjective intentions of drafters, whose

reasons and agendas may not have been known to or shared by the ultimate lawmakers: to repeat, We the People of the United States.

As Akhil put it in a recent interview: "One guy [Pinckney] submits a piece of paper. So what? The committee may not have even paid any attention to that piece of paper. Let's focus on the big picture," namely, the public discussions and actions that bear on the people's understandings of the word "legislature" in this setting.

And when we do properly focus on that big public picture, the case for ISL self-destructs. The public predecessor to the U.S. Constitution (known as the Articles of Confederation) contained words that strongly foreshadowed the Elections Clause of the Constitution: "Delegates [to the Confederation Congress] shall be annually appointed in such manner as the legislature of each State shall direct."

As every attentive American ratifier would have understood at a glance, the Constitution's Article I in effect cut and pasted this earlier language. The Article I word "legislature" in the Elections Clause thus offered a comforting textual continuity with the Articles of Confederation—and it did so in large part because there was a public track record of this predecessor clause under the Articles of Confederation. (Such inter-constitutional carryover often and rightly figures prominently in constitutional interpretation.)

That public track record under the Articles of Confederation (as emphatically distinct from the fake and in any event private Pinckney Plan) is the true originalist smoking gun: *Long before the Philadelphia Convention commenced, but after the Articles of Confederation were*

operative, multiple state constitutions across the continent openly told state legislatures how to pick Confederation Congressmen. State legislatures were not remotely "independent" under the precursor language from the Articles of Confederation that the Philadelphia Convention in effect cut and pasted. In context, a state's "legislature" here was understood to mean its lawmaking system as delimited by its state constitution.

If state constitutions could (and did) uncontroversially dictate rules for state legislative bodies (that is, state assemblies and state senates) in the congressional-selection process under the Articles of Confederation, surely state constitutions could likewise dictate rules for state legislative bodies in the congressional-selection process under a nearly identical provision of the Constitution. And in fact, in the years immediately after the Constitution, state constitutions continued, everywhere the issue arose, the pre-Philadelphia-Convention practice of dictating rules for federal elections, thus treating state legislative bodies as the exact opposite of independent. And Petitioners cite no evidence to suggest that these post-ratification state constitutions that on their face regulated federal elections did not mean exactly what they said, or that anyone complained that these provisions regulating federal elections in particular or state and federal elections alike violated the Elections Clause.

In understanding original public meaning, actions by governments and institutions matter a great deal more than words that some individuals may have uttered but that weren't necessarily connected to any public action that was ultimately taken or rejected. Actions thus speak louder than words, and public words speak louder than private conversations.

Importantly, *none* of this key originalist evidence – from the Articles of Confederation or the early post-ratification state constitutions (or the related practice in early federal elections right after the federal Constitution was launched) – *was cited at all, much less discussed or analyzed,* in *any* of the briefs of the parties (or of the dozen-plus amici) in the 2015 Arizona ISL case mentioned earlier, *the only case dealing with ISL on the merits in which repudiation of ISL by the Court was not unanimous*. No wonder none of this key material ever found its way into any of the Court's opinions in 2015. And no wonder Chief Justice John Roberts, in his dissent in that case (a dissent he has since moved away from) fell prey to the fake Pinckney Plan and an ahistorical reading of Article I. But if today the Court majority is serious about originalism – and the *Moore* parties and amici are, in their briefing, taking the Court's recent originalism cues much more seriously than did litigants just seven years ago – then conscientious Justices must be constrained by where the careful originalist briefing (and underlying originalist scholarship) bearing on ISL undeniably lead.

One final originalist post-script . . . about originalist post-scripts. As previously illustrated, proper originalism attends not just to pre-ratification backdrops but also to post-ratification glosses placed on enacted constitutional text in the first years of constitutional operation. While the proposed Constitution was pending before the American people in 1787-88, James Madison explicitly advised his fellow citizens (in his *Federalist* No. 37) that early post-enactment practice would likely help fix the meaning of various constitutional clauses. In keeping with Madison's forecast, the Judiciary Act of 1789 has in fact helped settle the meaning of various Article III provisions governing the federal judiciary. Likewise, the now-famous Decision of 1789, a cluster of early congressional statutes

presented to and endorsed by George Washington, has clarified the president's broad power under Article II to remove executive department heads at will. Washington himself emphasized the importance of these early glosses. In early May 1789 he wrote to Madison that "As the first of everything, *in our situation* will serve to establish a Precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles" (emphasis in original). A few days later, he wrote much the same thing to other confidantes and advisors: "Many things which appear of little importance in themselves and at the beginning may have great and durable consequences from their having been established at the commencement of a new general Government."

As noted, the early glosses from post-ratification state constitutions overwhelmingly undercut ISLers. But how far into the 1790s (and beyond?) should proper originalists trace gloss and give it weight? In an originalist amicus brief I submitted to the Court last month, Akhil Amar, Steve Calabresi, and I traced state constitutions for a full five years after the Constitution's launch. We showed that every one of the nine states that squarely addressed ISL prior to 1794 rejected it. In six other states, the issue did not arise.

But why, one might ask, should we trace gloss for five years, as opposed to say, four or six or two or twelve? Five seemed to us a nice round number. But on reflection, perhaps we should have carried the analysis all the way through Washington's second term. After all, Washington was the Constitution's driving force, its three-dimensional embodiment. Had we stretched five to eight, our tally would in fact have been even stronger: In 1796, Tennessee joined the union with an anti-ISL state constitution. Nine out of nine would have become ten out of ten.

And there is more: Three of the early anti-ISL constitutions came from states beyond the original thirteen, states that had to be admitted into the union. Vermont, Kentucky, and Tennessee all joined the union after 1789, and each did so with an anti-ISL state constitution that not only had to pass muster within each of these states, respectively, but also had to win approval in Congress—meaning of course, the House, the Senate, *and President Washington*, who signed the bills admitting these new states (under an Article IV clause that speaks of "Congress" only but that has been rightly understood to include presidential involvement).

The pro-ISL crowd in *Moore* is thus picking a fight not just with modern ISL critics; and not just with a long line of unbroken Supreme Court precedents. ISLers are also thumbing their nose at America's first Congress and America's most revered Founder, backed as he was by Congress and all the early states that took a position on the issue.

Flouting George Washington, the first Congress, and the makers of all the early post-ratification state constitutions (to say nothing of the Americans who adopted the Constitution against the backdrop of the Articles of Confederation's apparent meaning) is no way to do proper originalism.

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