THE DUAL-TRACK INDEPENDENT STATE LEGISLATURE DOCTRINE

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What's in a word—especially when that word is of Constitutional import? In the pending case of *Moore v. Harper*,[1] the word at issue is "legislature," and the question is how broadly it can be defined. *Moore* represents the Supreme Court's attempt to determine the Constitutional merit of the so-called "independent state legislature doctrine" (ISLD),[2] which posits, in its broadest form, that state legislatures have plenary and exclusive power to set the rules for federal elections.[3] Advocates of ISLD cite two Constitutional sources for this claim: the Elections Clause, at Art. I, § 4, Cl. 1, which governs state legislatures' power to regulate Congressional elections; and the Presidential Electors Clause, at Art. II, § 1, Cl. 2, which governs legislatures' power to regulate the choosing of presidential electors. This article will refer to the former as "Art. I ISLD" and the latter as "Art. II ISLD."

However, recent scholarship has sometimes been confused as to the relationship between the caselaw of the Elections Clause and that of the Presidential Electors Clause. Opponents of ISLD rely more heavily on the Elections Clause cases, which are more supportive of their position, and tend to criticize latter-day Presidential Electors Clause cases for insufficiently addressing the Elections Clause cases.[4] Conversely, advocates of ISLD tend to rely more heavily on the Presidential Electors Clause caselaw, and seek to minimize the impact of Elections Clause caselaw by characterizing it as downstream of the Presidential Electors cases.[5] Some commentators take a totally separate approach and imply that arguments about one clause have no bearing on the

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[1] No. 21-1271 (U.S.).

[2] Also referred to as the "independent state legislature theory" (ISLT).

[3] *See, e.g.*, Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 90–92 (2020) ("The most extreme approach would be to construe the term "Legislature" in the Elections Clause and Presidential Electors Clause literally, thereby implementing the independent state legislature doctrine to the fullest possible extent. Under such an approach, only a state's institutional legislature may regulate federal elections—no other entities or processes (e.g., public initiatives or referenda) may be involved—and the state constitution may not impose substantive restrictions on the scope of the legislature's authority.").

[4] *See, e.g.*, Vikram David Amar and Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 33 (2022) ("The 'legislature' in Article I means 'legislative process' as structured by state constitution. . . . The *Bush* [*v. Gore*] concurrence championing ISL ideology simply ignored all this, making no mention whatsoever of [Art. I ISLD cases].").

[5] *See, e.g., generally* Morley, *supra* note 3, at 69–90 (arguing that the Court's understanding of ISLD was established by the Art. II case of *McPherson v. Blacker*, 146 U.S. 1 (1892); that the Court's later Art. I ISLD cases suggest that the Court "may have harbored some degree of skepticism toward" ISLD but remained "fully consistent" with the understanding established by *McPherson*; that the Court's return to Art. II ISLD in the 21st century was "an endorsement of the independent state legislature doctrine"; and, finally, that in the Art. I ISLD case of *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), the Court went from "enthusiastically embracing the independent state legislature doctrine to rejecting it").

other: for instance, the *Moore* respondents dismiss petitioners' arguments regarding the Presidential Electors Clause by suggesting that those arguments are inapplicable to the Elections Clause.[6]

This article will demonstrate that, contrary to some current understandings, Art. I and Art. II ISLD have effectively developed into two wholly different strands of law—a dual-track independent state legislature doctrine. Despite the textual, historical, and structural similarities between the Elections Clause and the Presidential Electors Clause, the most significant caselaw surrounding each has developed almost entirely independently of each other, and the doctrine for each is profoundly out-of-conversation with the other. Indeed, of the most significant ISLD cases, not one Art. I ISLD majority opinion cites a single Art. II ISLD case for its position on the scope of the term "legislature;" nor vice versa.

The article will begin by listing and explicating the seminal Art. I ISLD cases. The article will discuss how these cases exist in conversation with each other, but not with the Art. II ISLD cases. The article will proceed by doing the same for the most notable Art. II ISLD cases. Finally, the article will conclude by briefly analyzing the history, structure, and text of both the Elections Clause and the Presidential Electors Clause, and will argue that due to deep similarities between the two, the Court should seek to explicitly harmonize the caselaw in the future in a manner more consistent with Art. II ISLD than with Art. I ISLD.

ARTICLE I ISLD

None of the leading Art. I ISLD cases which deal with the Elections Clause have substantively engaged with analogous Art. II ISLD cases that address the Presidential Electors Clause. This has led to two distinct lines of cases.

The Elections Clause concerns state legislatures' power to regulate the election of members of Congress. Located at Art. 1, § 4, Cl. 1, it reads as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be *prescribed in each State by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. (emphasis added)

There are four seminal cases which govern the Supreme Court's interpretation of the Elections Clause:[7] *Davis v. Hildebrant*,[8] *Hawke v. Smith*,[9] *Smiley v. Holm*,[10] and most recently, *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[11] While each of these cases converse with at least one of the other, in not one does the majority opinion reference any of the Art. II

[6] Br. by State Resp'ts at 53, Moore v. Harper, No. 21-1271 (U.S. Oct. 19, 2022) ("Petitioners next turn to decisions of this Court interpreting the *Electors* Clause—which is not at issue in this case. . . . But even assuming those decisions bear on the *Elections* Clause's meaning, they do not help Petitioners.").

[7] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 805 (2015) ("[W]e summarize this Court's precedent relating to appropriate state decisionmakers for redistricting purposes. Three decisions compose the relevant case law: [] *Davis v. Hildebrant*; *Hawke v. Smith* []; and *Smiley v. Holm*." (citations omitted)).

[8] 241 U.S. 565 (1916).

[9] 253 U.S. 221 (1920).

[10] 285 U.S. 355 (1932).

[11] 576 U.S. 787 (2015).

ISLD cases for its interpretation of analogous language in Art. II concerning the scope of the word "legislature."

At issue in *Davis* was an amendment to the Constitution of Ohio that gave the people the right, exercisable by referendum, to approve or disapprove any law enacted by the Ohio legislature.[12] In 1915, the state legislature passed a new plan for Congressional redistricting, which the people of Ohio then disapproved via referendum.[13] After failing to secure relief at the Ohio Supreme Court, petitioners then approached the federal Supreme Court, asserting that this plan unconstitutionally curtailed the Ohio legislature's plenary grant of authority under the Elections Clause to regulate Congressional elections.[14]

The Supreme Court declined to grant relief to the petitioners in this case. The Court instead read the Election Clause's use of the word "legislature" broadly, to include "treating the referendum as a part of the legislative power for the purpose of apportionment, where so ordained by the state Constitutions and laws."[15] The Court thus incorporated referenda into the legislative power contemplated by the word "legislature" in the Elections Clause.

The next in this line of cases, *Hawke*, did not concern the Elections Clause at all. Once again emanating out of Ohio, the people of Ohio sought to use their power of referendum to disapprove of the state legislature's ratification of the Eighteenth Amendment.[16] Petitioners before the U.S. Supreme Court claimed that this was an unconstitutional abrogation of the Ohio state legislature's exclusive power to ratify constitutional amendments pursuant to Article V of the U.S. Constitution,[17] which mandates in relevant part that constitutional amendments shall be adopted "when ratified by the *legislatures* of three fourths of the several states (emphasis added)."

The Court agreed, and held that the "ratification" function imparted to state legislatures by the Constitution was separate from the "legislation" function: while the latter could be construed as including actors and bodies besides the actual houses of legislators, the former function was reserved only for the Ohio state legislature itself.[18] The Court thus distinguished *Hawke* from *Davis* by holding that while the Court in *Davis* "recognized the referendum as part of the legislative authority of the state for the purpose stated," "[s]uch legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required."[19]

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[12] *Davis*, 241 U.S. at 566.

[13] *Id.* at 566–57.

[14] *Id.* at 567.

[15] *Id.* at 569.

[16] Hawke v. Smith, 253 U.S. 221, 224 (1920).

[17] *Id.* at 225.

[18] *Id.* at 229 ("The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the federal Constitution through the medium of a referendum rests upon the proposition that the federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this-ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.").

[19] *Id.* at 230–31.

In *Smiley*, the Court reviewed another congressional redistricting issue. The Minnesota state legislature had approved a redistricting plan which the Minnesota governor subsequently vetoed.[20] Petitioners argued, *inter alia*, that this was an unconstitutional abrogation of the legislature's grant of authority conferred by the Elections Clause.[21] Once again, the Supreme Court disagreed. Drawing upon their precedent in *Davis*, the Court wrote that the legislative function mentioned in the Elections Clause "must be in accordance with the method which the State has prescribed for legislative enactments,"[22] and that in Minnesota, the State had made the Governor "part of the legislative process."[23] The Court thus expanded the definition of "legislature" in the Elections Clause to include not only referenda as in *Davis*, but also governors, so long as both were authorized by the constitution of the state.

The *Smiley* court also clarified the distinction between the "legislative" function as implicated in *Davis* and *Smiley* and other functions imputed to state legislatures by the Constitution. While the former could be read expansively, latter functions—such as the "ratification" function mentioned in *Hawke*, the "electoral" function of choosing senators prior to the ratification of the Seventeenth Amendment, or the "consenting" function as in relation to Congressional acquisitions of land from states pursuant to Art. 1, § 8, Cl. 17 of the Constitution—are reserved only for the legislative bodies themselves.[24] The Court thus further distinguished the "legislative" function from other functions that the Constitution assigns to state legislatures.

Each of these cases was important to the Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[25] In that case, the Court considered the constitutionality of an independent redistricting commission, established by initiative pursuant to the Arizona constitution, to create congressional redistricting plans entirely independent of the state legislature. The Arizona state legislature sued, alleging that this violated the authority granted to them by the Elections Clause.[26] Over the vigorous objections of Chief Justice Roberts, the Court majority found this scheme constitutional—and cited no Art. II ISLD cases while doing so.

The Court placed the Arizona commission squarely in the line of precedent established by *Davis*, *Hawke*, and *Smiley*. In contrast with the function of the state legislature at issue in *Hawke*, the Court held that redistricting was a "legislative" function, as opposed to another function like the ratifying, electoral, or consenting function.[27] Relying on *Davis* and *Smiley*, the Court went on to hold that the legislative function is "performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto."[28] While the Court noted that "the exercise of the initiative . . . was not at issue in our prior decisions," they nonetheless professed to see "no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking."[29] The Court thus construed the legislative function

[20] Smiley v. Holm, 285 U.S. 355, 361 (1932).
[21] *Id.* at 362–63.
[22] *Id.* at 367.
[23] *Id.* at 369.
[24] *Id.* at 365–66.
[25] 576 U.S. 787 (2015).
[26] *Id.* at 792.
[27] *Id.* at 807.
[28] *Id.* at 808.
[29] *Id.* at 808–09.

implicated in the Elections Clause as inclusive of referenda such as the one that established the state's redistricting commission, and thereby found no violation of the Elections Clause.

Not one of the preceding majority opinions references a single Presidential Electors Clause case for the purpose of interpreting analogous language in the Elections Clause.[30] The Art. II ISLD line of cases is only referenced in Chief Justice Roberts' vociferous dissent in *Arizona State Legislature.* In dissent, the Chief Justice cited *McPherson v. Blacker*,[31] the first in the line of fundamental Art. II cases, to bolster his more limited reading of the word "legislature" in the Elections Clause. The Chief Justice asserted that *Davis* and *Smiley* were both decided "[a]gainst th[e] backdrop" of *McPherson*[32] despite the fact that neither case cited *McPherson* for its interpretation of the Presidential Electors Clause, and that *Davis* did not cite *McPherson* at all.

Notwithstanding Chief Justice Roberts' dissent in *Arizona State Legislature*, the Court's seminal Art. I ISLD majority opinions refuse to substantively engage with the leading Art. II ISLD cases at all. Throughout the Court's Art. I ISLD caselaw, they have maintained a *cordon sanitaire* against citing Art. II ISLD cases. Despite profound similarities between the Elections Clause and Presidential Electors Clauses, the two lines of precedent have effectively developed into two different strands of caselaw. Thus, while Art. I ISLD cases are generally suspicious of granting exclusive and plenary power to state legislatures to determine regulations for Congressional elections, Art. II ISLD cases, discussed below, are much less hesitant to consider that state legislatures may hold this power exclusively.

ARTICLE II ISLD

Just as with Art. I ISLD and the Elections Clause, the leading Art. II ISLD cases which deal with the Presidential Electors Clause have refused to substantively engage with Art. I ISLD precedent, leading to the development of two different lines of caselaw.

The Presidential Electors Clause is found at Art. II, § 1, Cl. 2, and reads as follows:

> Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. (emphasis added)

[30] *Smiley* does reference what, at the time, was the only extant Presidential Electors Clause case—*McPherson v. Blacker*, 146 U.S. 1 (1892)—but only for the proposition that "the terms of the constitutional provision furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the states," 285 U.S. at 369, and only as part of a string cite alongside *Missouri Pacific Railway v. Kansas*, 248 U.S. 276 (1919); *Myers v. United States*, 272 U.S. 52 (1926); and the *Pocket Veto Case*, 279 U.S. 655 (1929). None of these latter cases has anything to do with either the Elections Clause or the Presidential Electors Clause, and neither does *Smiley* reference *McPherson* specifically for its interpretation of the Presidential Electors Clause. Instead, *Smiley* only references *McPherson*, alongside several other cases, for broad principles of constitutional interpretation.

[31] 146 U.S. 1 (1892).

[32] *Ariz. State Legislature*, 576 U.S. at 840 (Roberts, C.J., dissenting).

The caselaw surrounding the Presidential Electors Clause is significantly more supportive of ISLD than the caselaw surrounding the Elections Clause. The three most important cases[33] in this line are *McPherson v. Blacker*,[34] *Bush v. Palm Beach County Canvassing Board*,[35] and *Bush v. Gore*.[36]

McPherson predates any of the Art. I ISLD cases discussed above. In *McPherson*, the Michigan state legislature had passed a law which changed the system by which the state apportioned its presidential electors. Instead of awarding the state's electors according to the statewide popular vote, the new law awarded only two of the state's electors to the winner of the statewide vote, with the rest going to the state's congressional districts to represent the winner of the presidential vote in each of those individual districts.[37] The plaintiffs filed suit against the Michigan Secretary of State, alleging that the law violated, *inter alia*, the Presidential Electors Clause.[38]

Plaintiffs argued that the use of the word "State" in the Presidential Electors Clause implied that the state was to act as a unit in the assignment of its electors, and that "the appointment of electors by districts is not an appointment by the state, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors."[39] However, the Supreme Court disagreed with plaintiffs' assertion that the Presidential Electors Clause could be read to constrain the power of legislatures to determine how they allocated their electoral votes. The Court instead held that the Presidential Electors Clause "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment.[40] *McPherson* thus established a broad grant of power from the Constitution onto state legislatures to determine the appointment of their presidential electors.

Bush v. Palm Beach County Canvassing Board was a case from the 2000 Florida election litigation and was the Supreme Court's first foray into the Florida recount. After a mandatory recount was triggered by Florida statute, George W. Bush maintained his initial lead over Al Gore, but by a narrower margin than he had in the first count. Gore subsequently requested a manual recount of the votes in four counties.[41] Florida statutory law required the Secretary of State to certify the election by November 14 of that year,[42] but was contradictory about what to do with results received after that date. One statute read that the Secretary of State "may" ignore late manual recounts, while another statute read that the Secretary of State "shall" ignore such results.[43] The Secretary of State, a Republican, decided to ignore the late results and certify the election;[44]

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[33] Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y 135, 147–49 (2023) ("Proponents of the ISL theory [] claim to find support in a different set of Supreme Court decisions. The first of these [is] *McPherson v. Blacker* . . . Proponents of the ISL theory also point to *Bush v. Palm Beach County Canvassing Board* . . . In *Bush v. Gore* . . . Chief Justice Rehnquist [] wrote a concurring opinion.")

[34] 146 U.S. 1 (1892).

[35] 531 U.S. 70 (2000).

[36] 531 U.S. 98 (2000).

[37] *Id.* at 24–25.

[38] *Id.* at 3.

[39] *Id.* at 24–25.

[40] *Id.* at 27.

[41] *Id.* at 73–74.

[42] *Id.* at 74.

[43] *Id.* at 75.

[44] *Id.* at 74.

however, the Florida Supreme Court ruled that the Secretary was obligated to receive results until November 26 of that year.[45]

In a unanimous per curiam opinion, the United States Supreme Court vacated and remanded the decision of the Florida Supreme Court for clarification. The federal Court wrote that "[a]s a general rule, this Court defers to a state court's interpretation of a state statute," but that in this case, the Florida legislature was "not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under [the Presidential Electors Clause]."[46] Pursuant to its review under this federal hook, the federal Court wanted the Florida Court to clarify the degree to which it had considered the Presidential Electors Clause. However, while the Court noted that it had in *McPherson* held that the Presidential Electors Clause operated as a "limitation upon the State in respect of any attempt to circumscribe the legislative power,"[47] it did not opine in *Palm Beach County* as to the breadth or scope of that limitation. Instead, it merely asked the Florida Supreme Court to clarify the extent to which it had construed the Florida Election Code to be consistent with the Presidential Electors Clause.[48] In reaching this outcome, the Court did not consider any of the cases in the Art. I ISLD line, including *Davis, Hawke*, or *Smiley*.

Of the leading cases that address the Presidential Electors Clause, perhaps the most notable—and certainly the most notorious—was *Bush v. Gore*.[49] *Bush* was a follow-up to *Palm Beach County*: after the United States Supreme Court vacated and remanded the Florida Supreme Court's decision in *Palm Beach County*, the Florida Court returned with another decision that extended the date of the recount to December 8 of that year.[50] The federal Court intervened once again, but rather than vacating the decision of the Florida Court, they reversed it entirely. The majority did not address the Presidential Electors Clause issue: the basis of their ruling was the Equal Protection Clause, and they mentioned *McPherson* only in passing.[51] However, in his concurrence, Chief Justice Rehnquist (joined by Justices Scalia and Thomas) opined at length as to the scope and applicability of the Presidential Electors Clause.

Chief Justice Rehnquist wrote that *McPherson* stood for the proposition that the Presidential Electors Clause gives the "exclusive," "broadest power" to the legislature to appoint a state's presidential electors.[52] Chief Justice Rehnquist found further that the Florida state legislature had delegated the authority to run elections and oversee election disputes to the Secretary of State.[53] As such, the Chief wrote that "with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its

[45] *Id.* at 75–76.
[46] *Id.* at 76.
[47] *Id.* (quoting McPherson v. Blacker, 146 U.S. 1, 25 (1892)).
[48] *Id.* at 77.
[49] 531 U.S. 98 (2000).
[50] *Id.* at 100.
[51] *Id.* at 104.
[52] *Id.* at 113 (Rehnquist, C.J., concurring) (citing *McPherson*, 146 U.S. at 13).
[53] *Id.* at 113–14.

constitutional mandate."[54] However, as in *Palm Beach County*, the Chief did not cite any Art. I ISLD cases.

Of the main opinions in the Art. II ISLD case line, the only opinion that substantively engages with Art. I ISLD precedent is Justice Stevens' dissent in *Bush v. Gore*.[55] In that opinion, Justice Stevens cites *Smiley* for the assertion that a state legislature's power to amend election law is cabined by the constitution of that state.[56] However, neither the majority opinions in *McPherson* and *Palm Beach County* nor Chief Justice Rehnquist's concurrence in *Bush* see fit to mention the Elections Clause at all, much less any Supreme Court precedent, in their interpretation of the language of the Presidential Electors Clause. Instead, the foundational Art. II ISLD cases assiduously avoid referencing Art. I ISLD precedent, preserving the *cordon sanitaire* between the two lines of cases and creating two distinct doctrines: an interpretation of the Elections Clause which is generally hostile to ISLD, and an interpretation of the Presidential Electors Clause which is much more credulous, if not outright accepting, of ISLD.

HISTORY, TEXT, AND STRUCTURE OF THE ELECTIONS AND PRESIDENTIAL ELECTORS CLAUSES

The Supreme Court has developed two distinct lines of caselaw for analyzing the Elections Clause and the Presidential Electors Clause, but an analysis of the history, text, and structure of each clause reveals that both clauses should properly be interpreted as analogous to one another. This mutual interpretation should rightly be closer to Art. II ISLD than Art. I ISLD.

Although current ISLD precedent does not intermingle the Art. I and Art. II case lines and has effectively created two substantively different lines of precedent, the language of the Elections Clause and the Presidential Electors Clause ought to be interpreted analogously. In *U.S. Term Limits, Inc. v. Thornton*, the Court wrote in dicta that the Article I duty that "'[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[]' . . . parallels the duty under Article II that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.'"[57] Analysis of the Elections and Presidential Electors Clauses reinforces this conclusion, and further indicates that this identical meaning ought to be closer to the Art. II ISLD understanding than the Art. I ISLD version.

As Chief Justice Roberts noted in his *Arizona State Legislature* dissent, Founding-era dictionaries generally define the word "legislature" much more narrowly than Art. I ISLD cases might suggest. For instance, Samuel Johnson's Dictionary of the English Language notes that

[54] *Id.* at 114.

[55] Art. I ISLD cases are cited on two other occasions in the *Bush* dissents, but neither mention substantively engages with the cases on their interpretations of analogous language in the Elections Clause. Justice Ginsburg's dissent cites *Davis* for its alternate holding that a question about the Elections Clause is nonjusticiable, but it does not cite *Davis* for any interpretation of the language of the Elections Clause. *Bush*, 531 U.S. at 142 (Ginsburg, J., dissenting) (citing Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916)). Justice Stevens' dissent also makes passing reference to an argument that the *Bush* petitioners made with regard to *Hawke*, but neither Justice Stevens' dissent nor any of the other opinions found that argument availing, and none besides Justice Stevens' address the argument at all. *Id.* at 124 (Stevens, J., dissenting) (citing Hawke v. Smith, 253 U.S. 221, 221 (1920)).

[56] *Id.* at 123 (Stevens, J., dissenting) (citing Smiley v. Holm, 285 U.S. 355, 367 (1932)).

[57] 514 U.S. 779, 804–05 (1995).

"[w]ithout the concurrent consent of all three parts of the legislature, no law is or can be made,"[58] and Noah Webster's American Dictionary of the English Language defines "legislature" as "[t]he body of men in a state or kingdom, invested with power to make and repeal laws . . . [which in] most of the states in America . . . consist of two houses or branches." [59] Both of these definitions caution towards an understanding of "legislature" cabined to an actual lawmaking body of representatives, rather than—as various Art. I ISLD opinions have asserted or attempted to assert—state courts, unelected commissions, or the people generally.[60]

Historical practice regarding the use of "legislature" in the Elections and Presidential Electors Clauses also supports the claim that the term should be read analogously across the two, and that this reading should be closer, in some form, to the latter than former.[61] For instance, at the Massachusetts Constitutional Convention of 1820, it was understood that state constitutions were legally incapable of limiting the state legislature's power over congressional and presidential elections.[62] Additionally, every state constitution from the Founding Era that used the term "legislature" defined it as a distinct multimember entity comprised of representatives.[63]

Finally, the structure of the Constitution itself also bolsters these conclusions. The Art. I ISLD cases concede that other provisions of the Constitution which specifically delegate power to state legislatures—for instance, the constitutional amendment ratification function in Art. V, or the Art. I, § 3 electoral function of choosing senators prior to the ratification of the Seventeenth Amendment—are reserved only for those institutional representative bodies.[64] This would suggest the word "legislature" should be read uniformly across the Constitution, including across both the Elections Clause and Presidential Electors Clause.[65] Yet, the Art. I ISLD case line insists that "legislature" be read more broadly in the context of the Elections Clause to encompass bodies besides actual representative bodies. The Art. II ISLD cases do not take this tack: while they do not reference any other instances of the word "legislature" in the Constitution, their interpretation of the word is nonetheless consistent with the interpretation of the word in the other aforementioned Constitutional contexts. An intratextualist and structuralist read of the Constitution thus indicates not only that the word "legislature" ought to be read uniformly across

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[58] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 828 (2015) (Roberts, C.J., dissenting) (citing 2 A DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1755)).

[59] *Id*. (citing 2 An American Dictionary of the English Language 2 (1828)).

[60] *See also* Br. for Non-State Resp'ts at 19–20, Moore v. Harper, No. 21-1271 (U.S. Oct. 19, 2022) (citing these exact dictionary definitions, and noting that Petitioners correctly "acknowledge" them).

[61] C*f.* Br. of *Amici Curiae* Professors Akhil Reed Amar, Vikram David Amar and Steven Gow Calabresi in Support of Respondents at 19–21, Moore v. Harper, No. 21-1271 (U.S. Oct. 24, 2022). Professors Amar, Amar and Calabresi cite the historical practice of two states – New York and Massachusetts – as evidence that historical practice weighs against a limited reading of the word "legislature." But the professors readily admit that Massachusetts and New York were outliers: "In eleven states . . . the institution known as the "legislature" made the laws, and no one outside this institution participated in the lawmaking system."

[62] Morley, *supra* note 3, at 38 (Justice Story, a delegate to the Convention, argued that the Convention did not "have a right to insert in our [state] constitution a provision which controls or destroys a discretion . . . which must be exercised by the Legislature, in virtue of powers confided to it by the constitution of the United States."). *But see* Br. of *Amici Curiae* Professors, *supra* note 61, at 16–17 n.22 (conceding Justice Story a "towering figure" yet dismissing his comments as "mistaken").

[63] *Ariz. State Legislature*, 576 U.S. at 828 (Roberts, C.J., dissenting) (citing Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. ONLINE 131, 147 and n.101 (2015)).

[64] Smiley v. Holm, 285 U.S. 355, 365–66 (1932).

[65] *See also* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

the Elections Clause and the Presidential Electors Clause, but that this interpretation ought to be closer to the Art. II ISLD version.

CONCLUSION

Despite profound similarities between the Elections Clause and the Presidential Electors Clause, the Supreme Court has created a dual-track independent state legislature doctrine featuring two district strands of caselaw that are almost entirely out-of-conversation with one another. Not one majority opinion amongst the seminal Art. I ISLD cases cites an Art. II ISLD case for its interpretation of the word "legislature," and the same is true in reverse. However, an analysis of the text, history, and structure of the two clauses demonstrates not only that they should be read analogously, but that they should both be read closer to the narrower Art. II ISLD definition of "legislature" than the broader Art. I ISLD interpretation.