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Recommended Citation

Herz, Michael, "More on the Varying Meanings of “Congress” and “Legislature”" (2022). *Online Publications*. 59.

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More on the Varying Meanings of “Congress” and “Legislature”

By [RICHARD PILDES](#) on [October 20, 2022, 11:58 am](#)

This is a guest post from Professor Michael Herz:

In a [recent Election Law Blog post](#) regarding the Independent State Legislature doctrine, Rick Pildes observes that the term “Congress” in the U.S. Constitution sometimes means Congress acting alone and sometimes means Congress acting through legislation. Given that, it makes perfect sense that the term “legislature” can also sometimes mean the one and sometimes the other. I agree. This post just expands the intratextual analysis.

Here’s a possible rebuttal to Pildes. In general, the Constitution carefully distinguishes situations in which it expects Congress to act through the legislative process prescribed by Article I, § 7 and when it means for Congress (or part of Congress) to act on its own. The standard formulation for the former is the phrase “by law,” as in “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” The phrase “by law” or “Congress by law” appears 19 times in the original Constitution and 8 additional times in the amendments (9 if one includes the 1st Amendment’s statement that “Congress shall make no law . . .”). Each time, the provision clearly refers to federal legislation.

In contrast, in several provisions where it is clear that Congress is on its own, the “by law” modifier disappears. For example, the pocket veto provision says that an unsigned bill becomes law after ten days “unless the Congress by their Adjournment prevent its Return.” Or consider the requirement in art. I, § 9 that for any officer to accept an emolument from a foreign King, prince, or state requires the “consent of Congress.” Or, most obviously, “Congress” (not “Congress by law”) proposes amendments under Article V. See also art. I, § 10 (approval of interstate compacts).

Why might this matter? One could argue that given this careful usage regarding Congress, one would expect that when the Constitution meant to refer to the state lawmaking process, it would speak of “the legislature by law.” But it does not do that in the Electors Clause (or anywhere else), creating the inference that references just to “the legislature” mean the legislature, period. They are the equivalent to references to “Congress” without the “by law” modifier.

This argument does not work. It does not work for two reasons.

First, multiple counterexamples destroy the inference that when the Constitution refers to “Congress” doing something without specifying that it is to do that thing “by law” it means Congress acts on its own rather than through the legislative process. For example,

consider the statement in art. III, § 2 that the Supreme Court's appellate jurisdiction is subject to "such exceptions, and under such Regulations as the Congress shall make." Also in article 3, we see that "Congress shall have the power to declare the Punishment of Treason." And, most strikingly, accepting this inference would mean that Congress can exercise *all* its enumerated powers without the President. That is, art. I, § 8 does *not* say "The Congress shall have Power *by law* To lay and collect Taxes" etc. It says "The Congress shall have Power To lay and collect Taxes" etc. But absolutely no one would claim that means Congress can do all these things without going through the article I, §7 legislative process.

The second reason that the absence of "by law" in the Electors Clause is not significant is that the Constitution *never* refers to a state legislature acting "by law." So if the Independent State Legislature doctrine holds, then every reference to state legislatures must be read to give authority to the state legislature alone and preclude the involvement of any other state actor. This is not inconceivable. There are not that many such references, several of them in context clearly do refer to the legislature simpliciter, and state governments could continue to function under such a constraint. But this reading still seems unlikely and to be an unnecessary, and ultimately anti-federalism, move.

Take one provision in particular, the Elections Clause: "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." Art. I, § 4, cl. 1. Focusing on text (and ignoring the holding of *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015)), one might argue that the reference to "the Legislature thereof" in the first part of the sentence, contrasted with "Congress ... by law" in the second part indicates that the state legislature is to act on its own, nonlegislatively, whereas Congress must go through the legislative process. But since there is no reference anywhere to state legislatures acting "by law" the inference is weak. And the "by law" phrase actually supports the opposite inference, for it indicates that the Constitution deems the adoption of election "regulations" to be a legislative act. We know Congress must go through the legislative process to adopt such regulations, why would the state legislature's first cut at these regulations not be subject to the same process? Indeed, the Supreme Court said exactly this in *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932).[\[1\]](#)

All of this is just the long way round to the same conclusion as Professor Pildes and *Smiley*. "Congress" sometimes means "Congress, period" and sometimes means "Congress, through legislation." There is no reason to think that the same is not true of "legislature." To quote *Smiley*: "Whenever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view."

[\[1\]](#) The Court directly addressed the "by law" inference:

Respondent urges that the fact that the words “by law” are found in the clause relating to the action of the Congress, and not in the clause giving authority to the state legislature, supports the contention that the latter was not to act in the exercise of the lawmaking power. We think that the inference is strongly to the contrary. It is the nature of the function that makes the phrase “by law” apposite. That is the same whether it is performed by state or national legislature, and the use of the phrase places the intent of the whole provision in a strong light. Prescribing regulations to govern the conduct of the citizen, under the first clause, and making and altering such rules by law, under the second clause, involve action of the same inherent character.

Smiley, 285 U.S. at 367.