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Vol. I

Constitutional Structures: Separated Powers and Federalism

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West Virginia v. EPA

597 U.S. ___ (2022)

In 2015 the Environmental Protection Agency, acting under its authority from the Clear Air Act, issued new rules governing carbon dioxide emissions from fossil fuel fired power plants. As per the language of the statute, it found that carbon dioxide was an "air pollutant" that could "reasonably be anticipated to endanger public health or welfare" by causing climate change. Acting under a provision of the Act that called on the agency to establish rules for the "Best Source of Emission Reduction" (BSER) it proposed rules on new and existing power plants that were designed to cap the amount of emissions from fossil fuel plants and push power generators toward lower emissions methods such as wind and solar. The same day the rules went into effect dozens of suits were filed to stop them, including by 27 states. The D.C. Circuit declined to stay the new rules, but the Supreme Court issued a stay. The case proceeded in the D.C. Circuit, but before a ruling could be issued, President Obama was replaced by President Trump and the Trump EPA requested that the litigation be halted while it reviewed the rule. In 2019 the EPA repealed the Obama era rules, finding that the agency had overstepped its authority under the Clean Air Act with the Clean Power Plan. It replaced it with a new and significantly scaled back plan. States and organizations that supported the Obama Clean Power Plan now sued, attempting to stop the new rules from going into effect and arguing for the earlier plan. West Virginia asked to intervene on behalf of the Trump EPA rules. The D.C. Circuit consolidated the cases and held that the Trump EPA had misunderstood its authority under the Act, that the Clean Power Plan was within the agency's authority, and vacated the Trump replacement rule. When the administration changed again with the election of Joe Biden in 2020, the EPA requested that the case be dismissed while it reconsidered the Clean Power Plan and came up with its own rule. West Virginia and others objected and the Supreme Court granted cert to decide whether the DC Circuit had ruled appropriately.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into the air. 84Stat. 1683, 42 U. S. C. §7411(a)(1). That standard may be different for new and existing plants, but in each case it must reflect the "best system of emission reduction" that the Agency has determined to be "adequately demonstrated" for the particular category. §§7411(a)(1), (b)(1), (d). For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders.

Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

[*Roberts begins with a lengthy review of the various provisions of the Clean Air Act and how Section 111 which authorizes the EPA to establish the "best system of emission reduction" fits into the larger statutory scheme. He concludes that this section has been little used by the EPA in its 50-year history. He then explains the provisions of the 2015 regulations and the ensuing legal battles that brought the case to the Court. He rejects the Government's argument that no one has standing to sue at this time because the Biden administration is reviewing the rules and no one is being harmed by them. Roberts says the states have standing because the DC Circuit vacated the Trump rule and "its embedded repeal of the Clean Power Plan." That meant the circuit decision had in fact reinstated the 2015 rules and West Virginia had standing to challenge them.*]

III

A

In devising emissions limits for power plants, EPA first "determines" the "best system of emission reduction" that—taking into account cost, health, and other factors—it finds "has been adequately demonstrated." 42 U. S. C. §7411(a)(1). The Agency then quantifies "the degree of emission limitation achievable" if that best system were applied to the covered source. *Ibid.*; see also 80 Fed. Reg. 64719. The BSER, therefore, "is the central determination that the EPA must make in formulating [its emission] guidelines" under Section 111. *Id.*, at 64723. The issue here is whether restructuring the Nation's

overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the "best system of emission reduction" within the meaning of Section 111.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the agency has asserted. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). In the ordinary case, that context has no great effect on the appropriate analysis. Nonetheless, our precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *Id.*, at 159–160.

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. *Id.*, at 126–127. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion." *Id.*, at 160. In *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 3), we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the . . . spread of " disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. We found the statute's language a "wafer-thin reed" on which to rest such a measure, given "the sheer scope of the CDC's claimed authority," its "unprecedented" nature, and the fact that Congress had failed to extend the moratorium after previously having done so. *Id.*, at ___ (slip op., at 6–8).

Our decision in *Utility Air* addressed another question regarding EPA's authority—namely, whether EPA could construe the term "air pollutant," in a specific provision of the Clean Air Act, to cover greenhouse gases. 573 U. S., at 310. Despite its textual plausibility, we noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements. *Id.*, at 310, 324. We declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." *Id.*, at 324. In *Gonzales* v. *Oregon*,546 U.S. 243 (2006), we confronted the Attorney General's assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal. The Attorney General argued that this came within his statutory power

to revoke licenses where he found them "inconsistent with the public interest," 21 U. S. C. §823(f). We considered the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation . . . not sustainable." 546 U. S., at 267. Similar considerations informed our recent decision invalidating the Occupational Safety and Health Administration's mandate that "84 million Americans . . . either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense." *National Federation of Independent Business* v. *Occupational Safety and Health Administration*, 595 U. S. ___, ___ (2022) (*per curiam*) (slip op., at 5). We found it "telling that OSHA, in its half century of existence," had never relied on its authority to regulate occupational hazards to impose such a remarkable measure. *Id.*, at ___ (slip op., at 8).

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue, *Brown & Williamson*, 529 U. S., at 133, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *Whitman*, 531 U. S., at 468. Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*,512 U.S.218, 229 (1994). Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." E. Gellhorn & P. Verkuil, Controlling *Chevron*- Based Delegations, 20 Cardozo L. Rev. 989, 1011 (1999). We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn.* v. *FCC*, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. *Utility Air*, 573 U. S., at 324. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims. *Ibid.*

. . .

B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative

expansion in [its] regulatory authority." *Utility Air*, 573 U. S., at 324. It located that newfound power in the vague language of an "ancillary provision[ ]" of the Act, . . . one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. . . . Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d).

Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. . .. It had never devised a cap by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner sources."

. . .

. . . On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. EPA decides, for instance, how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably "exorbitant."

There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, "Understand[ing] and project[ing] system-wide . . . trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise *not* traditionally needed in EPA regulatory development." EPA, Fiscal Year 2016: Justification of Appropriation Estimates for the Committee on Appropriations 213 (2015) (emphasis added). "When [an] agency has no comparative expertise" in making certain policy judgments, we have said, "Congress presumably would not" task it with doing so.

We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal- based generation there should be over the coming decades. . . The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. See W. Eskridge, Interpreting Law: A Primer on How To Read Statutes and the Constitution 288 (2016) ("Even if Congress has delegated an agency general rulemaking or adjudicatory power, judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions."). Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d).

. . .

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected" multiple times. . . At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon. See 80 Fed. Reg. 64734 ("Emissions trading is . . . an integral part of our BSER analysis."). Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program. . .. It has also declined to enact similar measures, such as a carbon tax. . . . "The importance of the issue," along with the fact that the same basic scheme EPA adopted "has been the subject of an earnest and profound debate across the country, . . . makes the oblique form of the claimed delegation all the more suspect." *Gonzales*, 546 U. S., at 267–268

C

[*In this section Roberts argues that the Government has not met the burden of proof that Congress intended to give the EPA authority of the sort it exercised in adopting the Clean Power Plan.*]

* * *

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." *New York* v. *United States*,505 U.S. 144,187 (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

To resolve today's case the Court invokes the major questions doctrine. Under that doctrine's terms, administrative agencies must be able to point to " 'clear congressional authorization' " when they claim the power to make decisions of vast " 'economic and political significance.' " . . . Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees. [*Gorsuch elaborates on the argument that the major questions doctrine protects Congress's lawmaking power and its ties to popular sovereignty and offers a more extensive history of the use of "clear statements" requirements in the law.*]

*

When Congress seems slow to solve problems, it may be only natural that those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives. In our Republic, "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society." *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810). Because today's decision helps safeguard that foundational constitutional promise, I am pleased to concur.

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

Today, the Court strips the Environmental Protection Agency (EPA) of the power Congress gave it to respond to "the most pressing environmental challenge of our time." *Massachusetts* v. *EPA*, 549 U.S. 497, 505 (2007).

Climate change's causes and dangers are no longer subject to serious doubt. Modern science is "unequivocal that human influence"—in particular, the emission of greenhouse gases like carbon dioxide—"has warmed the atmosphere, ocean and land." Intergovernmental Panel on Climate Change, Sixth Assessment Report, The Physical Science Basis: Headline Statements 1 (2021). The Earth is now warmer than at any time "in the history of modern civilization," with the six warmest years on record all occurring in the last decade. U. S. Global Change Research Program, Fourth National Climate Assessment, Vol. I, p. 10 (2017); Brief for Climate Scientists as *Amici Curiae* 8. The rise in temperatures brings with it "increases in heat-related deaths," "coastal inundation and erosion," "more frequent and intense hurricanes, floods, and other extreme weather events," "drought," "destruction of ecosystems," and "potentially significant disruptions of food production." *American Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 417 (2011) (internal quotation marks omitted). If the current rate of emissions continues, children born this year could live to see parts of the Eastern seaboard swallowed by the ocean. See Brief for Climate Scientists as *Amici Curiae* 6. Rising waters, scorching heat, and other severe weather conditions could force "mass migration events[,] political crises, civil unrest," and "even state failure." Dept. of Defense, Climate Risk Analysis 8 (2021). And by the end of this century, climate change could be the cause of "4.6 million excess yearly deaths." See R. Bressler, The Mortality Cost of Carbon, 12 Nature Communications 4467, p. 5 (2021).

Congress charged EPA with addressing those potentially catastrophic harms, including through regulation of fossil-fuel-fired power plants. Section 111 of the Clean Air Act directs EPA to regulate stationary sources of any substance that "causes, or contributes

significantly to, air pollution" and that "may reasonably be anticipated to endanger public health or welfare." 42 U. S. C. §7411(b)(1)(A). Carbon dioxide and other greenhouse gases fit that description. See *American Elec. Power*, 564 U. S., at 416–417; *Massachusetts*, 549 U. S., at 528–532. EPA thus serves as the Nation's "primary regulator of greenhouse gas emissions." *American Elec. Power*, 564 U. S., at 428. And among the most significant of the entities it regulates are fossil-fuel-fired (mainly coal- and natural-gas-fired) power plants. Today, those electricity-producing plants are responsible for about one quarter of the Nation's greenhouse gas emissions. . . Curbing that output is a necessary part of any effective approach for addressing climate change.

To carry out its Section 111 responsibility, EPA issued the Clean Power Plan in 2015. The premise of the Plan—which no one really disputes—was that operational improvements at the individual-plant level would either "lead to only small emission reductions" or would cost far more than a readily available regulatory alternative. 80 Fed. Reg. 64727–64728 (2015). That alternative—which fossil-fuel-fired plants were "already using to reduce their [carbon dioxide] emissions" in "a cost effective manner"—is called generation shifting. *Id.*, at 64728, 64769. As the Court explains, the term refers to ways of shifting electricity generation from higher emitting sources to lower emitting ones—more specifically, from coal-fired to natural-gas-fired sources, and from both to renewable sources like solar and wind. See *ante*, at 8. A power company (like the many supporting EPA here) might divert its own resources to a cleaner source, or might participate in a cap-and-trade system with other companies to achieve the same emissions-reduction goals.

This Court has obstructed EPA's effort from the beginning. Right after the Obama administration issued the Clean Power Plan, the Court stayed its implementation. That action was unprecedented: Never before had the Court stayed a regulation then under review in the lower courts. See Reply Brief for 29 States and State Agencies in No. 15A773, p. 33 (conceding the point). The effect of the Court's order, followed by the Trump administration's repeal of the rule, was that the Clean Power Plan never went into effect. The ensuing years, though, proved the Plan's moderation. Market forces alone caused the power industry to meet the Plan's nationwide emissions target—through exactly the kinds of generation shifting the Plan contemplated. See 84 Fed. Reg. 32561–32562 (2019); Brief for United States 47. So by the time yet another President took office, the Plan had become, as a practical matter, obsolete. For that reason, the Biden administration announced that, instead of putting the Plan into effect, it would commence a new rulemaking. Yet this Court determined to pronounce on the legality of the old rule anyway. The Court may be right that doing so does not violate Article III mootness rules (which are notoriously strict). See *ante*, at 14–16. But the Court's docket is discretionary, and because no one is now subject to the Clean Power Plan's terms, there was no reason to reach out to decide this case. The Court today

issues what is really an advisory opinion on the proper scope of the new rule EPA is considering. That new rule will be subject anyway to immediate, pre-enforcement judicial review. But this Court could not wait—even to see what the new rule says—to constrain EPA's efforts to address climate change.

The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. *Ante*, at 31. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. §7411(a)(1). The "best system" full stop—no ifs, ands, or buts of any kind relevant here. The parties do not dispute that generation shifting is indeed the "best system"—the most effective and efficient way to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system; to the contrary, the Plan's regulatory approach fits hand-in-glove with the rest of the statute. The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is wrong. A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases.

I

. . .

"Congress," this Court has said, "knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Arlington* v. *FCC*, 569 U.S. 290, 296 (2013). In Section 111, Congress spoke in capacious terms. It knew that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Massachusetts*, 549 U. S., at 532. So the provision enables EPA to base emissions limits for existing stationary sources on the "best system." That system may be technological in nature; it may be whatever else the majority has in mind; or, most important here, it may be generation shifting. The statute does not care. And when Congress uses "expansive language" to authorize agency action, courts generally may not "impos[e] limits on [the] agency's discretion." *Little Sisters of the Poor Saints Peter and Paul Home* v.

Pennsylvania, 591 U. S. ___, ___ (2020) (slip op., at 16). That constraint on judicial authority—that insistence on judicial modesty—should resolve this case.

II

The majority thinks not, contending that in "certain extraordinary cases"—of which this is one—courts should start off with "skepticism" that a broad delegation authorizes agency action. *Ante*, at 19. The majority labels that view the "major questions doctrine," and claims to find support for it in our caselaw. *Ante*, at 19–20, 28. But the relevant decisions do normal statutory interpretation: In them, the Court simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense. Using that ordinary method, the decisions struck down agency actions (even though they plausibly fit within a delegation's terms) for two principal reasons. First, an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience. And second, the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress's broader design. In short, the assertion of delegated power was a misfit for both the agency and the statutory scheme. But that is not true here. The Clean Power Plan falls within EPA's wheelhouse, and it fits perfectly—as I've just shown—with all the Clean Air Act's provisions. That the Plan addresses major issues of public policy does not upend the analysis. Congress wanted EPA to do just that. Section 111 entrusts important matters to EPA in the expectation that the Agency will use that authority to combat pollution—and that courts will not interfere.

. . .

The majority claims it is just following precedent, but that is not so. The Court has never even used the term "major questions doctrine" before. And in the relevant cases, the Court has done statutory construction of a familiar sort. It has looked to the text of a delegation. It has addressed how an agency's view of that text works—or fails to do so—in the context of a broader statutory scheme. And it has asked, in a common-sensical (or call it purposive) vein, about what Congress would have made of the agency's view—otherwise said, whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience. In short, in assessing the scope of a delegation, the Court has considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design.

. . .

III

Some years ago, I remarked that "[w]e're all textualists now." Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of

Statutes (Nov. 25, 2015). It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence. . . .

The kind of agency delegations at issue here go all the way back to this Nation's founding. "[T]he founding era," scholars have shown, "wasn't concerned about delegation." E. Posner & A. Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1734 (2002) (Posner & Vermeule). The records of the Constitutional Convention, the ratification debates, the Federalist—none of them suggests any significant limit on Congress's capacity to delegate policymaking authority to the Executive Branch. And neither does any early practice. The very first Congress gave sweeping authority to the Executive Branch to resolve some of the day's most pressing problems, including questions of "territorial administration," "Indian affairs," "foreign and domestic debt," "military service," and "the federal courts." J. Mortenson & N. Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277, 349 (2021) (Mortenson & Bagley).. . .

It is not surprising that Congress has always delegated, and continues to do so—including on important policy issues. As this Court has recognized, it is often "unreasonable and impracticable" for Congress to do anything else.. . .

First, Members of Congress often don't know enough—and know they don't know enough—to regulate sensibly on an issue. Of course, Members can and do provide overall direction. But then they rely, as all of us rely in our daily lives, on people with greater expertise and experience. Those people are found in agencies. Congress looks to them to make specific judgments about how to achieve its more general objectives. And it does so especially, though by no means exclusively, when an issue has a scientific or technical dimension. Why *wouldn't* Congress instruct EPA to select "the best system of emission reduction," rather than try to choose that system itself? . . .

Second and relatedly, Members of Congress often can't know enough—and again, know they can't—to keep regulatory schemes working across time. Congress usually can't predict the future—can't anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur. Once again, that is most obviously true when it comes to scientific and technical matters. The "best system of emission reduction" is not today what it was yesterday, and will surely be something different tomorrow. So for this reason too, a rational Congress delegates. It enables an agency to

adapt old regulatory approaches to new times, to ensure that a statutory program remains effective. . . .

Over time, the administrative delegations Congress has made have helped to build a modern Nation. Congress wanted fewer workers killed in industrial accidents. It wanted to prevent plane crashes, and reduce the deadliness of car wrecks. It wanted to ensure that consumer products didn't catch fire. It wanted to stop the routine adulteration of food and improve the safety and efficacy of medications. And it wanted cleaner air and water. If an American could go back in time, she might be astonished by how much progress has occurred in all those areas. It didn't happen through legislation alone. It happened because Congress gave broad-ranging powers to administrative agencies, and those agencies then filled in—rule by rule by rule—Congress's policy outlines.

. . .

In short, when it comes to delegations, there are good reasons for Congress (within extremely broad limits) to get to call the shots. Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest.

Today, the Court is not. Section 111, most naturally read, authorizes EPA to develop the Clean Power Plan—in other words, to decide that generation shifting is the "best system of emission reduction" for power plants churning out carbon dioxide. Evaluating systems of emission reduction is what EPA does. And nothing in the rest of the Clean Air Act, or any other statute, suggests that Congress did not mean for the delegation it wrote to go as far as the text says. In rewriting that text, the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean Air Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.

The subject matter of the regulation here makes the Court's intervention all the more troubling. Whatever else this Court may know about, it does not have a clue about how to address climate change. And let's say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent.

Consumer Financial Protection Bureau v. Community Financial Services Assoc.
601 U.S. ___(2024)

Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act in response to the 2008 financial crisis. The Act created an independent financial regulator within the Federal Reserve System called the Consumer Financial Protection Bureau (CFPB) charged with enforcing consumer financial protection laws and ensuring that "the markets for consumer financial products and services are fair, transparent, and competitive." Congress gave the CFPB rulemaking, enforcement and adjudicatory authority. In seeking to ensure a measure of independence for the bureau, it was funded in a manner different from most federal agencies that are required to seek annual appropriations from Congress. The head of the bureau was authorized to request funding from the earnings of the Federal Reserve system and was also permitted to retain and invest unused funds form a given year. In 2017 the CFPB promulgated a regulation that imposed constraints on organizations like "pay day lenders" who issue high interest consumer loans. Two trade associations representing these lenders filed suit, arguing that the funding scheme for the CFPB was unconstitutional because it did not follow the appropriations process required in the Article I Spending clause. A district court in Texas rejected the claim, but the Fifth Circuit overturned that decision, finding a constitutional violation. The CFPB appealed.

JUSTICE THOMAS delivered the opinion of the Court.

Our Constitution gives Congress control over the public fisc, but it specifies that its control must be exercised in a specific manner. The Appropriations Clause commands that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, §9, cl. 7. For most federal agencies, Congress provides funding on an annual basis. This annual process forces them to regularly implore Congress to fund their operations for the next year. The Consumer Financial Protection Bureau is different. The Bureau does not have to petition for funds each year. Instead, Congress authorized the Bureau to draw from the Federal Reserve System the amount its Director deems "reasonably necessary to carry out" the Bureau's duties, subject only to an inflation-adjusted cap. 124Stat. 1975, 12 U. S. C. §§5497(a)(1), (2). In this case, we must decide the narrow question whether this funding mechanism complies with the Appropriations Clause. We hold that it does.

. . .

II

Under the Appropriations Clause, an appropriation is simply a law that authorizes expenditures from a specified source of public money for designated purposes. The statute that provides the Bureau's funding meets these requirements. We therefore conclude that the Bureau's funding mechanism does not violate the Appropriations Clause.

A

The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, §9, cl. 7. Textually, the command is unmistakable—"no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937). Our decisions have long given the Appropriations Clause this straightforward reading. See, *e.g., Office of Personnel Management*, 496 U. S., at 424 ("Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute"); *Reeside* v. *Walker*, 11 How. 272, 291 (1851) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not . . . previously sanctioned" through an appropriation made by Congress).

As a threshold matter, the parties agree that the Bureau's funding must comply with the Appropriations Clause. The Appropriations Clause applies to money "drawn from the Treasury." Art. I, §9, cl. 7. The Bureau draws money from the Federal Reserve System. 12 U. S. C. §5497(a)(1). And, surplus funds in the Federal Reserve System would otherwise be deposited into the general fund of the Treasury. §289(a)(3)(B). Whatever the scope of the term "Treasury" in the Appropriations Clause, money otherwise destined for the general fund of the Treasury qualifies. The Bureau's funding is therefore subject to the requirements of the Appropriations Clause.

. . .

Based on the Constitution's text, the history against which that text was enacted, and congressional practice immediately following ratification, we conclude that appropriations need only identify a source of public funds and authorize the expenditure of those funds for designated purposes to satisfy the Appropriations Clause.

1

The Constitution's text requires an "Appropriatio[n] made by Law." Art. I, §9, cl. 7. Our concern is principally with the meaning of the word "appropriation." The Constitution's use of the term "appropriation" in the Appropriations Clause and in other Clauses provides important contextual clues about its meaning. To state the obvious, the Appropriations Clause itself makes clear that an appropriation must authorize withdrawals from a particular source—the public treasury. It provides that money may be "drawn from the Treasury" only "in Consequence of Appropriations made by Law." Cl. 7. The section preceding the Appropriations Clause further suggests that appropriations assign funds for specific uses: Congress has the power to "raise and support Armies," but subject to the limitation that "no Appropriation of Money to that Use shall be for a longer Term than two Years." §8, cl. 12.

At the time the Constitution was ratified, "appropriation" meant "[t]he act of sequestering, or assigning to a particular use or person, in exclusion of all others." 1 N. Webster, An American Dictionary of the English Language (1828); see also 1 J. Ash, The New and Complete Dictionary of the English Language (2d ed. 1795) ("[t]he

application of something to a particular use"); 1 S. Johnson, A Dictionary of the English Language (6th ed. 1785) ("[t]he application of something to a particular purpose"); T. Dyche & W. Pardon, A New General English Dictionary (14th ed. 1771) ("the appointing a thing to a particular use"). In ordinary usage, then, an appropriation of public money would be a law authorizing the expenditure of particular funds for specified ends. Taken as a whole, this evidence suggests that, at a minimum, appropriations were understood as a legislative means of authorizing expenditure from a source of public funds for designated purposes.

2

Pre-founding history supports the conclusion that an identified source and purpose are all that is required for a valid appropriation. The concept of legislative "appropriations" grew out of the broader struggle for popular control of the purse in England. [*Thomas details the move from the King having " near total fiscal independence" during the Middle Ages to the increased parliamentary oversight that came when the King used various forms of taxation, rather than his inherited wealth, to accomplish goals such as waging war. By the 17th Century the balance of power over appropriations had shifted to the Parliament*.]

Following the Glorious Revolution, Parliament's usual practice was to appropriate government revenue "to particular purposes more or less narrowly defined." … Additionally, Parliament began limiting the duration of its revenue grants….Limiting the duration of these and other revenue grants ensured that the King could not rule without Parliament. As one historian described it, Parliament made sure "the Crown should be altogether unable to pay its way without an annual meeting of Parliament. . . . Every year he and his Ministers had to come, cap in hand, to the House of Commons, and more often than not the Commons drove a bargain and exacted a *quid pro quo* in return for supply." G. Trevelyan, The English Revolution 1688–1689, pp. 180–181 (1939).

Even with this newfound fiscal supremacy, Parliament did not micromanage every aspect of the King's finances. Not all post-Glorious Revolution grants of supplies were time limited. A notable exception involved what came to be known as the civil list. Despite its established power to limit the duration of revenue grants, Parliament deemed it proper to cover the expenses of the King's household and the civil government by appropriating revenue to that purpose for life. … And, parliamentary grants of supplies ordinarily gave the Crown broad discretion regarding how much to spend within an appropriated sum. Statutes granting money often stated that the Crown could spend "any Sum not exceeding" a particular amount…. These grants were permissive. As Maitland explained, "Money is granted to the queen; it is placed at the disposal of her and her ministers. But she and they are not bound by law to spend it, at least not bound by the Appropriation Act." Maitland 445. Other parliamentary appropriations acts, however, *required* that money be spent for particular purposes. …

The appropriations practice in the Colonies and early state legislatures was much the same. "When called upon to grant supplies," the lower houses in the colonial assemblies "insisted upon appropriating them in detail." J. Greene, The Quest for

Power: The Lower Houses of Assembly in the Southern Royal Colonies 1689–1776, p. 88 (1963). Many early state constitutions vested the legislative body with power over appropriations. Rappaport 332–333. And, in exercising that authority, state legislative bodies often opted for open-ended, discretionary appropriations. …
By the time of the Constitutional Convention, the principle of legislative supremacy over fiscal matters engendered little debate and created no disagreement. It was uncontroversial that the powers to raise and disburse public money would reside in the Legislative Branch. The only disagreement was about whether the right to originate taxation and appropriations bills should rest in a legislative body with proportionate representation…[*This disagreement was resolved by requiring that all revenue bills begin in the house but allowing appropriation bills to start in either the House or Senate.]* Compare Art. I, §7, cl. 1, with §9, cl. 7.

In short, the origins of the Appropriations Clause confirm that appropriations needed to designate particular revenues for identified purposes. Beyond that, however, early legislative bodies exercised a wide range of discretion. Some appropriations required expenditure of a particular amount, while others allowed the recipient of the appropriated money to spend up to a cap. Some appropriations were time limited, others were not. And, the specificity with which appropriations designated the objects of the expenditures varied greatly.

3

The practice of the First Congress also illustrates the source-and-purpose understanding of appropriations. …

Many early appropriations laws made annual lump-sum grants for the Government's expenses. Congress' first annual appropriations law, for instance, divided Government expenditures into four broad categories and authorized disbursements up to certain amounts for those purposes. For example, the law appropriated a "sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list," which covered most nonmilitary executive officers' salaries and expenses…. And, it appropriated "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war." …The law specified that the disbursements would "be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on impost and tonnage." Subsequent annual appropriations laws followed a similar pattern. . . .

Congress took even more flexible approaches to appropriations for several early executive agencies and allowed the agencies to indefinitely fund themselves directly from revenue collected. . . . [*Thomas notes the way in which the Customs Service and the Post Office were funded off revenue they generated in carrying out their tasks, modeled after similar agencies from the colonial period.*]

B

The Bureau's funding statute contains the requisite features of a congressional appropriation. The statute authorizes the Bureau to draw public funds from a particular

source—"the combined earnings of the Federal Reserve System," in an amount not exceeding an inflation-adjusted cap. 12 U. S. C. §§5497(a)(1), (2)(A)–(B). And, it specifies the objects for which the Bureau can use those funds—to "pay the expenses of the Bureau in carrying out its duties and responsibilities." §5497(c)(1).

Further, the Bureau's funding mechanism fits comfortably with the First Congress' appropriations practice. In design, the Bureau's authorization to draw an amount that the Director deems reasonably necessary to carry out the agency's responsibilities, subject to a cap, is similar to the First Congress' lump-sum appropriations. And, the commission- and fee-based appropriations that supplied the Customs Service and Post Office provided standing authorizations to expend public money in the same way that the Bureau's funding mechanism does.

For these reasons, we conclude that the statute that authorizes the Bureau to draw funds from the combined earnings of the Federal Reserve System is an "Appropriatio[n] made by Law." We therefore hold that the requirements of the Appropriations Clause are satisfied.

III

The associations make three principal arguments for why the Bureau's funding mechanism violates the Appropriations Clause, each of which attempts to build additional requirements into the meaning of an "Appropriatio[n] made by Law." None is persuasive.

A

At the outset, the associations argue that the Bureau's funding is not "drawn . . . in Consequence of Appropriations made by Law" because the agency, rather than Congress, decides the amount of annual funding that it draws from the Federal Reserve System. This argument proceeds from a mistaken premise. Congress determined the amount of the Bureau's annual funding by imposing a statutory cap. The Bureau's funding statute provides that "the amount that shall be transferred to the Bureau in each fiscal year shall not exceed" 12 percent "of the total operating expenses of the Federal Reserve System" as reported in 2009 and adjusted for inflation. §5497(a)(2). The only sense in which the Bureau decides its own funding, then, is by exercising its discretion to draw less than the statutory cap. But, as we have explained, "sums not exceeding" appropriations, which provided the Executive with the same discretion, were commonplace immediately after the founding. *Supra*, at 12–13. Thus, we cannot conclude that Congress violated the Appropriations Clause by permitting the Bureau to decide how much funding to draw up to a cap.

B

Next, the associations suggest that the Bureau's funding statute is not a valid appropriation because it is not time limited. On their reading, the Appropriations Clause requires both Chambers of Congress to periodically agree on an agency's funding, which ensures that each Chamber reserves the power to unilaterally block those funding measures through inaction. The Bureau's funding mechanism, the associations

insist, inverts this baseline by allowing it to draw funds—forever—unless both Chambers of Congress step in and affirmatively prevent the agency from doing so.

But, the Constitution's text suggests that, at least in some circumstances, Congress can make standing appropriations. The Constitution expressly provides that "no Appropriation of Money" to support an army "shall be for a longer Term than two Years." Art. I, §8, cl. 12. Hamilton explained that this restriction ensures that, for the army, Congress cannot "vest in the Executive department . . . permanent funds" and must instead "once at least in every two years . . . deliberate upon the propriety of keeping a military force on foot," "come to a new resolution on the point," and "declare their sense of the matter, by a formal vote in the face of their constituents." The Federalist No. 26, p. 143 (E. Scott ed. 1898). The Framers were thus aware of the dynamic that the associations highlight, but they did not explicitly limit the duration of appropriations for other purposes.

The First Congress' practice confirms this understanding. Recall that the appropriations that supplied funding to the Customs Service and the Post Office were not time limited. *Supra,* at 13–14. The associations resist the analogy to the Post Office and other fee-based agencies, arguing that such agencies do not enjoy the same level of fiscal independence as the Bureau. Fee-based agencies, the associations reason, "could not demand funds from the federal fisc, but rather needed to persuade the people they served to pay them, and the public could refuse to purchase to influence their conduct." Brief for Respondents 35. The associations, however, make no attempt to explain why the possibility that the public's choices could restrain fee-based agencies' revenue is relevant to the question whether a law complies with the constitutional imperative that there be an appropriation.

C

Finally, the associations contend that the Bureau's funding mechanism provides a blueprint for destroying the separation of powers, and that it invites tyranny by allowing the Executive to operate free of any meaningful fiscal check. If the Bureau's funding mechanism is consistent with the Appropriations Clause, the associations reason, then Congress could do the same for any—or every—civilian executive agency. And that, they conclude, would be the very unification of the sword and purse that the Appropriations Clause forbids.

The associations err by reducing the power of the purse to only the principle expressed in the Appropriations Clause. To be sure, the Appropriations Clause presupposes Congress' powers over the purse. But, its phrasing and location in the Constitution make clear that it is not itself the source of those powers. The Appropriations Clause is phrased as a limitation: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, §9. And, it is placed within a section of other such limitations. Compare *ibid.* ("No Bill of Attainder or ex post facto Law shall be passed") and *ibid.* ("No Tax or Duty shall be laid on Articles exported from any State"), with §8 ("The Congress shall have Power To . . . "). The associations offer no defensible argument that the Appropriations Clause requires more than a law that

authorizes the disbursement of specified funds for identified purposes. Without such a theory, the associations' Appropriations Clause challenge must fail. …

IV

The dissent's theory fares no better. The dissent accepts that the question in this case is ultimately about the meaning of "Appropriations." … It faults us for consulting dictionaries to ascertain the original public meaning of that word, insisting instead that "Appropriations" is a "term of art whose meaning has been fleshed out by centuries of history." … But, as we have explained at length, both preratification and postratification appropriations practice support our source-and-purpose understanding. …What is more, the dissent never offers a competing understanding of what the word "Appropriations" means. After winding its way through English, Colonial, and early American history about the struggle for popular control of the purse, the dissent declares that "the Appropriations Clause demands legislative control over the source and disposition of the money used to finance Government operations and projects." *Post*, at 17. The dissent never connects its summary of history back to the word "Appropriations." And, even setting that problem aside, it is unclear why the dissent's theory leads to a different outcome: Congress controls the "source and disposition of the money used to finance Government operations and projects" by enacting a law that identifies the source of public funds and authorizes the expenditure of those funds for designated purposes….

V

The statute that authorizes the Bureau to draw money from the combined earnings of the Federal Reserve System to carry out its duties satisfies the Appropriations Clause. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.
It is so ordered.

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR, JUSTICE KAVANAUGH, and JUSTICE BARRETT join, concurring.

I join in full the Court's opinion holding that the funding mechanism for the Consumer Financial Protection Bureau complies with the Appropriations Clause. As the Court details, that conclusion emerges from the Clause's "text, the history against which that text was enacted, and congressional practice immediately following ratification." … The CFPB's funding scheme, if transplanted back to the late-18th century, would have fit right in.

I write separately to note that the same would have been true at any other time in our Nation's history. " 'Long settled and established practice' may have 'great weight' " in interpreting constitutional provisions about the operation of government.. . . And here just such a tradition supports everything the Court says about the Appropriations Clause's meaning. The founding-era practice that the Court relates became the 19th-century practice, which became the 20th-century practice, which became today's. For

over 200 years now, Congress has exercised broad discretion in crafting appropriations. Sometimes it has authorized the expenditure of a sum certain for an itemized purpose on an annual basis. And sometimes it has departed from that model in one or more ways. All the flexibility and diversity evident in the founding period has thus continued unabated, making it ever more obvious that the CFPB's funding accords with the Constitution. [*Kagan then provides multiple examples of this point throughout history.*]

I would therefore add one more point to the Court's opinion. As the Court describes, the Appropriations Clause's text and founding-era history support the constitutionality of the CFPB's funding. See *ante*, at 6. And so too does a continuing tradition. Throughout our history, Congress has created a variety of mechanisms to pay for government operations. Some schemes specified amounts to go to designated items; others left greater discretion to the Executive. Some were limited in duration; others were permanent. Some relied on general Treasury moneys; others designated alternative sources of funds. Whether or not the CFPB's mechanism has an exact replica, its essentials are nothing new. And it was devised more than two centuries into an unbroken congressional practice, beginning at the beginning, of innovation and adaptation in appropriating funds. The way our Government has actually worked, over our entire experience, thus provides another reason to uphold Congress's decision about how to fund the CFPB.

JUSTICE JACKSON, concurring.
Today, the Court correctly concludes that, based on the plain meaning of the text of the Appropriations Clause, "an appropriation is simply a law that authorizes expenditures from a specified source of public money for designated purposes." . . . The statute that Congress passed to fund the Consumer Financial Protection Bureau easily meets the Appropriations Clause's minimal requirements. . . . It authorizes the Bureau to withdraw money from "the combined earnings of the Federal Reserve System," 12 U. S. C. §5497(a)(1), in order "to pay the expenses of the Bureau in carrying out its duties and responsibilities," §5497(c)(1). In my view, nothing more is needed to decide this case.

Indeed, there are good reasons to go no further. When the Constitution's text does not provide a limit to a coordinate branch's power, we should not lightly assume that Article III implicitly directs the Judiciary to find one. The Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819) (emphasis deleted). An essential aspect of the Constitution's endurance is that it empowers the political branches to address new challenges by enacting new laws and policies—without undue interference by courts. To that end, we have made clear in cases too numerous to count that nothing in the Constitution gives federal court. . . Put another way, the principle of separation of powers manifested in the Constitution's text applies with just as much force to the Judiciary as it does to Congress and the Executive.

. . .

JUSTICE ALITO, with whom JUSTICE GORSUCH joins, dissenting.

Since the earliest days of our Republic, Congress's "power over the purse" has been its "most complete and effectual weapon" to ensure that the other branches do not exceed or abuse their authority. The Federalist No. 58, p. 359 (C. Rossiter ed. 1961) (J. Madison). The Appropriations Clause protects this power by providing that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, §9, cl. 7. This provision has a rich history extending back centuries before the founding of our country. Its aim is to ensure that the people's elected representatives monitor and control the expenditure of public funds and the projects they finance, and it imposes on Congress an important duty that it cannot sign away. "Any other course" would give the Executive "a most dangerous discretion." *Reeside* v. *Walker*, 11 How. 272, 291 (1851).

Unfortunately, today's decision turns the Appropriations Clause into a minor vestige. The Court upholds a novel statutory scheme under which the powerful Consumer Financial Protection Bureau (CFPB) may bankroll its own agenda without any congressional control or oversight. According to the Court, all that the Appropriations Clause demands is that Congress "identify a source of public funds and authorize the expenditure of those funds for designated purposes." *Ante*, at 6. Under this interpretation, the Clause imposes no temporal limit that would prevent Congress from authorizing the Executive to spend public funds in perpetuity.. . . Nor does the Court's interpretation require Congress to set an upper limit on the amount of money that the Executive may take. Today's decision does not even demand that an agency's funds come from the Treasury. As the Solicitor General admitted at argument, under this interpretation, the Appropriations Clause would permit an agency to be funded entirely by private sources. Tr. of Oral Arg. 34–35. In short, there is apparently nothing wrong with a law that empowers the Executive to draw as much money as it wants from any identified source for any permissible purpose until the end of time.

That is not what the Appropriations Clause was understood to mean when it was adopted. In England, Parliament had won the power over the purse only after centuries of struggle with the Crown. Steeped in English constitutional history, the Framers placed the Appropriations Clause in the Constitution to protect this hard-won legislative power. [Alito summarizes much of the same history relied upon by Thomas, but he argues that the majority has misunderstood or misused that historical evidence.]

. . .

III

A

As the previous discussion shows, today's case turns on a simple question: Is the CFPB financially accountable to Congress in the way the Appropriations Clause demands? History tells us it is not. . . .

The CFPB's funding scheme contains the following features: (1) it applies in perpetuity; (2) the CFPB has discretion to select the amount of funding that it receives, up to a statutory cap; (3) the funds taken by the CFPB come from other entities; (4) those entities are self-funded corporations that obtain their funding from fees on private parties, "not departments of the Government," *Emergency Fleet Corp.*, 275 U. S., at 426; (5) the CFPB is not required to return unspent funds or transfer them to the Treasury; and (6) those funds may be placed in a separate fund that earns interest and may be used to pay the CFPB's expenses in the future. At argument, the Government was unable to cite any other agency with a funding scheme like this, see Tr. of Oral Arg. 31–33, 39–41, and thus no other agency—old or new—has enjoyed so many layers of insulation from accountability to Congress.

. . .

In sum, the CFPB's unprecedented combination of funding features affords it the very kind of financial independence that the Appropriations Clause was designed to prevent. It is not an exaggeration to say that the CFPB enjoys a degree of financial autonomy that a Stuart king would envy.

. . .

Loper Bright Enterprises v. Raimondo

603 U.S. ____(2024)

The Magnuson-Stevens Fishing Conservation and Management Act (MSA) was designed to manage and preserve fish populations within the oceans off the coasts of the United States. It authorized an agency within the Commerce Department to regulate the amount of fishing that happened in the zones controlled by the U.S. and permitted the use of observers on boats to gather data and monitor fish intake. Loper Bright Enterprises is a commercial fishing business that was subject to a regulation issued by the National Marine Fisheries Service (NMFS) that required companies seeking to fish for Atlantic herring pay for these observers when they were required. Loper and other similar businesses sued, arguing that the MSA did not authorize the agency to require them to pay for the observers. The U.S. District Court and the Circuit Court of Appeals both disagreed, arguing that under the *Chevron* doctrine they were required to defer to the agency's interpretation of the statute. In *Chevron v. Natural Resources Defense Council,* decided in 1984, the Court said that when interpreting statutes judges must first determine whether Congress had spoken directly to the situation in the statute. If Congress's intent was "silent or ambiguous" then judges should defer to the agency interpretation if it was "based on a permissible construction of the statute." Loper Bright enterprises appealed to the Supreme Court, where some justices had been signaling a willingness to reconsider *Chevron.* The Court granted cert in order to consider solely the question of whether *Chevron* should be overruled.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Since our decision in *Chevron . . .* , we have sometimes required courts to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. In these cases we consider whether that doctrine should be overruled.

. . .

II

A

Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved. The Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear. Cognizant of the limits of human language and foresight, they anticipated that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation," would be "more or less obscure and equivocal, until their meaning" was settled "by a series of particular discussions and adjudications." The Federalist No. 37, p. 236 (J. Cooke ed. 1961) (J. Madison).

The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." *Id.*, No. 78, at 525 (A. Hamilton). Unlike the political branches, the courts would by design exercise "neither Force nor Will, but merely judgment." *Id.*, at 523. To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches.. . .

This Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury* v. *Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177 (1803). And in the following decades, the Court understood "interpret[ing] the laws, in the last resort," to be a "solemn duty" of the Judiciary. *United States* v. *Dickson*, 15 Pet. 141, 162 (1841) (Story, J., for the Court). When the meaning of a statute was at issue, the judicial role was to "interpret the act of Congress, in order to ascertain the rights of the parties." *Decatur* v. *Paulding*, 14 Pet. 497, 515 (1840).

The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. . . .

Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. . . . That is because "the longstanding 'practice of the government' "—like any other interpretive aid—"can inform [a court's] determination of

'what the law is.' " *NLRB* v. *Noel Canning*,573 U.S. 513,515 (2014) (first quoting *McCulloch* v. *Maryland*, 4 Wheat. 316, 401 (1819); then quoting *Marbury*, 1 Cranch, at 177). The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men, and masters of the subject," who were "[n]ot unfrequently . . . the draftsmen of the laws they [were] afterwards called upon to interpret." . . .

"Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge "certainly would not be bound to adopt the construction given by the head of a department." . . .. Otherwise, judicial judgment would not be independent at all. As Justice Story put it, "in cases where [a court's] own judgment . . . differ[ed] from that of other high functionaries," the court was "not at liberty to surrender, or to waive it." *Dickson*, 15 Pet., at 162.

B

The New Deal ushered in a "rapid expansion of the administrative process." . . . But as new agencies with new powers proliferated, the Court continued to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment.

During this period, the Court often treated agency determinations of *fact* as binding on the courts, provided that there was "evidence to support the findings." . . . "When the legislature itself acts within the broad field of legislative discretion," the Court reasoned, "its determinations are conclusive." Congress could therefore "appoint[ ] an agent to act within that sphere of legislative authority" and "endow the agent with power to make *findings of fact* which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily."

But the Court did not extend similar deference to agency resolutions of questions of *law*. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function." . . . The Court understood, in the words of Justice Brandeis, that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." *St. Joseph Stock Yards*, 298 U. S., at 84 (concurring opinion). It also continued to note, as it long had, that the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to "great weight." *American Trucking Assns.*, 310 U. S., at 549.

. . .

Nothing in the New Deal era or before it thus resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes. . . .

C

Congress in 1946 enacted the APA [Administrative Procedures Act] "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." . . . It was the culmination of a "comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers."

In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U. S. C. §706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." §706(2)(A).

The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, §706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential. See §706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); §706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").

In a statute designed to "serve as the fundamental charter of the administrative state," . . ., Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was "exclusively a judicial function," *American Trucking Assns.*, 310 U. S., at 544. But nothing in the APA hints at such a dramatic departure. On the contrary, by directing courts to "interpret constitutional and statutory provisions" without differentiating between the two, Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus "remains the responsibility of the court to decide whether the law means what the agency says." . . .

The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning. According to both the House and Senate Reports on the legislation, Section 706 "provide[d] that questions of law are for courts *rather than agencies* to decide in the last analysis." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946) (emphasis added); accord, S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945). Some of the legislation's most prominent supporters articulated the same view. . . . Even the Department of Justice—an agency with every incentive to endorse a view of

the APA favorable to the Executive Branch—opined after its enactment that Section 706 merely "restate[d] the present law as to the scope of judicial review." That "present law," as we have described, adhered to the traditional conception of the judicial function. . .

[*Roberts cites legal scholars whose contemporaneous comments mirrored this view of judicial independence in interpreting regulations.*]

The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. *Skidmore*, 323 U. S., at 140. And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning. See *ibid.*; *American Trucking Assns.*, 310 U. S., at 549.

. . .

III

The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.

A

In the decades between the enactment of the APA and this Court's decision in *Chevron*, courts generally continued to review agency interpretations of the statutes they administer by independently examining each statute to determine its meaning.. . .
.
Chevron, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach. . ..[*Roberts notes that the Court never mentioned the APA in its decision.*]

B

Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA. The "law of deference" that this Court has built on the foundation laid in *Chevron* has instead been "[h]eedless of the original design" of the APA. *Perez*, 575 U. S., at 109 (Scalia, J., concurring in judgment).

1

Chevron defies the command of the APA that "the reviewing court"—not the agency whose action it reviews—is to "decide *all* relevant questions of law" and "interpret . . .

statutory provisions." §706 (emphasis added). It requires a court to *ignore*, not follow, "the reading the court would have reached" had it exercised its independent judgment as required by the APA. *Chevron*, 467 U. S., at 843, n. 11. And although exercising independent judgment is consistent with the "respect" historically given to Executive Branch interpretations, see, *e.g.*, *Edwards' Lessee*, 12 Wheat., at 210; *Skidmore*, 323 U. S., at 140, *Chevron* insists on much more. It demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time. See 467 U. S., at 863. Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is "unambiguous." *Brand X*, 545 U. S., at 982. That regime is the antithesis of the time honored approach the APA prescribes. In fretting over the prospect of "allow[ing]" a judicial interpretation of a statute "to override an agency's" in a dispute before a court, *ibid.*, *Chevron* turns the statutory scheme for judicial review of agency action upside down.

Chevron cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies. See Brief for Respondents in No. 22–1219, pp. 13, 37–38; *post*, at 4–15 (opinion of Kagan, J.). Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality. *Chevron*'s presumption does not, because "[a]n ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two." C. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 445 (1989). As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even "consider the question" with the requisite precision. 467 U. S., at 865. In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. And many or perhaps most statutory ambiguities may be unintentional. As the Framers recognized, ambiguities will inevitably follow from "the complexity of objects, . . . the imperfection of the human faculties," and the simple fact that "no language is so copious as to supply words and phrases for every complex idea." The Federalist No. 37, at 236.

Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority. Of course, when faced with a statutory ambiguity in such a case, the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute. Courts in that situation do not throw up their hands because "Congress's instructions have" supposedly "run out," leaving a statutory "gap." *Post*, at 2 (opinion of Kagan, J.). Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; "every statute's meaning is fixed at the time of enactment." *Wisconsin Central Ltd.* v. *United States*, 585 U.S. 274, 284 (2018) (emphasis deleted). So instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.

In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. *Chevron*, 467 U. S., at 843, n. 11. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. And even *Chevron* itself reaffirmed that "[t]he judiciary is the final authority on issues of statutory construction" and recognized that "in the absence of an administrative interpretation," it is "necessary" for a court to "impose its own construction on the statute." *Id.*, at 843, and n. 9. *Chevron* gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate.

2

The Government responds that Congress must generally intend for agencies to resolve statutory ambiguities because agencies have subject matter expertise regarding the statutes they administer; because deferring to agencies purportedly promotes the uniform construction of federal law; and because resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts. See Brief for Respondents in No. 22–1219, pp. 16–19. The dissent offers more of the same. See *post*, at 9–14. But none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent.

Beginning with expertise, we recently noted that interpretive issues arising in connection with a regulatory scheme often "may fall more naturally into a judge's bailiwick" than an agency's. *Kisor*, 588 U. S., at 578 (opinion of the Court). We thus observed that "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." *Ibid. Chevron*'s broad rule of deference, though, demands that courts presume just the opposite. Under that rule, ambiguities of all stripes trigger deference. Indeed, the Government and, seemingly, the dissent continue to defend the proposition that *Chevron* applies even in cases having little to do with an agency's technical subject matter expertise. See Brief for Respondents in No. 22–1219, p. 17; *post*, at 10.

But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. . . . Courts, after all, do not decide such questions blindly. The parties and

amici in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives. In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal.. . .

For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise. The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute.

Nor does a desire for the uniform construction of federal law justify *Chevron*. Given inconsistencies in how judges apply *Chevron*,. . . it is unclear how much the doctrine as a whole (as opposed to its highly deferential second step) actually promotes such uniformity. In any event, there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. We see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.

The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation. . . . Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches.. . .

That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA. By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.

. . .

The experience of the last 40 years has thus done little to rehabilitate *Chevron*. It has only made clear that *Chevron*'s fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing *court*," to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added).

IV

The only question left is whether *stare decisis*, the doctrine governing judicial adherence to precedent, requires us to persist in the *Chevron* project. It does not. . . .

* * *

. . .

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Because the D. C. and First Circuits relied on *Chevron* in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

. . .

I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers, as I have previously explained at length. . . . To provide "practical and real protections for individual liberty," the Framers drafted a Constitution that divides the legislative, executive, and judicial powers between three branches of Government. . . . *Chevron* deference compromises this separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits.

. . .

JUSTICE GORSUCH, concurring.

[*Gorsuch focuses his concurrence on why a "proper application of the doctrine of stare decisis supports" the Court's decision to overrule Chevron, relying in large part of the traditional common law notions of the judicial role and precedent.*]

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR and JUSTICE JACKSON join, dissenting.

For 40 years, *Chevron . . .* has served as a cornerstone of administrative law, allocating responsibility for statutory construction between courts and agencies. Under *Chevron*, a court uses all its normal interpretive tools to determine whether Congress has spoken to an issue. If the court finds Congress has done so, that is the end of the matter; the agency's views make no difference. But if the court finds, at the end of its interpretive work, that Congress has left an ambiguity or gap, then a choice must be made. Who should give content to a statute when Congress's instructions have run out? Should it be a court? Or should it be the agency Congress has charged with administering the statute? The answer *Chevron* gives is that it should usually be the agency, within the bounds of reasonableness. That rule has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades. It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.

And the rule is right. This Court has long understood *Chevron* deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court. Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy. And of course Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer—to make rules about and otherwise implement—the statute giving rise to the ambiguity or gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority. We defer, the Court has

explained, “because of a presumption that Congress” would have “desired the agency (rather than the courts)” to exercise “whatever degree of discretion” the statute allows. . . .

Today, the Court flips the script: It is now “the courts (rather than the agency)” that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris. In recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies. The Court has substituted its own judgment on workplace health for that of the Occupational Safety and Health Administration; its own judgment on climate change for that of the Environmental Protection Agency; and its own judgment on student loans for that of the Department of Education. See, *e.g.*, *National Federation of Independent Business* v. *OSHA*, 595 U.S. 109 (2022); *West Virginia* v. *EPA*, 597 U.S. 697 (2022); *Biden* v. *Nebraska*, 600 U.S. 477 (2023). But evidently that was, for this Court, all too piecemeal. In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country’s administrative czar. It defends that move as one (suddenly) required by the (nearly 80-year-old) Administrative Procedure Act. But the Act makes no such demand. Today’s decision is not one Congress directed. It is entirely the majority’s choice.

And the majority cannot destroy one doctrine of judicial humility without making a laughing-stock of a second. (If opinions had titles, a good candidate for today’s would be Hubris Squared.) *Stare decisis* is, among other things, a way to remind judges that wisdom often lies in what prior judges have done. It is a brake on the urge to convert “every new judge’s opinion” into a new legal rule or regime. *Dobbs* v. *Jackson Women’s Health Organization*, 597 U.S. 215, 388 (2022) (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting) (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (7th ed. 1775)). *Chevron* is entrenched precedent, entitled to the protection of *stare decisis*, as even the majority acknowledges. In fact, *Chevron* is entitled to the supercharged version of that doctrine because Congress could always overrule the decision, and because so many governmental and private actors have relied on it for so long. Because that is so, the majority needs a “particularly special justification” for its action. *Kisor* v. *Wilkie*, 588 U.S. 558, 588 (2019) (opinion of the Court). But the majority has nothing that would qualify. It barely tries to advance the usual factors this Court invokes for overruling precedent. Its justification comes down, in the end, to this: Courts must have more say over regulation—over the provision of health care, the protection of the environment, the safety of consumer products, the efficacy of transportation systems, and so on. A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power.

. . .

[*Kagan rejects the majority's interpretation of the APA . She also objects to its argument for why adherence to precedent is not warranted in this case. She argues that Congress could have easily rejected the Chevron doctrine by amending the APA to make it clear that judges were not required to defer to agency interpretations. Congress has had four decades to do so but has chosen not to, a sign, Kagan says, that should be interpreted as its approval of the decision*.]

On the other side of the balance, the most important *stare decisis* factor—call it the "jolt to the legal system" issue—weighs heavily against overruling *Chevron*. *Dobbs*, 597 U. S., at 357 (Roberts, C. J., concurring in judgment). Congress and agencies alike have relied on *Chevron*—have assumed its existence—in much of their work for the last 40 years. Statutes passed during that time reflect the expectation that *Chevron* would allocate interpretive authority between agencies and courts. Rules issued during the period likewise presuppose that statutory ambiguities were the agencies' to (reasonably) resolve. Those agency interpretations may have benefited regulated entities; or they may have protected members of the broader public. Either way, private parties have ordered their affairs—their business and financial decisions, their health-care decisions, their educational decisions—around agency actions that are suddenly now subject to challenge.. . .

IV

Judges are not experts in the field, and are not part of either political branch of the Government. — Chevron U. S. A. Inc. v. *Natural Resources Defense Council, Inc.*,467 U.S. 837, 865 (1984)

Those were the days, when we knew what we are not. When we knew that as between courts and agencies, Congress would usually think agencies the better choice to resolve the ambiguities and fill the gaps in regulatory statutes. Because agencies *are* "experts in the field." And because they *are* part of a political branch, with a claim to making interstitial policy. And because Congress has charged them, not us, with administering the statutes containing the open questions. At its core, *Chevron* is about respecting that allocation of responsibility—the conferral of primary authority over regulatory matters to agencies, not courts.

Today, the majority does not respect that judgment. It gives courts the power to make all manner of scientific and technical judgments. It gives courts the power to make all manner of policy calls, including about how to weigh competing goods and values. . . . It puts courts at the apex of the administrative process as to every conceivable subject—because there are always gaps and ambiguities in regulatory statutes, and often of great import. What actions can be taken to address climate change or other

environmental challenges? What will the Nation's health-care system look like in the coming decades? Or the financial or transportation systems? What rules are going to constrain the development of A.I.? In every sphere of current or future federal regulation, expect courts from now on to play a commanding role. It is not a role Congress has given to them, in the APA or any other statute. It is a role this Court has now claimed for itself, as well as for other judges. . . .

Once again, with respect, I dissent.

Section G. Investigations and Executive Power

Trump v. Vance
591 U.S. 2020

In 2018, the New York County District Attorney's Office opened an investigation into what it opaquely describes as "business transactions involving multiple individuals whose conduct may have violated state law." A year later, the office—acting on behalf of a grand jury—served a subpoena *duces tecum* (essentially a request to produce evidence) on Mazars USA, LLP, the personal accounting firm of President Donald J. Trump. The subpoena directed Mazars to produce financial records, including tax returns, relating to the President and business organizations affiliated with him. Trump sued the district attorney and Mazars in Federal District Court to enjoin enforcement of the subpoena. He argued that, under Article II and the Supremacy Clause, a sitting President enjoys absolute immunity from state criminal process. The District Court ruled that the President was not entitled to injunctive relief. The Second Circuit agreed. It concluded that history demonstrates that "presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President." Trump appealed and the Court granted cert.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In our judicial system, "the public has a right to every man's evidence." Since the earliest days of the Republic, "every man" has included the President of the United States. Beginning with Jefferson and carrying on through Clinton, Presidents have uniformly testified or produced documents in criminal proceedings when called upon by federal courts. This case involves—so far as we and the parties can tell—the first *state* criminal subpoena directed to a President. The President contends that the subpoena is unenforceable. We granted certiorari to decide whether Article II and the Supremacy Clause categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.

. . .

II

[*Roberts recounts the story of the first time the question of whether presidents had immunity from subpoenas – the case of Aaron Burr, who was being tried for treason and who sought documents in the hands of President Thomas Jefferson. Chief Justice John Marshall presided over the case in his role as the circuit judge for Virginia. He ruled that the president does not "stand exempt from the general provisions of the constitution" or, in particular, the Sixth Amendment's guarantee that those accused have compulsory process for obtaining witnesses for their defense. The President, unlike a king, is "of the people" and subject to the law.*]

Marshall also rejected the prosecution's argument that the President was immune from a subpoena *duces tecum* because executive papers might contain state secrets. "A subpoena duces tecum," he said, "may issue to any person to whom an ordinary subpoena may issue." *Ibid.* As he explained, no "fair construction" of the Constitution supported the conclusion that the right "to compel the attendance of witnesses does not extend" to requiring those witnesses to "bring[ ] with them such papers as may be material in the defence." *Id.*, at 35. And, as a matter of basic fairness, permitting such information to be withheld would "tarnish the reputation of the court." *Id.*, at 37. As for "the propriety of introducing any papers," that would "depend on the character of the paper, not on the character of the person who holds it." *Id.*, at 34. Marshall acknowledged that the papers sought by Burr could contain information "the disclosure of which would endanger the public safety," but stated that, again, such concerns would have "due consideration" upon the return of the subpoena. *Id.*, at 37.

. . .

In the two centuries since the Burr trial, successive Presidents have accepted Marshall's ruling that the Chief Executive is subject to subpoena. [*Roberts notes that presidents Monroe, Grant, Ford, Carter and Clinton all responded to subpoenas and provided evidence in criminal cases.*]

The bookend to Marshall's ruling came in 1974 when the question he never had to decide—whether to compel the disclosure of official communications over the objection of the President—came to a head. That spring, the Special Prosecutor appointed to investigate the break-in of the Democratic National Committee Headquarters at the Watergate complex filed an indictment charging seven defendants associated with President Nixon and naming Nixon as an unindicted co-conspirator. As the case moved toward trial, the Special Prosecutor secured a subpoena *duces tecum* directing Nixon to produce, among other things, tape recordings of Oval Office meetings. Nixon moved to quash the subpoena, claiming that the Constitution provides an absolute privilege of confidentiality to all presidential communications. This Court rejected that argument in *United States* v. *Nixon*, 418 U.S. 683 (1974), a decision we later described as "unequivocally and emphatically endors[ing] Marshall's" holding that Presidents are subject to subpoena. *Clinton* v. *Jones*, 520 U.S. 681, 704 (1997).

The *Nixon* Court readily acknowledged the importance of preserving the confidentiality of communications "between high Government officials and those who advise and assist them." 418 U. S., at 705. "Human experience," the Court explained, "teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Ibid.* Confidentiality thus promoted the "public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.*, at 708.

But, like Marshall two centuries prior, the Court recognized the countervailing interests at stake. Invoking the common law maxim that "the public has a right to every man's evidence," the Court observed that the public interest in fair and accurate judicial proceedings is at its height in the criminal setting, where our common commitment to justice demands that "guilt shall not escape" nor "innocence suffer." *Id.*, at 709 (internal quotation marks and alteration omitted). Because these dual aims would be "defeated if judgments" were "founded on a partial or speculative presentation of the facts," the *Nixon* Court recognized that it was "imperative" that "compulsory process be available for the production of evidence needed either by the prosecution or the defense." *Ibid.*

The Court thus concluded that the President's "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.*, at 713. Two weeks later, President Nixon dutifully released the tapes.

III

The history surveyed above all involved *federal* criminal proceedings. Here we are confronted for the first time with a subpoena issued to the President by a local grand jury operating under the supervision of a *state* court.

In the President's view, that distinction makes all the difference. He argues that the Supremacy Clause gives a sitting President absolute immunity from state criminal subpoenas because compliance with those subpoenas would categorically impair a President's performance of his Article II functions. The Solicitor General, arguing on behalf of the United States, agrees with much of the President's reasoning but does not commit to his bottom line. Instead, the Solicitor General urges us to resolve this case by holding that a state grand jury subpoena for a sitting President's personal records must, at the very least, "satisfy a heightened standard of need," which the Solicitor General contends was not met here. Brief for United States as *Amicus Curiae* 26, 29.

A

We begin with the question of absolute immunity. No one doubts that Article II guarantees the independence of the Executive Branch. As the head of that branch, the President "occupies a unique position in the constitutional scheme." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982). His duties, which range from faithfully executing the laws to commanding the Armed Forces, are of unrivaled gravity and breadth. Quite appropriately, those duties come with protections that safeguard the President's ability to perform his vital functions. . . .

In addition, the Constitution guarantees "the entire independence of the General Government from any control by the respective States." *Farmers and Mechanics Sav. Bank of Minneapolis* v. *Minnesota*,232 U.S. 516, 521 (1914). As we have often repeated, "States have no power . . . to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress." *McCulloch* v. *Maryland*, 4 Wheat. 316, 436 (1819). It follows that States also lack the power to impede the President's execution of those laws.

Marshall's ruling in *Burr*, entrenched by 200 years of practice and our decision in *Nixon*, confirms that *federal* criminal subpoenas do not "rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton*, 520 U. S., at 702–703. But the President, joined in part by the Solicitor General, argues that *state* criminal subpoenas pose a unique threat of impairment and thus demand greater protection. To be clear, the President does not contend here that *this* subpoena, in particular, is impermissibly burdensome. Instead he makes a *categorical* argument about the burdens generally associated with state criminal subpoenas, focusing on three: diversion, stigma, and harassment. We address each in turn.

1

The President's primary contention, which the Solicitor General supports, is that complying with state criminal subpoenas would necessarily divert the Chief Executive from his duties. He grounds that concern in *Nixon* v. *Fitzgerald*, which recognized a President's "absolute immunity from damages liability predicated on his official acts." 457 U. S., at 749. In explaining the basis for that immunity, this Court observed that the prospect of such liability could "distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.*, at 753. The President contends that the diversion occasioned by a state criminal subpoena imposes an equally intolerable burden on a President's ability to perform his Article II functions.

But *Fitzgerald* did not hold that distraction was sufficient to confer absolute immunity. We instead drew a careful analogy to the common law absolute immunity of judges and prosecutors, concluding that a President, like those officials, must "deal fearlessly and impartially with the duties of his office"—not be made "unduly cautious in the discharge of [those] duties" by the prospect of civil liability for official acts. Indeed, we expressly rejected immunity based on distraction alone 15 years later in *Clinton* v. *Jones*. There, President Clinton argued that the risk of being "distracted by the need to participate in litigation" entitled a sitting President to absolute immunity from civil liability, not just for official acts, as in *Fitzgerald*, but for private conduct as well. We disagreed with that rationale, explaining that the "dominant concern" in *Fitzgerald* was not mere distraction but the distortion of the Executive's "decisionmaking process" with respect to official acts that would stem from "worry as to the possibility of damages." 520 U. S., at 694, n. 19. The Court recognized that Presidents constantly face myriad demands on their attention, "some private, some political, and some as a result of official duty." *Id.*, at 705,

n. 40. But, the Court concluded, "[w]hile such distractions may be vexing to those subjected to them, they do not ordinarily implicate constitutional . . . concerns." *Ibid.*

The same is true of criminal subpoenas. Just as a "properly managed" civil suit is generally "unlikely to occupy any substantial amount of " a President's time or attention, two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties. If anything, we expect that in the mine run of cases, where a President is subpoenaed during a proceeding targeting someone else, as Jefferson was, the burden on a President will ordinarily be lighter than the burden of defending against a civil suit.

The President, however, believes the district attorney is investigating him and his businesses. In such a situation, he contends, the "toll that criminal process . . . exacts from the President is even heavier" than the distraction at issue in *Fitzgerald* and *Clinton*, because "criminal litigation" poses unique burdens on the President's time and will generate a "considerable if not overwhelming degree of mental preoccupation."

But the President is not seeking immunity from the diversion occasioned by the prospect of future criminal *liability*. Instead he concedes—consistent with the position of the Department of Justice—that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term. . . . The President's objection therefore must be limited to the *additional* distraction caused by the subpoena itself. But that argument runs up against the 200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process, see *Burr*, 25 F. Cas., at 34, even when the President is under investigation, see *Nixon*, 418 U. S., at 706.

2

The President next claims that the stigma of being subpoenaed will undermine his leadership at home and abroad. Notably, the Solicitor General does not endorse this argument, perhaps because we have twice denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct. See *Clinton*, 520 U. S., at 685; *Nixon*, 418 U. S., at 687. But even if a tarnished reputation were a cognizable impairment, there is nothing inherently stigmatizing about a President performing "the citizen's normal duty of . . . furnishing information relevant" to a criminal investigation. . . . Nor can we accept that the risk of association with persons or activities under criminal investigation can absolve a President of such an important public duty. Prior Presidents have weathered these associations in federal cases, and there is no reason to think any attendant notoriety is necessarily greater in state court proceedings.

To be sure, the consequences for a President's public standing will likely increase if he is the one under investigation. But, again, the President concedes that such investigations are permitted under Article II and the Supremacy Clause, and receipt of a subpoena would not seem to categorically magnify the harm to the President's reputation.

Additionally, while the current suit has cast the Mazars subpoena into the spotlight, longstanding rules of grand jury secrecy aim to prevent the very stigma the President anticipates. . . .

3

Finally, the President and the Solicitor General warn that subjecting Presidents to state criminal subpoenas will make them "easily identifiable target[s]" for harassment. *Fitzgerald*, 457 U. S., at 753. But we rejected a nearly identical argument in *Clinton*, where then-President Clinton argued that permitting civil liability for unofficial acts would "generate a large volume of politically motivated harassing and frivolous litigation." *Clinton*, 520 U. S., at 708. The President and the Solicitor General nevertheless argue that state criminal subpoenas pose a heightened risk and could undermine the President's ability to "deal fearlessly and impartially" with the States. They caution that, while federal prosecutors are accountable to and removable by the President, the 2,300 district attorneys in this country are responsive to local constituencies, local interests, and local prejudices, and might "use criminal process to register their dissatisfaction with" the President. What is more, we are told, the state courts supervising local grand juries may not exhibit the same respect that federal courts show to the President as a coordinate branch of Government.

We recognize, as does the district attorney, that harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive. Even so, in *Clinton* we found that the risk of harassment was not "serious" because federal courts have the tools to deter and, where necessary, dismiss vexatious civil suits. 520 U. S., at 708. And, while we cannot ignore the possibility that state prosecutors may have political motivations, see *post,* at 15 (Alito, J., dissenting), here again the law already seeks to protect against the predicted abuse.
First, grand juries are prohibited from engaging in "arbitrary fishing expeditions" and initiating investigations "out of malice or an intent to harass." These protections, as the district attorney himself puts it, "apply with special force to a President, in light of the office's unique position as the head of the Executive Branch." Brief for Respondent Vance 43. And, in the event of such harassment, a President would be entitled to the protection of federal courts. The policy against federal interference in state criminal proceedings, while strong, allows "intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith." Second, contrary to Justice Alito's characterization, our holding does not allow States to "run roughshod over the functioning of [the Executive B]ranch." The Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties. Any effort to manipulate a President's policy decisions or to "retaliat[e]" against a President for official acts through issuance of a subpoena, would thus be an unconstitutional attempt to "influence" a superior sovereign "exempt" from such obstacles, see *McCulloch*, 4 Wheat., at 427. We generally "assume[ ] that state courts and prosecutors will observe constitutional limitations." . . .

Given these safeguards and the Court's precedents, we cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause. Our dissenting colleagues agree. . . . On that point the Court is unanimous.

B

We next consider whether a state grand jury subpoena seeking a President's private papers must satisfy a heightened need standard. The Solicitor General would require a threshold showing that the evidence sought is "critical" for "specific charging decisions" and that the subpoena is a "last resort," meaning the evidence is "not available from any other source" and is needed "now, rather than at the end of the President's term." Brief for United States as *Amicus Curiae* 29, 32 (internal quotation marks and alteration omitted). Justice Alito, largely embracing those criteria, agrees that a state criminal subpoena to a President "should not be allowed unless a heightened standard is met." *Post,* at 16–18 (asking whether the information is "critical" and "necessary . . . now").

We disagree, for three reasons. First, such a heightened standard would extend protection designed for official documents to the President's private papers. As the Solicitor General and Justice Alito acknowledge, their proposed test is derived from executive privilege cases that trace back to *Burr*. Brief for United States as *Amicus Curiae* 26–28; *post,* at 17. There, Marshall explained that if Jefferson invoked presidential privilege over executive communications, the court would not "proceed against the president as against an ordinary individual" but would instead require an affidavit from the defense that "would clearly show the paper to be essential to the justice of the case." *Burr*, 25 F. Cas., at 192. The Solicitor General and Justice Alito would have us apply a similar standard to a President's personal papers. But this argument does not account for the relevant passage from *Burr*: "If there be a paper in the possession of the executive, which is *not of an official nature*, he must stand, as respects that paper, in nearly the same situation with any other individual." *Id.*, at 191 (emphasis added). And it is only "nearly"—and not "entirely"—because the President retains the right to assert privilege over documents that, while ostensibly private, "partake of the character of an official paper." *Id.*, at 191–192.

Second, neither the Solicitor General nor Justice Alito has established that heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions. Beyond the risk of harassment, which we addressed above, the only justification they offer for the heightened standard is protecting Presidents from "unwarranted burdens." In effect, they argue that even if federal subpoenas to a President are warranted whenever evidence is material, state subpoenas are warranted "only when [the] evidence is essential." But that double standard has no basis in law. For if the state subpoena is not issued to manipulate, the documents themselves are not protected, and the Executive is not impaired, then nothing in Article II or the Supremacy Clause supports holding state subpoenas to a higher standard than their federal counterparts.

Finally, in the absence of a need to protect the Executive, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence. Requiring

a state grand jury to meet a heightened standard of need would hobble the grand jury's ability to acquire "all information that might possibly bear on its investigation." And, even assuming the evidence withheld under that standard were preserved until the conclusion of a President's term, in the interim the State would be deprived of investigative leads that the evidence might yield, allowing memories to fade and documents to disappear. This could frustrate the identification, investigation, and indictment of third parties (for whom applicable statutes of limitations might lapse). More troubling, it could prejudice the innocent by depriving the grand jury of *exculpatory* evidence.

Rejecting a heightened need standard does not leave Presidents with "no real protection." To start, a President may avail himself of the same protections available to every other citizen. These include the right to challenge the subpoena on any grounds permitted by state law, which usually include bad faith and undue burden or breadth. And, as in federal court, "[t]he high respect that is owed to the office of the Chief Executive . . . should inform the conduct of the entire proceeding, including the timing and scope of discovery." . . . Furthermore, although the Constitution does not entitle the Executive to absolute immunity or a heightened standard, he is not "relegate[d]" only to the challenges available to private citizens. A President can raise subpoena-specific constitutional challenges, in either a state or federal forum. As previously noted, he can challenge the subpoena as an attempt to influence the performance of his official duties, in violation of the Supremacy Clause. This avenue protects against local political machinations "interposed as an obstacle to the effective operation of a federal constitutional power."

In addition, the Executive can—as the district attorney concedes—argue that compliance with a particular subpoena would impede his constitutional duties. Incidental to the functions confided in Article II is "the power to perform them, without obstruction or impediment." As a result, "once the President sets forth and explains a conflict between judicial proceeding and public duties," or shows that an order or subpoena would "significantly interfere with his efforts to carry out" those duties, "the matter changes." *Clinton*, 520 U. S., at 710, 714 (opinion of Breyer, J.). At that point, a court should use its inherent authority to quash or modify the subpoena, if necessary to ensure that such "interference with the President's duties would not occur." *Id.*, at 708 (opinion of the Court).

* * *

Two hundred years ago, a great jurist of our Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. We reaffirm that principle today and hold that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need. The "guard[ ] furnished to this high officer" lies where it always has—in "the conduct of a court" applying established legal and constitutional principles to individual subpoenas in a manner that preserves both the independence of the Executive and the integrity of the criminal justice system.

. . .
We affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.
It is so ordered.

JUSTICE KAVANAUGH, with whom JUSTICE GORSUCH joins, concurring in the judgment.

The Court today unanimously concludes that a President does not possess absolute immunity from a state criminal subpoena, but also unanimously agrees that this case should be remanded to the District Court, where the President may raise constitutional and legal objections to the subpoena as appropriate. I agree with those two conclusions.

* * *

The dispute over this grand jury subpoena reflects a conflict between a State's interest in criminal investigation and a President's Article II interest in performing his or her duties without undue interference. Although this case involves personal information of the President and is therefore not an executive privilege case, the majority opinion correctly concludes based on precedent that Article II and the Supremacy Clause of the Constitution supply some protection for the Presidency against state criminal subpoenas of this sort.

In our system of government, as this Court has often stated, no one is above the law. That principle applies, of course, to a President. At the same time, in light of Article II of the Constitution, this Court has repeatedly declared—and the Court indicates again today—that a court may not proceed against a President as it would against an ordinary litigant. . . .

The question here, then, is how to balance the State's interests and the Article II interests. The longstanding precedent that has applied to federal criminal subpoenas for official, privileged Executive Branch information is *United States* v. *Nixon*, 418 U.S. 683 (1974). That landmark case requires that a prosecutor establish a "demonstrated, specific need" for the President's information. *Id.*, at 713; see also *In re Sealed Case*, 121 F.3d 729, 753–757 (CADC 1997); cf. *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 730–731 (CADC 1974) (en banc) (similar standard for congressional subpoenas to the Executive Branch).

The *Nixon* "demonstrated, specific need" standard is a tried-and-true test that accommodates both the interests of the criminal process and the Article II interests of the Presidency. The *Nixon* standard ensures that a prosecutor's interest in subpoenaed information is sufficiently important to justify an intrusion on the Article II interests of the Presidency. The *Nixon* standard also reduces the risk of subjecting a President to unwarranted burdens, because it provides that a prosecutor may obtain a President's information only in certain defined circumstances.

Although the Court adopted the *Nixon* standard in a different Article II context—there, involving the confidentiality of official, privileged information—the majority opinion today recognizes that there are also important Article II (and Supremacy Clause) interests at stake here. A state criminal subpoena to a President raises Article II and Supremacy Clause issues because of the potential for a state prosecutor to use the criminal process and issue subpoenas in a way that interferes with the President's duties, through harassment or diversion.

Because this case again entails a clash between the interests of the criminal process and the Article II interests of the Presidency, I would apply the longstanding *Nixon* "demonstrated, specific need" standard to this case. The majority opinion does not apply the *Nixon* standard in this distinct Article II context, as I would have done. That said, the majority opinion appropriately takes account of some important concerns that also animate *Nixon* and the Constitution's balance of powers. . . .

JUSTICE THOMAS, dissenting.

I

. . .

I agree with the majority that the President does not have absolute immunity from the issuance of a grand jury subpoena. Unlike the majority, however, I do not reach this conclusion based on a primarily functionalist analysis. Instead, I reach it based on the text of the Constitution, which, as understood by the ratifying public and incorporated into an early circuit opinion by Chief Justice Marshall, does not support the President's claim of absolute immunity.

. . .

Based on the evidence of original meaning and Chief Justice Marshall's early interpretation in *Burr*, the better reading of the text of the Constitution is that the President has no absolute immunity from the issuance of a grand jury subpoena.

II

In addition to contesting the issuance of the subpoena, the President also seeks injunctive and declaratory relief against its enforcement. The majority recognizes that the President can seek relief from enforcement, but it does not vacate and remand for the lower courts to address this question. I would do so and instruct them to apply the standard articulated by Chief Justice Marshall in *Burr*: If the President is unable to comply because of his official duties, then he is entitled to injunctive and declaratory relief.

. . .

In sum, the demands on the President's time and the importance of his tasks are extraordinary, and the office of the President cannot be delegated to subordinates. A subpoena imposes both demands on the President's limited time and a mental burden, even when the President is not directly engaged in complying. This understanding of the

Presidency should guide courts in deciding whether to enforce a subpoena for the President's documents.

…

I would vacate and remand to allow the District Court to determine whether enforcement of this subpoena should be enjoined because the President's "duties as chief magistrate demand his whole time for national objects." *Id.*, at 34. Accordingly, I respectfully dissent.

JUSTICE ALITO, dissenting.

This case is almost certain to be portrayed as a case about the current President and the current political situation, but the case has a much deeper significance. While the decision will of course have a direct effect on President Trump, what the Court holds today will also affect all future Presidents—which is to say, it will affect the Presidency, and that is a matter of great and lasting importance to the Nation.

The event that precipitated this case is unprecedented. Respondent Vance, an elected state prosecutor, launched a criminal investigation of a sitting President and obtained a grand jury subpoena for his records. The specific question before us—whether the subpoena may be enforced—cannot be answered adequately without considering the broader question that frames it: whether the Constitution imposes restrictions on a State's deployment of its criminal law enforcement powers against a sitting President. If the Constitution sets no such limits, then a local prosecutor may prosecute a sitting President. And if that is allowed, it follows *a fortiori* that the subpoena at issue can be enforced. On the other hand, if the Constitution does not permit a State to prosecute a sitting President, the next logical question is whether the Constitution restrains any other prosecutorial or investigative weapons.

These are important questions that go to the very structure of the Government created by the Constitution. In evaluating these questions, two important structural features must be taken into account.

I

A

The first is the nature and role of the Presidency. The Presidency, like Congress and the Supreme Court, is a permanent institution created by the Constitution. All three of these institutions are distinct from the human beings who serve in them at any point in time. In the case of Congress or the Supreme Court, the distinction is easy to perceive, since they have multiple Members. But because "[t]he President is the only person who alone composes a branch of government . . . , there is not always a clear line between his personal and official affairs." *Trump* v. *Mazars USA, LLP*, *post*, at 17. As a result, the law's treatment of the person who serves as President can have an important effect on the institution, and the institution of the Presidency plays an indispensable role in our constitutional system.

The Constitution entrusts the President with responsibilities that are essential to the country's safety and well- being. [*Alito outlines the President's constitutional responsibilities.*]

B

The second structural feature is the relationship between the Federal Government and the States. Just as our Constitution balances power against power among the branches of the Federal Government, it also divides power between the Federal Government and the States. The Constitution permitted the States to retain many of the sovereign powers that they previously possessed, . . . but it gave the Federal Government powers that were deemed essential for the Nation's well-being and, indeed, its survival. And it provided for the Federal Government to be independent of and, within its allotted sphere, supreme over the States. Art. VI, cl. 2. Accordingly, a State may not block or interfere with the lawful work of the National Government.

. . .

Building on this principle of federalism, two centuries of case law prohibit the States from taxing, regulating, or otherwise interfering with the lawful work of federal agencies, instrumentalities, and officers. The Court premised these cases on the principle that "the activities of the Federal Government are free from regulation by any State. No other adjustment of competing enactments or legal principles is possible."

II

A

In *McCulloch*, Maryland's sovereign taxing power had to yield, and in a similar way, a State's sovereign power to enforce its criminal laws must accommodate the indispensable role that the Constitution assigns to the Presidency. This must be the rule with respect to a state prosecution of a sitting President. Both the structure of the Government established by the Constitution and the Constitution's provisions on the impeachment and removal of a President make it clear that the prosecution of a sitting President is out of the question. It has been aptly said that the President is the "sole indispensable man in government," and subjecting a sitting President to criminal prosecution would severely hamper his ability to carry out the vital responsibilities that the Constitution puts in his hands.

. . .

The scenario apparently contemplated by the District Court is striking. If a sitting President were charged in New York County, would he be arrested and fingerprinted? He would presumably be required to appear for arraignment in criminal court, where the judge would set the conditions for his release. Could he be sent to Rikers Island or be required to post bail? Could the judge impose restrictions on his travel? If the President were scheduled to travel abroad—perhaps to attend a G–7 meeting—would he have to get judicial approval? If the President were charged with a complicated offense requiring a long trial, would he have to put his Presidential responsibilities aside for weeks on end while sitting in a Manhattan courtroom? While the trial was in progress, would aides be able to approach him and whisper in his ear about pressing matters? Would he be able to obtain a recess whenever he needed to speak with an aide at greater length or attend

to an urgent matter, such as speaking with a foreign leader? Could he effectively carry out all his essential Presidential responsibilities after the trial day ended and at the same time adequately confer with his trial attorneys regarding his defense? Or should he be expected to give up the right to attend his own trial and be tried in absentia? And if he were convicted, could he be imprisoned? Would aides be installed in a nearby cell?

This entire imagined scene is farcical. . . .

. . .

D

In light of the above, a subpoena like the one now before us should not be enforced unless it meets a test that takes into account the need to prevent interference with a President's discharge of the responsibilities of the office. I agree with the Court that not all such subpoenas should be barred. There may be situations in which there is an urgent and critical need for the subpoenaed information. The situation in the Burr trial, where the documents at issue were sought by a criminal defendant to defend against a charge of treason, is a good example. But in a case like the one at hand, a subpoena should not be allowed unless a heightened standard is met.

. . .

The Presidency deserves greater protection. Thus, in a case like this one, a prosecutor should be required (1) to provide at least a general description of the possible offenses that are under investigation, (2) to outline how the subpoenaed records relate to those offenses, and (3) to explain why it is important that the records be produced and why it is necessary for production to occur while the President is still in office.

. . .

Trump v. U.S.

603 U. S. ____ (2024)

Donald J. Trump served as president from January 2017 until January 2021. On August 1, 2023 a federal grand jury indicted him for actions he took following the November 2020 election, which he lost, but while he was still president. He was charged with conspiring to overturn the election by spreading false claims of election fraud, soliciting alternative slates of electors, and attempting to obstruct the counting of electoral college ballots on January 6, 2021. Trump moved to dismiss the indictment claiming presidential immunity because all his actions fell within his official duties as president. The federal district court denied his motion and the DC Circuit affirmed. The Supreme Court granted certiorari to consider "[w]hether and to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office."

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

This case concerns the federal indictment of a former President of the United States for conduct alleged to involve official acts during his tenure in office. We consider the scope of a President's immunity from criminal prosecution.

I

. . .

According to the indictment, Trump advanced his goal through five primary means. First, he and his co-conspirators "used knowingly false claims of election fraud to get state legislators and election officials to . . . change electoral votes for [Trump's] opponent, Joseph R. Biden, Jr., to electoral votes for [Trump]." App. 185, Indictment ¶10(a). Second, Trump and his co-conspirators "organized fraudulent slates of electors in seven targeted states" and "caused these fraudulent electors to transmit their false certificatesto the Vice President and other government officials to be counted at the certification proceeding on January 6." Id., at 186, ¶10(b). Third, Trump and his co-conspirators attempted to use the Justice Department "to conduct shamelection crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant concerns that may have impacted the election outcome." Id., at 186–187, ¶10(c). Fourth, Trump and his co-conspirators attempted to persuade "the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." Id., at 187, ¶10(d). And when that failed, on the morning of January 6, they "repeated knowingly false claims of election fraud to gathered supporters, falsely told them that the Vice President had the authority to and might alter the election results, and directed them to the Capitol to obstruct the certification proceeding." Ibid. Fifth, when "a large and angry crowd . . . violently attacked the Capitol and halted the proceeding," Trump and his coconspirators "exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification." Id., at 187–188, ¶10(e).

Based on this alleged conduct, the indictment charged Trump with (1) conspiracy to defraud the United States in violation of 18 U. S. C. §371, (2) conspiracy to obstruct an official proceeding in violation of §1512(k), (3) obstruction of and attempt to obstruct an official proceeding in violation of §1512(c)(2), §2, and (4) conspiracy against rights in violation of §241.1

. . .

II

This case is the first criminal prosecution in our Nation's history of a former President for actions taken during his Presidency. We are called upon to consider whether and under what circumstances such a prosecution may proceed. Doing so requires careful assessment of the scope of Presidential power under the Constitution. We undertake that responsibility conscious that we must not confuse "the issue of a power's validity with the cause it is invoked to promote," but must instead focus on the "enduring consequences upon the balanced power structure of our Republic." Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579,634 (1952) (Jackson, J., concurring).

The parties before us do not dispute that a former President can be subject to criminal prosecution for unofficial acts committed while in office. They also agree that some of the conduct described in the indictment includes actions taken by Trump in his unofficial capacity. They disagree, however, about whether a former President can be prosecuted for his official actions. Trump contends that just as a President is absolutely immune from civil damages liability for acts within the outer perimeter of his official responsibilities, Fitzgerald, 457 U. S., at 756, he must be absolutely immune from criminal prosecution for such acts. And Trump argues that the bulk of the indictment's allegations involve conduct in his official capacity as President. Although the Government agrees that some official actions are included in the indictment's allegations, . . . it maintains that a former President does not enjoy immunity from criminal prosecution for any actions, regardless of how they are characterized.

We conclude that under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity. At the current stage of proceedings in this case, however, we need not and do not decide whether that immunity must be absolute, or instead whether a presumptive immunity is sufficient.

A

Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." §1, cl. 1. [*The Chief Justice outlines the powers of the president, both foreign and domestic, contained in Article II, as well as his role in the lawmaking process in Article I.]*

No matter the context, the President's authority to act necessarily "stem[s] either from an act of Congress or from the Constitution itself." Youngstown, 343 U. S., at 585. In the latter case, the President's authority is sometimes "conclusive and preclusive." Id., at 638 (Jackson, J., concurring). When the President exercises such authority, he may act even when the measures he takes are "incompatible with the expressed or implied will of Congress." Id., at 637. The exclusive constitutional authority of the President

"disabl[es] the Congress from acting upon the subject." Id., at 637–638. And the courts have "no power to control [the President's] discretion" when he acts pursuant to the powers invested exclusively in him by the Constitution. Marbury, 1 Cranch, at 166.

If the President claims authority to act but in fact exercises mere "individual will" and "authority without law,"the courts may say so. Youngstown, 343 U. S., at 655 (Jackson, J., concurring). In Youngstown, for instance, we held that President Truman exceeded his constitutional authority when he seized most of the Nation's steel mills. But once it is determined that the President acted within the scope of his exclusive authority, his discretion in exercising such authority cannot be subject to further judicial examination.

The Constitution, for example, vests the "Power to Grant Reprieves and Pardons for Offences against the United States" in the President. Art. II, §2, cl. 1. During and after the Civil War, President Lincoln offered a full pardon, with restoration of property rights, to anyone who had "engaged in the rebellion" but agreed to take an oath of allegiance to the Union. United States v. Klein, 13 Wall. 128, 139–141(1872). But in 1870, Congress enacted a provision that prohibited using the President's pardon as evidence of restoration of property rights. Id., at 143–144. Chief Justice Chase held the provision unconstitutional because it "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive." Id., at 147. "To the executive alone is intrusted the power of pardon," and the "legislature cannot change the effect of such a pardon any more than the executive can change a law." Id., at 147–148. The President's authority to pardon, in other words, is "conclusive and preclusive," "disabling the Congress from acting upon the subject." Youngstown, 343 U. S., at 637–638 (Jackson, J., concurring).

[*Roberts cites additional case law where the President's "exclusive" powers have been upheld and immune from congressional and judicial interference, including the power to remove and supervise executive officers and the recognition of foreign powers*]

Congress cannot act on, and courts cannot examine, the President's actions on subjects within his "conclusive and preclusive" constitutional authority. It follows that an Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions. We thus conclude that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.

B

But of course not all of the President's official acts fall within his "conclusive and preclusive" authority. As Justice Robert Jackson recognized in Youngstown, the President sometimes "acts pursuant to an express or implied authorization of Congress," or in a "zone of twilight" where "he and Congress may have concurrent authority." 343 U. S., at 635, 637 (concurring opinion). The reasons that justify the President's absolute immunity from criminal prosecution for acts within the scope of his exclusive authority therefore do not extend to conduct in areas where his authority is shared with Congress. We recognize that only a limited number of our prior decisions guide determination of the President's immunity in this context. That is because proceedings directly involving a President have been uncommon in our Nation, and "decisions of the Court in this area" have accordingly been "rare"and "episodic." Dames & Moore v. Regan, 453 U. S. 654, 661 (1981). To resolve the matter, therefore, we look primarily to the Framers' design of the Presidency within the separation of powers, our precedent on Presidential immunity in the civil context, and our criminal cases where a President resisted prosecutorial demands for documents.

1

The President "occupies a unique position in the constitutional scheme," Fitzgerald, 457 U. S., at 749, as "the only person who alone composes a branch of government,"Trump v. Mazars USA, LLP, 591 U. S. 848, 868 (2020). The Framers "sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many." Clinton v. Jones, 520 U. S. 681, 712 (1997) (Breyer, J., concurring in judgment).

They "deemed an energetic executive essential to 'the protection of the community against foreign attacks,' 'the steady administration of the laws,' 'the protection of property,' and 'the security of liberty.' " Seila Law, 591 U. S., at 223–224 (quoting The Federalist No. 70, p. 471 (J. Cooke ed. 1961) (A. Hamilton)). The purpose of a "vigorous" and "energetic" Executive, they thought, was to ensure "good government," for a "feeble executive implies a feeble execution of the government." Id., at 471–472.

The Framers accordingly vested the President with "supervisory and policy responsibilities of utmost discretion and sensitivity." Fitzgerald, 457 U. S., at 750. He must make "the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." Id., at 752. There accordingly "exists the greatest public interest" in providing the President with " 'the maximum ability to deal fearlessly and impartially with' the duties of his office." Appreciating the "unique risks to the effective functioning of government" that arise when the President's energies are diverted by proceedings that might render him "unduly cautious in the discharge of his official

duties," we have recognized Presidential immunities and privileges "rooted in the constitutional tradition of the separation of powers and supported by our history." Fitzgerald, 457 U. S., at 749, 751, 752, n. 32.

In Nixon v. Fitzgerald, for instance, we recognized that as "a functionally mandated incident of [his] unique office, "a former President "is entitled to absolute immunity from damages liability predicated on his official acts." Id., at 749. That case involved a terminated Air Force employee who sued former President Richard Nixon for damages, alleging that Nixon approved an Air Force reorganization that wrongfully led to his firing. In holding that Nixon was immune from that suit, "our dominant concern" was to avoid "diversion of the President's attention during the decision making process caused by needless worry as to the possibility of damages actions stemming from any particular official decision." Clinton, 520 U. S., at 694, n. 19. "[T]he singular importance of the President's duties" implicating "matters likely to 'arouse the most intense feelings,' " coupled with "the sheer prominence of [his] office," heightens the prospect of private damages suits that would threaten such diversion. Fitzgerald, 457 U. S., at 751–753 (quoting Pierson v. Ray, 386 U. S. 547, 554 (1967)). We therefore concluded that the President must be absolutely immune from "damages liability for acts within the 'outer perimeter' of his official responsibility." Fitzgerald, 457 U. S., at 756.

By contrast, when prosecutors have sought evidence from the President, we have consistently rejected Presidential claims of absolute immunity. For instance, during the treason trial of former Vice President Aaron Burr, Chief Justice Marshall rejected President Thomas Jefferson's claim that the President could not be subjected to a subpoena. Marshall reasoned that "the law does not discriminate between the president and a private citizen." United States v. Burr, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807) (Burr I). Because a President does not "stand exempt from the general provisions of the constitution," including the Sixth Amendment's guarantee that those accused shall have compulsory process for obtaining witnesses for their defense, a subpoena could issue. Id., at 33–34. Marshall acknowledged, however, the existence of a "privilege" to withhold certain "official paper[s]" that "ought not on light ground to be forced into public view." United States v. Burr, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807) (Burr II); see also Burr I, 25 F. Cas., at 37 (stating that nothing before the court showed that the document in question "contain[ed] any matter the disclosure of which would endanger the public safety"). And he noted that a court may not "be required to proceed against the president as against an ordinary individual." Burr II, 25 F. Cas., at 192.

Similarly, when a subpoena issued to President Nixon to produce certain tape recordings and documents relating to his conversations with aides and advisers, this Court rejected his claim of "absolute privilege," given the "constitutional duty of the Judicial Branch to do justice in criminal prosecutions." United States v. Nixon, 418 U. S. 683, 703,707 (1974). But we simultaneously recognized "the public interest in candid,

objective, and even blunt or harsh opinions in Presidential decisionmaking," as well as the need to protect communications between high Government officials and those who advise and assist them in the performance of their manifold duties." Id., at 705, 708. Because the President's "need for complete candor and objectivity from advisers calls for great deference from the courts," we held that a "presumptive privilege" protects Presidential communications. Id., at 706, 708. That privilege, we explained, "relates to the effective discharge of a President's powers." Id., at 711. We thus deemed it "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." Id., at 708.

2

Criminally prosecuting a President for official conduct undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession, as in Burr and Nixon. The danger is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the "bold and unhesitating action" required of an independent Executive. Fitzgerald, 457 U. S., at 745. Although the President might be exposed to fewer criminal prosecutions than the range of civil damages suits that might be brought by various plaintiffs, the threat of trial, judgment, and imprisonment is a far greater deterrent. Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decisionmaking than the potential payment of civil damages.

The hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions under "a pall of potential prosecution," McDonnell v. United States, 579 U. S. 550, 575 (2016), raises "unique risks to the effective functioning of government," Fitzgerald, 457 U. S., at 751. A President inclined to take one course of action based on the public interest may instead opt for another, apprehensive that criminal penalties may befall him upon his departure from office. And if a former President's official acts are routinely subjected to scrutiny in criminal prosecutions, "the independence of the Executive Branch" may be significantly undermined. Vance, 591 U. S., at 800. The Framers' design of the Presidency did not envision such counterproductive burdens on the "vigor[]" and "energy" of the Executive. The Federalist No. 70, at 471–472.

We must, however, "recognize[] the countervailing interests at stake." Vance, 591 U. S., at 799. Federal criminal laws seek to redress "a wrong to the public" as a whole, not just "a wrong to the individual." Huntington v. Attrill, 146 U. S. 657, 668 (1892). There is therefore a compelling "public interest in fair and effective law enforcement." Vance, 591 U. S., at 808. The President, charged with enforcing federal criminal laws, is not above them.

Chief Justice Marshall's decisions in Burr and our decision in Nixon recognized the distinct interests present in criminal prosecutions. Although Burr acknowledged that the President's official papers may be privileged and publicly unavailable, it did not grant him an absolute exemption from responding to subpoenas. See Burr II, 25 F. Cas.,at 192; Burr I, 25 F. Cas., at 33–34. Nixon likewise recognized a strong protection for the President's confidential communications—a "presumptive privilege"—but it did not entirely exempt him from providing evidence in criminal proceedings. 418 U. S., at 708.

Taking into account these competing considerations, we conclude that the separation of powers principles explicated in our precedent necessitate at least a presumptive immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility. Such an immunity is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution. Indeed, if presumptive protection for the President is necessary to enable the "effective discharge" of his powers when a prosecutor merely seeks evidence of his official papers and communications, id., at 711, it is certainly necessary when the prosecutor seeks to charge, try, and imprison the President himself for his official actions. At a minimum, the President must therefore be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no "dangers of intrusion on the authority and functions of the Executive Branch." Fitzgerald, 457 U. S., at 754.

But as we explain below, the current stage of the proceedings in this case does not require us to decide whether this immunity is presumptive or absolute. …Because we need not decide that question today, we do not decide it. "[O]ne case" in more than "two centuries does not afford enough experience" to definitively and comprehensively determine the President's scope of immunity from criminal prosecution. Mazars, 591 U. S., at 871.

C

As for a President's unofficial acts, there is no immunity. The principles we set out in Clinton v. Jones confirm as much. When Paula Jones brought a civil lawsuit against then-President Bill Clinton for acts he allegedly committed prior to his Presidency, we rejected his argument that he enjoyed temporary immunity from the lawsuit while serving as President. 520 U. S., at 684. Although Presidential immunity is required for official actions to ensure that the President's decisionmaking is not distorted by the threat of future litigation stemming from those actions, that concern does not support immunity for unofficial conduct. Id., at 694, and n. 19. The " 'justifying purposes' " of the immunity we recognized in Fitzgerald, and the one we recognize today, are not that the President must be immune because he is the President; rather, they are to ensure that the President can undertake his constitutionally designated functions effectively, free

from undue pressures or distortions. . . . The separation of powers does not bar a prosecution predicated on the President's unofficial acts. [*In a footnote Roberts distinguishes between civil and criminal proceedings against a sitting president, stating that the Clinton v. Jones case permits a trial in a civil case against a sitting president, but the Justice Department "has long recognized" that "the separation of powers precludes the criminal prosecution of a sitting President."*]

III

Determining whether a former President is entitled to immunity from a particular prosecution requires applying the principles we have laid out to his conduct at issue. The first step is to distinguish his official from unofficial actions. In this case, however, no court has thus far considered how to draw that distinction, in general or with respect to the conduct alleged in particular. Despite the unprecedented nature of this case, and the very significant constitutional questions that it raises, the lower courts rendered their decisions on a highly expedited basis. Because those courts categorically rejected any form of Presidential immunity, they did not analyze the conduct alleged in the indictment to decide which of it should be categorized as official and which unofficial. Neither party has briefed that issue before us (though they discussed it at oral argument in response to questions). And like the underlying immunity question, that categorization raises multiple unprecedented and momentous questions about the powers of the President and the limits of his authority under the Constitution. As we have noted, there is little pertinent precedent on those subjects to guide our review of this case—a case that we too are deciding on an expedited basis, less than five months after we granted the Government's request to construe Trump's emergency application for a stay as a petition for certiorari, grant that petition, and answer the consequential immunity question. Given all these circumstances, it is particularly incumbent upon us to be mindful of our frequent admonition that "[o]urs is a court of final review and not first view."

Critical threshold issues in this case are how to differentiate between a President's official and unofficial actions, and how to do so with respect to the indictment's extensive and detailed allegations covering a broad range of conduct.

We offer guidance on those issues below. Certain allegations—such as those involving Trump's discussions with the Acting Attorney General—are readily categorized in light of the nature of the President's official relationship to the office held by that individual. Other allegations—such as those involving Trump's interactions with the Vice President, state officials, and certain private parties, and his comments to the general public—present more difficult questions. Although we identify several considerations pertinent to classifying those allegations and determining whether they are subject to immunity, that analysis ultimately is best left to the lower courts to perform in the first instance.

A

Distinguishing the President's official actions from his unofficial ones can be difficult. When the President acts pursuant to "constitutional and statutory authority," he takes official action to perform the functions of his office. Fitzgerald, 457 U. S., at 757. Determining whether an action is covered by immunity thus begins with assessing the President's authority to take that action.

But the breadth of the President's "discretionary responsibilities" under the Constitution and laws of the United States "in a broad variety of areas, many of them highly sensitive," frequently makes it "difficult to determine which of [his] innumerable 'functions' encompassed a particular action." Id., at 756. And some Presidential conduct—for example, speaking to and on behalf of the American people, see Trump v. Hawaii, 585 U. S. 667, 701 (2018)—certainly can qualify as official even when not obviously connected to a particular constitutional or statutory provision. For those reasons, the immunity we have recognized extends to the "outer perimeter" of the President's official responsibilities, covering actions so long as they are "not manifestly or palpably beyond [his] authority." . . . In dividing official from unofficial conduct, courts may not inquire into the President's motives. Such an inquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect. Indeed, "[i]t would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government" if "[i]n exercising the functions of his office," the President was "under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry." . . .

B

With these principles in mind, we turn to the conduct alleged in the indictment.

1

[*Roberts argues that Trump's meeting with the Acting Attorney General in his effort to get the Department of Justice to convince certain states that election fraud had occurred and that they should replace the slate of electors, and his threat to have the AG fired for refusal to do so, "plainly implicate Trump's 'conclusive and preclusive' authority" over criminal prosecution, and his ability to remove executive officers under his control. Consequently, Trump is "absolutely immune from prosecution for the alleged conduct involving his discussion with Justice Department officials."*]

2

[*After a review of all of the ways in which the President and Vice President interact in the executive branch, and the frequency with which the VP acts as a surrogate for the president, Roberts concludes that it was Vice President Pence's official duty to preside over the counting of the electoral college votes and that the indictment's allegations that Trump pressured Pence involved official conduct that "is at least presumptively immune from prosecution".*]

The question then becomes whether that presumption of immunity is rebutted under the circumstances. When the Vice President presides over the January 6 certification proceeding, he does so in his capacity as President of the Senate. Ibid. Despite the Vice President's expansive role of advising and assisting the President within the Executive Branch, the Vice President's Article I responsibility of "presiding over the Senate" is "not an 'executive branch' function." . . . With respect to the certification proceeding in particular, Congress has legislated extensively to define the Vice President's role in the counting of the electoral votes, see, e.g., 3 U. S. C. §15, and the President plays no direct constitutional or statutory role in that process. So the Government may argue that consideration of the President's communications with the Vice President concerning the certification proceeding does not pose "dangers of intrusion on the authority and functions of the Executive Branch." . . .It is ultimately the Government's burden to rebut the presumption of immunity. We therefore remand to the District Court to assess in the first instance, with appropriate input from the parties, whether a prosecution involving Trump's alleged attempts to influence the Vice President's oversight of the certification proceeding in his capacity as President of the Senate would pose any dangers of intrusion on the authority and functions of the Executive Branch.

3

The indictment's remaining allegations cover a broad range of conduct. Unlike the allegations describing Trump's communications with the Justice Department and the Vice President, these remaining allegations involve Trump's interactions with persons outside the Executive Branch: state officials, private parties, and the general public. Many of the remaining allegations, for instance, cover at great length events arising out of communications that Trump and his co-conspirators initiated with state legislators and election officials in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin regarding those States' certification of electors.

. . .

Unlike Trump's alleged interactions with the Justice Department, this alleged conduct cannot be neatly categorized as falling within a particular Presidential function. The

necessary analysis is instead fact specific, requiring assessment of numerous alleged interactions with a wide variety of state officials and private persons. And the parties' brief comments at oral argument indicate that they starkly disagree on the characterization of these allegations. The concerns we noted at the outset—the expedition of this case, the lack of factual analysis by the lower courts, and the absence of pertinent briefing by the parties—thus become more prominent. We accordingly remand to the District Court to determine in the first instance—with the benefit of briefing we lack—whether Trump's conduct in this area qualifies as official or unofficial.

4

Finally, the indictment contains various allegations regarding Trump's conduct in connection with the events of January 6 itself. . . . The alleged conduct largely consists of Trump's communications in the form of Tweets and a public address. The President possesses "extraordinary power to speak to his fellow citizens and on their behalf." Hawaii, 585 U. S., at 701; cf. Lindke v. Freed, 601 U. S. 187, 191 (2024). As the sole person charged by the Constitution with executing the laws of the United States, the President oversees—and thus will frequently speak publicly about—a vast array of activities that touch on nearly every aspect of American life. Indeed, a long-recognized aspect of Presidential power is using the office's "bully pulpit" to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest. He is even expected to comment on those matters of public concern that may not directly implicate the activities of the Federal Government—for instance, to comfort the Nation in the wake of an emergency or tragedy. For these reasons, most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities.

There may, however, be contexts in which the President, notwithstanding the prominence of his position, speaks in an unofficial capacity—perhaps as a candidate for office or party leader. To the extent that may be the case, objective analysis of "content, form, and context" will necessarily inform the inquiry. Snyder v. Phelps, 562 U. S. 443, 453 (2011). But "there is not always a clear line between [the President's] personal and official affairs." Mazars, 591 U. S., at 868. The analysis therefore must be fact specific and may prove to be challenging.

The indictment reflects these challenges. It includes only select Tweets and brief snippets of the speech Trump delivered on the morning of January 6, omitting its full text or context. See App. 228–230, Indictment ¶104. Whether the Tweets, that speech, and Trump's other communications on January 6 involve official conduct may depend on the content and context of each. Knowing, for instance, what else was said contemporaneous to the excerpted communications, or who was involved in transmitting the electronic communications and in organizing the rally, could be relevant

to the classification of each communication. This necessarily factbound analysis is best performed initially by the District Court. We therefore remand to the District Court to determine in the first instance whether this alleged conduct is official or unofficial.

C

The essence of immunity "is its possessor's entitlement not to have to answer for his conduct" in court. Mitchell, 472 U. S., at 525. Presidents therefore cannot be indicted based on conduct for which they are immune from prosecution. As we have explained, the indictment here alleges at least some such conduct. See Part III–B–1, supra. On remand, the District Court must carefully analyze the indictment's remaining allegations to determine whether they too involve conduct for which a President must be immune from prosecution. And the parties and the District Court must ensure that sufficient allegations support the indictment's charges without such conduct.

The Government does not dispute that if Trump is entitled to immunity for certain official acts, he may not "be held criminally liable" based on those acts. Brief for United States 46. But it nevertheless contends that a jury could "consider" evidence concerning the President's official acts "for limited and specified purposes," and that such evidence would "be admissible to prove, for example, [Trump's] knowledge or notice of the falsity of his election-fraud claims." Id., at 46, 48. That proposal threatens to eviscerate the immunity we have recognized. It would permit a prosecutor to do indirectly what he cannot do directly—invite the jury to examine acts for which a President is immune from prosecution to nonetheless prove his liability on any charge. But "[t]he Constitution deals with substance, not shadows." Cummings v. Missouri, 4 Wall. 277, 325 (1867). And the Government's position is untenable in light of the separation of powers principles we have outlined.

If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the "intended effect" of immunity would be defeated. Fitzgerald, 457 U. S., at 756. The President's immune conduct would be subject to examination by a jury on the basis of generally applicable criminal laws. Use of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted. See Clinton, 520 U. S., at 694, n. 19. The Government asserts that these weighty concerns can be managed by the District Court through the use of "evidentiary rulings" and "jury instructions." Brief for United States 46. But such tools are unlikely to protect adequately the President's constitutional prerogatives. Presidential acts frequently deal with "matters likely to 'arouse the most intense feelings.' " Fitzgerald, 457 U. S., at 752 (quoting Pierson, 386 U. S., at 554). Allowing prosecutors to ask or suggest that the jury probe official acts for which the President is immune would thus raise a unique risk that the jurors'

deliberations will be prejudiced by their views of the President's policies and performance while in office. The prosaic tools on which the Government would have courts rely are an inadequate safeguard against the peculiar constitutional concerns implicated in the prosecution of a former President. Cf. Nixon, 418 U. S., at 706. Although such tools may suffice to protect the constitutional rights of individual criminal defendants, the interests that underlie Presidential immunity seek to protect not the President himself, but the institution of the Presidency.

IV

A

Trump asserts a far broader immunity than the limited one we have recognized. He contends that the indictment must be dismissed because the Impeachment Judgment Clause requires that impeachment and Senate conviction precede a President's criminal prosecution.

The text of the Clause provides little support for such an absolute immunity. It states that an impeachment judgment "shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." Art. I, §3, cl. 7. It then specifies that "the Party convicted shall *nevertheless* be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Ibid. (emphasis added).

The Clause both limits the consequences of an impeachment judgment and clarifies that notwithstanding such judgment, subsequent prosecution may proceed. By its own terms, the Clause does not address whether and on what conduct a President may be prosecuted if he was never impeached and convicted. Historical evidence likewise lends little support to Trump's position. For example, Justice Story reasoned that without the Clause's clarification that "Indictment, Trial, Judgment and Punishment" may nevertheless follow Senate conviction, "it might be matter of extreme doubt, whether . . . a second trial for the same offence could be had, either after an acquittal, or a conviction in the court of impeachments." 2 J. Story, Commentaries on the Constitution of the United States §780, p. 251 (1833). James Wilson, who served on the Committee that drafted the Clause and later as a Justice of this Court, similarly concluded that acquittal of impeachment charges posed no bar to subsequent prosecution. See 2 Documentary History of the Ratification of the Constitution 492 (M. Jensen ed. 1979). And contrary to Trump's contention, Alexander Hamilton did not disagree. The Federalist Papers on which Trump relies, see Brief for Petitioner 17–18, concerned the checks available against a sitting President. Hamilton noted that unlike "the King of Great-Britain," the President "would be liable to be impeached" and "removed from office," and "would afterwards be liable to prosecution and punishment." The Federalist No. 69, at 463; see also id., No. 77, at 520 (explaining that the President is "at all times

liable to impeachment, trial, dismission from office . . . and to the forfeiture of life and estate by subsequent prosecution"). Hamilton did not endorse or even consider whether the Impeachment Judgment Clause immunizes a former President from prosecution.

The implication of Trump's theory is that a President who evades impeachment for one reason or another during his term in office can never be held accountable for his criminal acts in the ordinary course of law. So if a President manages to conceal certain crimes throughout his Presidency, or if Congress is unable to muster the political will to impeach the President for his crimes, then they must forever remain impervious to prosecution.

Impeachment is a political process by which Congress can remove a President who has committed "Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, §4. Transforming that political process into a necessary step in the enforcement of criminal law finds little support in the text of the Constitution or the structure of our Government.

B

[*Roberts rejects the "similarly broad view" of the government that the President has no immunity from criminal prosecution. He notes the Department of Justice's position that a number of generally applicable laws would not apply to the president because of his constitutional powers (in appointment, for example) and that the protections built into the criminal justice system that place the burden on the prosecution to prove allegations and allow for review by higher courts would adequately protect the President,*]

These safeguards, though important, do not alleviate the need for pretrial review. They fail to address the fact that under our system of separated powers, criminal prohibitions annot apply to certain Presidential conduct to begin with. . . .Questions about whether the President may be held liable for particular actions, consistent with the separation of powers, must be addressed at the outset of a proceeding.

C

As for the dissents, they strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today—conclude that immunity extends to official discussions between the President and his Attorney General, and then remand to the lower courts to determine "in the first instance" whether and to what extent Trump's remaining alleged conduct is entitled to immunity.

. . .

Like everyone else, the President is subject to prosecution in his unofficial capacity. But unlike anyone else, the President is a branch of government, and the Constitution vests in him sweeping powers and duties. Accounting for that reality—and ensuring that the President may exercise those powers forcefully, as the Framers anticipated he would—

does not place him above the law; it preserves the basic structure of the Constitution from which that law derives.

. . .

The dissents overlook the more likely prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next. . . .

The enfeebling of the Presidency and our Government that would result from such a cycle of factional strife is exactly what the Framers intended to avoid. Ignoring those risks, the dissents are instead content to leave the preservation of our system of separated powers up to the good faith of prosecutors.

…

V

This case poses a question of lasting significance: When may a former President be prosecuted for official acts taken during his Presidency? Our Nation has never before needed an answer. But in addressing that question today, unlike the political branches and the public at large, we cannot afford to fixate exclusively, or even primarily, on present exigencies. In a case like this one, focusing on "transient results" may have profound consequences for the separation of powers and for the future of our Republic.

…

The President enjoys no immunity for his unofficial acts, and not everything the President does is official. The President is not above the law. But Congress may not criminalize the President's conduct in carrying out the responsibilities of the Executive Branch under the Constitution. And the system of separated powers designed by the Framers has always demanded an energetic, independent Executive. The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts. That immunity applies equally to all occupants of the Oval Office, regardless of politics, policy, or party.

The judgment of the Court of Appeals for the D. C. Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THOMAS , J., concurring

. . .

I write separately to highlight another way in which this prosecution may violate our constitutional structure. In this case, the Attorney General purported to appoint a private citizen as Special Counsel to prosecute a former President on behalf of the United States. But, I am not sure that any office for the Special Counsel has been "established by Law," as the Constitution requires. Art. II, §2, cl. 2. By requiring that Congress create federal offices "by Law," the Constitution imposes an important check against the President—he cannot create offices at his pleasure. If there is no law establishing the office that the Special Counsel occupies, then he cannot proceed with this prosecution. A private citizen cannot criminally prosecute anyone, let alone a former President. No former President has faced criminal prosecution for his acts while in office in the more than 200 years since the founding of our country. And, that is so despite numerous past Presidents taking actions that many would argue constitute crimes. If this unprecedented prosecution is to proceed, it must be conducted by someone duly authorized to do so by the American people. The lower courts should thus answer these essential questions concerning the Special Counsel's appointment before proceeding.

. . .

II

. . .

Even if the Special Counsel has a valid office, questions remain as to whether the Attorney General filled that office in compliance with the Appointments Clause. For example, it must be determined whether the Special Counsel is a principal or inferior officer. If the former, his appointment is invalid because the Special Counsel was not nominated by the President and confirmed by the Senate, as principal officers must be. Art. II, §2, cl. 2. Even if he is an inferior officer, the Attorney General could appoint him without Presidential nomination and senatorial confirmation only if "Congress . . . by law vest[ed] the Appointment" in the Attorney General as a "Hea[d] of Department." Ibid. So, the Special Counsel's appointment is invalid unless a statute created the Special Counsel's office and gave the Attorney General the power to fill it "by Law."

Whether the Special Counsel's office was "established by Law" is not a trifling technicality. If Congress has not reached a consensus that a particular office should exist, the Executive lacks the power to unilaterally create and then fill that office. Given that the Special Counsel purports to wield the Executive Branch's power to prosecute, the consequences are weighty. Our Constitution's separation of powers, including its separation of the powers to create and fill offices, is "the absolutely central guarantee of

a just Government" and the liberty that it secures for us all. Morrison, 487 U. S., at 697 (Scalia, J., dissenting). There is no prosecution that can justify imperiling it.

* * *

JUSTICE BARRETT , concurring in part.

For reasons I explain below, I do not join Part III–C of the Court's opinion. The remainder of the opinion is consistent with my view that the Constitution prohibits Congress from criminalizing a President's exercise of core Article II powers and closely related conduct. That said, I would have framed the underlying legal issues differently. The Court describes the President's constitutional protection from certain prosecutions as an "immunity." As I see it, that term is shorthand for two propositions: The President can challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment, and he can obtain interlocutory review of the trial court's ruling.

There appears to be substantial agreement on the first point. Like the Court, the dissenting Justices and the Special Counsel all accept that some prosecutions of a President's official conduct may be unconstitutional.. . . As for interlocutory review, our precedent recognizes that resolving certain legal issues before trial is necessary to safeguard important constitutional interests—here, Executive Branch independence on matters that Article II assigns to the President's discretion.

Properly conceived, the President's constitutional protection from prosecution is narrow. The Court leaves open the possibility that the Constitution forbids prosecuting the President for any official conduct, instructing the lower courts to address that question in the first instance. . . . I would have answered it now. Though I agree that a President cannot be held criminally liable for conduct within his "conclusive and preclusive" authority and closely related acts, ante, at 8–9, the Constitution does not vest every exercise of executive power in the President's sole discretion, Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 637 (1952) (Jackson, J., concurring). Congress has concurrent authority over many Government functions, and it may sometimes use that authority to regulate the President's official conduct, including by criminal statute. Article II poses no barrier to prosecution in such cases.

I would thus assess the validity of criminal charges predicated on most official acts—i.e., those falling outside of the President's core executive power—in two steps. The first question is whether the relevant criminal statute reaches the President's official conduct. Not every broadly worded statute does. For example, §956 covers conspiracy to murder in a foreign country and does not expressly exclude the President's decision to, say, order a hostage rescue mission abroad. 18 U. S. C. §956(a). The underlying murder statute, however, covers only "unlawful" killings. §1111. The Office of Legal Counsel has

interpreted that phrase to reflect a public-authority exception for official acts involving the military and law enforcement. . . .

I express no view about the merits of that interpretation, but it shows that the threshold question of statutory interpretation is a nontrivial step. If the statute covers the alleged official conduct, the prosecution may proceed only if applying it in the circumstances poses no " 'dange[r] of intrusion on the authority and functions of the Executive Branch.' " Ante, at 14 (quoting Nixon v. Fitzgerald, 457 U. S. 731, 754 (1982)). On remand, the lower courts will have to apply that standard to various allegations involving the President's official conduct. Some of those allegations raise unsettled questions about the scope of Article II power, see ante, at 21–28, but others do not. For example, the indictment alleges that the President "asked the Arizona House Speaker to call the legislature into session to hold a hearing" about election fraud claims. App. 193. The President has no authority over state legislatures or their leadership, so it is hard to see how prosecuting him for crimes committed when dealing with the Arizona House Speaker would unconstitutionally intrude on executive power.

[*In a footnote Barrett also states that Trump's efforts to pressure states to create alternative slates of electors clearly do not constitute exercise of his official duties since the Constitution contemplates no role for the President at all in the electoral college process.*]

This two-step analysis—considering first whether the statute applies and then whether its application to the particular facts is constitutional—is similar to the approach that the Special Counsel presses in this Court. Brief for United States 24–30. It is also our usual approach to considering the validity of statutes in situations raising a constitutional question. . . .

An important difference in this context is that the President is entitled to an interlocutory appeal of the trial court's ruling. See ante, at 36. A criminal defendant in federal court normally must wait until after trial to seek review of the trial court's refusal to dismiss charges. See United States v. MacDonald, 435 U. S. 850, 853–854 (1978); see also 18 U. S. C. §3731. But where trial itself threatens certain constitutional interests, we have treated the trial court's resolution of the issue as a "final decision" for purposes of appellate jurisdiction.. . .

The prospect of a trial court erroneously allowing the prosecution to proceed poses a unique danger to the "independence of the Executive Branch." Trump v. Vance, 591 U. S. 786, 800 (2020). As the Court explains, the possibility that the President will be made to defend his official conduct before a jury after he leaves office could distort his decisions while in office. Ante, at 13–14, 36. These Article II concerns do not insulate the President from prosecution. But they do justify interlocutory review of the trial court's final decision on the President's as-applied constitutional challenge.. . .

I understand most of the Court's opinion to be consistent with these views. I do not join Part III–C, however, which holds that the Constitution limits the introduction of protected conduct as evidence in a criminal prosecution of a President, beyond the limits afforded by executive privilege. I disagree with that holding; on this score, I agree with the dissent. See post, at 25–27 (SOTOMAYOR, J., dissenting). The Constitution does not require blinding juries to the circumstances surrounding conduct for which Presidents can be held liable. Consider a bribery prosecution—a charge not at issue here but one thatprovides a useful example. The federal bribery statute forbids any public official to seek or accept a thing of value "for or because of any official act." 18 U. S. C. §201(c). The Constitution, of course, does not authorize a President to seek or accept bribes, so the Government may prosecute him if he does so. . . . Yet excluding from trial any mention of the official act connected to the bribe would hamstring the prosecution. To make sense of charges alleging a quid pro quo, the jury must be allowed to hear about both the quid and the quo, even if the quo, standing alone, could not be a basis for the President's criminal liability.

. . .

* * *

The Constitution does not insulate Presidents from criminal liability for official acts. But any statute regulating the exercise of executive power is subject to a constitutional challenge. . . . A criminal statute is no exception. Thus, a President facing prosecution may challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment. If that challenge fails, however, he must stand trial.

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and J USTICE J ACKSON join, dissenting.

Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law. Relying on little more than its own misguided wisdom about the need for "bold and unhesitating action" by the President, ante, at 3, 13, the Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.

I

The indictment paints a stark portrait of a President desperate to stay in power. [*Sotomayor recounts the various ways that Trump sought to overturn the 2020 election results.*]

That is the backdrop against which this case comes to the Court.

II

The Court now confronts a question it has never had to answer in the Nation's history: Whether a former President enjoys immunity from federal criminal prosecution. The majority thinks he should, and so it invents an atextual, ahistorical, and unjustifiable immunity that puts the President above the law.

The majority makes three moves that, in effect, completely insulate Presidents from criminal liability. First, the majority creates absolute immunity for the President's exercise of "core constitutional powers." Ante, at 6. This holding is unnecessary on the facts of the indictment, and the majority's attempt to apply it to the facts expands the concept of core powers beyond any recognizable bounds. In any event, it is quickly eclipsed by the second move, which is to create expansive immunity for all "official act[s]." Ante, at 14. Whether described as presumptive or absolute, under the majority's rule, a President's use of any official power for any purpose, even the most corrupt, is immune from prosecution. That is just as bad as it sounds, and it is baseless. Finally, the majority declares that evidence concerning acts for which the President is immune can play no role in any criminal prosecution against him. See ante, at 30–32. That holding, which will prevent the Government from using a President's official acts to prove knowledge or intent in prosecuting private offenses, is nonsensical.

Argument by argument, the majority invents immunity through brute force. Under scrutiny, its arguments crumble. To start, the majority's broad "official acts" immunity is nconsistent with text, history, and established understandings of the President's role. …Moreover, it is deeply wrong, even on its own functionalist terms. …Next, the majority's "core" immunity is both unnecessary and misguided. … Furthermore, the majority's illogical evidentiary holding is unprecedented. … Finally, this majority's project will have disastrous consequences for the Presidency and for our democracy. …

III

The main takeaway of today's decision is that all of a President's official acts, defined without regard to motive or intent, are entitled to immunity that is "at least . . . presumptive," and quite possibly "absolute." …Whenever the President wields the enormous power of his office, the majority says, the criminal law (at least presumptively) cannot touch him. This official-acts immunity has "no firm grounding in constitutional text, history, or precedent." Dobbs v. Jackson Women's Health Organization, 597 U. S. 215, 280 (2022). Indeed, those "standard grounds for constitutional decisionmaking," id., at 279, all point in the opposite direction. No matter how you look at it, the majority's official-acts immunity is utterly indefensible.

A

…

The Constitution's text contains no provision for immunity from criminal prosecution for former Presidents. Of course, "the silence of the Constitution on this score is not dispositive." United States v. Nixon, 418 U. S. 683, 706,n. 16 (1974). Insofar as the majority rails against the notion that a " 'specific textual basis' " is required, ante, at 37 (quoting Nixon v. Fitzgerald, 457 U. S. 731, 750, n. 31(1982)), it is attacking an argument that has not been made here. The omission in the text of the Constitution is worth noting, however, for at least three reasons. First, the Framers clearly knew how to provide for immunity from prosecution. They did provide a narrow immunity for legislators in the Speech or Debate Clause. See Art. I, §6, cl. 1 ("Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace,be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place"). They did not extend the same or similar immunity to Presidents.

Second, "some state constitutions at the time of the Framing specifically provided 'express criminal immunities' to sitting governors." . . . The Framers chose not to include similar language in the Constitution to immunize the President. If the Framers "had wanted to create some constitutional privilege to shield the President . . . from criminal indictment," they could have done so. . . .They did not.

Third, insofar as the Constitution does speak to this question, it actually contemplates some form of criminal liability for former Presidents. The majority correctly rejects Trump's argument that a former President cannot be prosecuted unless he has been impeached by the House and convicted by the Senate for the same conduct. …The majority ignores, however, that the Impeachment Judgment Clause cuts against its own position. That Clause presumes the availability of criminal process as a backstop by establishing that an official impeached and convicted by the Senate "shall *nevertheless* be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Art. I, §3, cl. 7 (emphasis added). That Clause clearly contemplates that a former President may be subject to criminal prosecution for the same conduct that resulted (or could have resulted) in an impeachment judgment—including conduct such as "Bribery," Art. II, §4, which implicates official acts almost by definition.

B

[*Sotomayor also rejects the majority's reliance on "constitutional tradition", noting that "the historical evidence that exists on Presidential immunity from criminal prosecution cuts decisively against it." For example, Alexander Hamilton argued in Federalist 69*

that one of the many ways that the president was unlike a king was in the fact that he was "liable to prosecution and punishment in the ordinary course of law." She notes that no discussion of presidential immunity took place at the constitutional convention although one delegate later explained that "[t]he Convention which formed the Constitution well knew" that "no subject had been more abused than privilege," and so it "determined to . . . limi[t] privilege to what was necessary, and no more." 3 id., at 385. "No privilege . . . was intended for [the] Executive."]

This historical evidence reinforces that, from the very beginning, the presumption in this Nation has always been that no man is free to flout the criminal law. The majority fails to recognize or grapple with the lack of historical evidence for its new immunity. With nothing on its side of the ledger, the most the majority can do is claim that the historical evidence is a wash.. . . It seems history matters to this Court only when it is convenient. See, e.g., New York State Rifle & Pistol Assn., Inc. v. Bruen, 597 U. S. 1 (2022); Dobbs, 597U. S. 215.

C

Our country's history also points to an established understanding, shared by both Presidents and the Justice Department, that former Presidents are answerable to the criminal law for their official acts. . . . Consider Watergate, for example. After the Watergate tapes revealed President Nixon's misuse of official power to obstruct the Federal Bureau of Investigation's investigation of the Watergate burglary, President Ford pardoned Nixon. Both Ford's pardon and Nixon's acceptance of the pardon necessarily "rested on the understanding that the former President faced potential criminal liability." . . .

[*Sotomayor notes that post-Watergate special counsel investigations have assumed that the government could prosecute former presidents and that Trump's own lawyers assured Senators in his second impeachment trial that a decision "declining to impeach Trump for his conduct related to January 6 would not leave him 'in any way above the law.'. . . [and] that a former President 'is like any other citizen and can be tried in a court of law.'"*]

In sum, the majority today endorses an expansive vision of Presidential immunity that was never recognized by the Founders, any sitting President, the Executive Branch, or even President Trump's lawyers, until now. Settled understandings of the Constitution are of little use to the majority in this case, and so it ignores them.

IV

A

…

The majority purports to keep us in suspense as to whether this immunity is absolute or presumptive, but it quickly gives up the game. It explains that, "[a]t a minimum, the President must . . . be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose *no 'dangers of intrusion* on the authority and functions of the Executive Branch.' " Ibid. (emphasis added). No dangers, none at all. It is hard to imagine a criminal prosecution for a President's official acts that would pose no dangers of intrusion on Presidential authority in the majority's eyes. Nor should that be the standard. Surely some intrusions on the Executive may be "justified by an overriding need to promote objectives within the constitutional authority of Congress." Nixon v. Administrator of General Services, 433 U. S. 425, 443 (1977). Other intrusions may be justified by the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." United States v. Nixon, 418 U. S.683, 707 (1974). According to the majority, however, any incursion on Executive power is too much. When presumptive immunity is this conclusive, the majority's indecision as to "whether [official-acts] immunity must be absolute" or whether, instead, "presumptive immunity is sufficient, "ante, at 6, hardly matters. …

Today's Court, …, has replaced a presumption of equality before the law with a presumption that the President is above the law for all of his official acts. Quick on the heels of announcing this astonishingly broad official-acts immunity, the majority assures us that a former President can still be prosecuted for "unofficial acts." Ante, at 15. Of course he can. No one has questioned the ability to prosecute a former President for unofficial (otherwise known as private) acts. Even Trump did not claim immunity for such acts and, as the majority acknowledges, such an immunity would be impossible to square with Clinton v. Jones, 520 U. S. 681 (1997). See ante, at 15. This unremarkable proposition is no real limit on today's decision. It does not hide the majority's embrace of the most far-reaching view of Presidential immunity on offer. In fact, the majority's dividing line between "official" and "unofficial" conduct narrows the conduct considered "unofficial" almost to a nullity. . . .

It is one thing to say that motive is irrelevant to questions regarding the scope of civil liability, but it is quite another to make it irrelevant to questions regarding criminal liability. Under that rule, any use of official power for any purpose, even the most corrupt purpose indicated by objective evidence of the most corrupt motives and intent, remains official and immune. Under the majority's test, if it can be called a test, the category of Presidential action that can be deemed "unofficial" is destined to be vanishingly small….

B

[*Sotomayor rejects the majority's argument that fear of criminal prosecution will weigh even more heavily on presidents than the fear of civil liability at issue in the Fitzgerald case.*] If that is right, then that distortion has been shaping Presidential decisionmaking since the earliest days of the Republic. Although it makes sense to avoid "diversion of the President's attention during the decisionmaking process"with "needless worry," Clinton, 520 U. S., at 694, n. 19, one wonders why requiring some small amount of his attention (or his legal advisers' attention) to go towards complying with federal criminal law is such a great burden. If the President follows the law that he must "take Care" to execute, Art. II, §3, he has not been rendered " 'unduly cautious,' " ante, at 10 (quoting Fitzgerald, 457 U. S., at 752,n. 32). Some amount of caution is necessary, after all. It is a far greater danger if the President feels empowered to violate federal criminal law, buoyed by the knowledge of future immunity. I am deeply troubled by the idea, inherent in the majority's opinion, that our Nation loses something valuable when the President is forced to operate within the confines of federal criminal law.

…

2

…

There is a twisted irony in saying, as the majority does, that the person charged with "tak[ing] Care that the Laws be faithfully executed" can break them with impunity. In the case before us, the public interest and countervailing Article II interest are particularly stark. The public interest in this criminal prosecution implicates both "[t]he Executive Branch's interest in upholding Presidential elections and vesting power in a new President under the Constitution" as well as "the voters' interest in democratically selecting their President." 91 F. 4th 1173, 1195 (CADC 2024) (per curiam). It also, of course, implicates Congress's own interest in regulating conduct through the criminal law…Yet the majority believes that a President's anxiety over prosecution overrides the public's interest in accountability and negates the interests of the other branches in carrying out their constitutionally assigned functions. It is, in fact, the majority's position that "boil[s] down to ignoring the Constitution's separation of powers."

…

VII

Today's decision to grant former Presidents immunity for their official acts is deeply wrong. As troubling as this criminal immunity doctrine is in theory, the majority's application of the doctrine to the indictment in this case is perhaps even more troubling. In the hands of the majority, this new official-acts immunity operates as a one-way

ratchet. [*Sotomayor argues that the Court has identified all of Trump's interactions with the Justice Department and the Vice President to be official conduct, and has raised questions about whether any of the other conduct identified in the indictment can be considered unofficial acts, even as it says this factfinding is up to the district court.*]

Looking beyond the fate of this particular prosecution, the long-term consequences of today's decision are stark. The Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. This new official-acts immunity now "lies about like a loaded weapon" for any President that wishes to place his own interests, his own political survival, or his own financial gain, above the interests of the Nation. Korematsu v. United States, 323 U. S. 214, 246 (1944) (Jackson, J., dissenting). The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune. Let the President violate the law, let him exploit the trappings of his office for personal gain, let him use his official power for evil ends. Because if he knew that he may one day face liability for breaking the law, he might not be as bold and fearless as we would like him to be. That is the majority's message today. Even if these nightmare scenarios never play out, and I pray they never do, the damage has been done. The relationship between the President and the people he serves has shifted irrevocably. In every use of official power, the President is now a king above the law.

* * *

The majority's single-minded fixation on the President's need for boldness and dispatch ignores the countervailing need for accountability and restraint. The Framers were not so single-minded. In the Federalist Papers, after "endeavor[ing] to show" that the Executive designed by the Constitution "combines . . . all the requisites to energy," Alexander Hamilton asked a separate, equally important question: "Does it also combine the requisites to safety, in a republican sense, a due dependence on the people, a due responsibility?" The Federalist No. 77, p. 507 (J. Harvard Library ed. 2009). The answer then was yes, based in part upon the President's vulnerability to "prosecution in the common course of law." Ibid. The answer after today is no. Never in the history of our Republic has a President had reason to believe that he would be immune from criminal prosecution if he used the trappings of his office to violate the criminal law. Moving forward, however, all former Presidents will be cloaked in such immunity. If the occupant of that office misuses official power for personal gain, the criminal law that the rest of us must abide will not provide a backstop.

With fear for our democracy, I dissent.

JUSTICE J ACKSON, dissenting.

…

I agree with every word of [Justice Sotomayor's] her powerful dissent. I write separately to explain, as succinctly as I can, the theoretical nuts and bolts of what, exactly, the majority has done today to alter the paradigm of accountability for Presidents of the United States. I also address what that paradigm shift means for our Nation moving forward.

I

To fully appreciate the profound change the majority has wrought, one must first acknowledge what it means to have immunity from criminal prosecution. Put simply, immunity is "exemption" from the duties and liabilities imposed by law. . . . In its purest form, the concept of immunity boils down to a maxim— " '[t]he King can do no wrong' "—a notion that was firmly "rejected at the birth of [our] Republic." Clinton v. Jones, 520 U. S. 681, 697, n. 24 (1997) (quoting 1 W. Blackstone, Commentaries *246 (Blackstone)); see United States v. Burr, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807). To say that someone is immune from criminal prosecution is to say that, like a King, he "is not under the coercive power of the law," which "will not suppose him capable of committing a folly, much less a crime." 4 Blackstone *33. Thus, being immune is not like having a defense under the law. Rather, it means that the law does not apply to the immunized person in the first place. Conferring immunity therefore "create[s] a privileged class free from liability for wrongs inflicted or injuries threatened." Hopkins, 221 U. S., at 643. It is indisputable that immunity from liability for wrongdoing is the exception rather than the rule in the American criminal justice system. That is entirely unsurprising, for the very idea of immunity stands in tension with foundational principles of our system of Government. It is a core tenet of our democracy that the People are the sovereign, and the Rule of Law is our first and final security.

…

II

A

These foundational presuppositions are reflected in a procedural paradigm of rules and accountability that operates in the realm of criminal law—what I would call an individual accountability model. The basic contours of that model are familiar, because they manifest in every criminal case. [*Jackson details all the procedural hurdles in the*

criminal justice process that amount to constraints on the ability of the government to prosecute someone for a crime and protections for the defendant. There are any number of defenses that a defendant might rely on to counter the government's case.]

Importantly, a defense is not an immunity, even though a defense can likewise result in a person charged with a crime avoiding liability for his criminal conduct. Consistent with our foundational norms, the individual accountability model adheres to the presumption that the law applies to all and that everyone must follow it; yet, the model makes allowances for recognized defenses. One such defense is the special privilege that Government officials sometimes invoke when carrying out their official duties. All of this is to say that our Government has long functioned under an accountability paradigm in which no one is above the law; an accused person is innocent until proven guilty; and criminal defendants may raise defenses, both legal and factual, tailored to their particular circumstances, whether they be Government officials or ordinary citizens. For over two centuries, our Nation has survived with these principles intact.

B

With that understanding of how our system of accountability for criminal acts ordinarily functions, it becomes much easier to see that the majority's ruling in this case breaks new and dangerous ground. Departing from the traditional model of individual accountability, the majority has concocted something entirely different: a Presidential accountability model that creates immunity—an exemption from criminal law—applicable only to the most powerful official in our Government.

2

The majority's multilayered, multifaceted threshold parsing of the character of a President's criminal conduct differs from the individual accountability model in several crucial respects. For one thing, it makes it next to impossible to know ex ante when and under what circumstances a President will be subject to accountability for his criminal acts. For every allegation, courts must run this gauntlet first—no matter how well documented or heinous the criminal act might be. Thus, even a hypothetical President who admits to having ordered the assassinations of his political rivals or critics, see, e.g., Tr. of Oral Arg. 9, or one who indisputably instigates an unsuccessful coup, id., at 41–43, has a fair shot at getting immunity under the majority's new Presidential accountability model. That is because whether a President's conduct will subject him to criminal liability turns on the court's evaluation of a variety of factors related to the character of that particular act—specifically, those characteristics that imbue an act with the status of "official" or "unofficial" conduct (minus motive). In the end, then, under the majority's new paradigm, whether the President will be exempt from legal liability for murder, assault, theft, fraud, or any other reprehensible and outlawed criminal act will

turn on whether he committed that act in his official capacity, such that the answer to the immunity question will always and inevitably be: It depends.

Under the individual accountability paradigm, the accountability analysis is markedly less convoluted, and leads to a more certain outcome. None of the same complications r consequences arise, because, as I have explained, there are no exemptions from the criminal law for any person, but every defendant can assert whatever legal arguments and defenses might be applicable under governing law. Since no one is above the law, everyone can focus on what the law demands and permits, and on what the defendant did or did not do; no one has to worry about characterizing any criminal conduct as official or unofficial in order to assess the applicability of an immunity at the outset.

. . .

Immunity can issue for Presidents under the majority's model even for unquestionably and intentionally egregious criminal behavior. Regardless of the nature or the impact of the President's criminal conduct, so long as he is committing crimes "pursuant to the powers invested exclusively in him by the Constitution," ante, at 7, or as needed "to carry out his constitutional duties without undue caution," ante, at 14, he is likely to be deemed immune from prosecution. Ultimately, the majority's model simply sets the criminal law to one side when it comes to crimes allegedly committed by the President.

. . .

3

. . .

Under the majority's immunity regime,…, the President can commit crimes in the course of his job even under circumstances in which no one thinks he has any excuse; the law simply does not apply to him. Unlike a defendant who invokes an affirmative defense and relies on a legal determination that there was a good reason for his otherwise unlawful conduct, a former President invoking immunity relies on the premise that he can do whatever he wants, however he wants, so long as he uses his " 'official power' " in doing so. Ante, at 19. In the former paradigm, the President remains subject to law; in the latter, he is above it.

III

…

Here, I will highlight just two observations about the results that follow from this paradigm shift. First, by changing the accountability paradigm in this fashion, the Court has unilaterally altered the balance of power between the three coordinate branches of our Government as it relates to the Rule of Law, aggrandizing power in the Judiciary

and the Executive, to the detriment of Congress. Second, the majority's new Presidential accountability model undermines the constraints of the law as a deterrent for future Presidents who might otherwise abuse their power, to the detriment of us all.

. . .

* * *

The majority of my colleagues seems to have put their trust in our Court's ability to prevent Presidents from becoming Kings through case-by-case application of the indeterminate standards of their new Presidential accountability paradigm. I fear that they are wrong. But, for all our sakes, I hope that they are right. In the meantime, because the risks (and power) the Court has now assumed are intolerable, unwarranted, and plainly antithetical to bedrock constitutional norms, I dissent.

Chapter 9. Political Participation

Section A. Presidential Elections

Trump v. Anderson

601 U.S. ____ (2024)

Six months before the March 5, 2024 primary election in Colorado, a group of Republican and independent Colorado voters filed a petition in state court contending that former President Donald Trump was constitutionally ineligible to serve as President again because of the role he played in the effort to stop the certification of the 2020 presidential election and his incitement of the mob that attacked the Capitol on January 6, 2021. Their claim relied on Section 3 of the 14th Amendment, which states: "No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability." The voters asked that

Trump be excluded from the primary ballot because he was not eligible to serve as president. A district court found that Trump had engaged in an "insurrection" but dismissed the case because he rule that Section 3 did not apply because the presidency is not an "office…under the United States." On appeal the Colorado Supreme Court reversed in part and affirmed in part, agreeing that Trump had engaged in insurrection but finding that the Colorado voters were permitted to bring this suit, that the President was covered by Section 3, and that Trump's name should be excluded from the ballot. The decision was stayed to allow Trump to appeal to the U.S. Supreme Court.

PER CURIAM.

A group of Colorado voters contends that Section 3 of the Fourteenth Amendment to the Constitution prohibits former President Donald J. Trump, who seeks the Presidential nomination of the Republican Party in this year's election, from becoming President again. The Colorado Supreme Court agreed with that contention. It ordered the Colorado secretary of state to exclude the former President from the Republican primary ballot in the State and to disregard any write-in votes that Colorado voters might cast for him.

Former President Trump challenges that decision on several grounds. Because the Constitution makes Congress, rather than the States, responsible for enforcing Section 3 against federal officeholders and candidates, we reverse.

I

. . .

We granted former President Trump's petition for certiorari, which raised a single question: "Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?" See 601 U. S. ___ (2024). Concluding that it did, we now reverse.

II

A

Proposed by Congress in 1866 and ratified by the States in 1868, the Fourteenth Amendment "expand[ed] federal power at the expense of state autonomy" and thus "fundamentally altered the balance of state and federal power struck by the Constitution." . . . Section 1 of the Amendment, for instance, bars the States from "depriv[ing] any person of life, liberty, or property, without due process of law" or "deny[ing] to any person . . . the equal protection of the laws." And Section 5 confers on

Congress "power to enforce" those prohibitions, along with the other provisions of the Amendment, "by appropriate legislation."

Section 3 of the Amendment likewise restricts state autonomy, but through different means. It was designed to help ensure an enduring Union by preventing former Confederates from returning to power in the aftermath of the Civil War.. . .

Section 3 works by imposing on certain individuals a preventive and severe penalty—disqualification from holding a wide array of offices—rather than by granting rights to all. It is therefore necessary, as Chief Justice Chase concluded and the Colorado Supreme Court itself recognized, to " 'ascertain[ ] what particular individuals are embraced' " by the provision. . . . Chase went on to explain that "[t]o accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." For its part, the Colorado Supreme Court also concluded that there must be some kind of "determination" that Section 3 applies to a particular person "before the disqualification holds meaning."

The Constitution empowers Congress to prescribe how those determinations should be made. The relevant provision is Section 5, which enables Congress, subject of course to judicial review, to pass "appropriate legislation" to "enforce" the Fourteenth Amendment. . . . Or as Senator Howard put it at the time the Amendment was framed, Section 5 "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith." Cong. Globe, 39th Cong., 1st Sess., at 2768.

Congress's Section 5 power is critical when it comes to Section 3. Indeed, during a debate on enforcement legislation less than a year after ratification, Sen. Trumbull noted that "notwithstanding [Section 3] . . . hundreds of men [were] holding office" in violation of its terms. Cong. Globe, 41st Cong., 1st Sess., at 626. The Constitution, Trumbull noted, "provide[d] no means for enforcing" the disqualification, necessitating a "bill to give effect to the fundamental law embraced in the Constitution." *Ibid.* The enforcement mechanism Trumbull championed was later enacted as part of the Enforcement Act of 1870, "pursuant to the power conferred by §5 of the [Fourteenth] Amendment." . . .

B

This case raises the question whether the States, in addition to Congress, may also enforce Section 3. We conclude that States may disqualify persons holding or attempting to hold *state* office. But States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency.

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Bond* v. *United States*,572 U.S. 844, 854 (2014). Among those retained powers is the power of a State to "order the processes of

its own governance." *Alden* v. *Maine*,527 U.S. 706, 752 (1999). In particular, the States enjoy sovereign "power to prescribe the qualifications of their own officers" and "the manner of their election . . . free from external interference, except so far as plainly provided by the Constitution of the United States." *Taylor* v. *Beckham*,178 U.S. 548, 570–571 (1900). Although the Fourteenth Amendment restricts state power, nothing in it plainly withdraws from the States this traditional authority. And after ratification of the Fourteenth Amendment, States used this authority to disqualify state officers in accordance with state statutes.. .

Such power over governance, however, does not extend to *federal* officeholders and candidates. Because federal officers " 'owe their existence and functions to the united voice of the whole, not of a portion, of the people,' " powers over their election and qualifications must be specifically "delegated to, rather than reserved by, the States." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 803–804 (1995) . . . But nothing in the Constitution delegates to the States any power to enforce Section 3 against federal officeholders and candidates.

. . .

This can hardly come as a surprise, given that the substantive provisions of the Amendment "embody significant limitations on state authority." *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976). Under the Amendment, States cannot abridge privileges or immunities, deprive persons of life, liberty, or property without due process, deny equal protection, or deny male inhabitants the right to vote (without thereby suffering reduced representation in the House). See Amdt. 14, §§1, 2. On the other hand, the Fourteenth Amendment grants new power to Congress to enforce the provisions of the Amendment against the States. It would be incongruous to read this particular Amendment as granting the States the power—silently no less—to disqualify a candidate for federal office.

The only other plausible constitutional sources of such a delegation are the Elections and Electors Clauses, which authorize States to conduct and regulate congressional and Presidential elections, respectively. See Art. I, §4, cl. 1; Art. II, §1, cl. 2. But there is little reason to think that these Clauses implicitly authorize the States to enforce Section 3 against federal officeholders and candidates. Granting the States that authority would invert the Fourteenth Amendment's rebalancing of federal and state power.

The text of Section 3 reinforces these conclusions. Its final sentence empowers Congress to "remove" any Section 3 "disability" by a two-thirds vote of each house. The text imposes no limits on that power, and Congress may exercise it any time, as the respondents concede. See Brief for Respondents 50. In fact, historically, Congress sometimes exercised this amnesty power postelection to ensure that some of the people's chosen candidates could take office. But if States were free to enforce Section

3 by barring candidates from running in the first place, Congress would be forced to exercise its disability removal power before voting begins if it wished for its decision to have any effect on the current election cycle. Perhaps a State may burden congressional authority in such a way when it exercises its "exclusive" sovereign power over its own state offices. *Taylor*, 178 U. S., at 571. But it is implausible to suppose that the Constitution affirmatively delegated to the States the authority to impose such a burden on congressional power with respect to candidates for federal office. Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 436 (1819) ("States have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress").

Nor have the respondents identified any tradition of state enforcement of Section 3 against federal officeholders or candidates in the years following ratification of the Fourteenth Amendment. Such a lack of historical precedent is generally a " 'telling indication' " of a " 'severe constitutional problem' " with the asserted power. . . . And it is an especially telling sign here, because as noted, States *did* disqualify persons from holding state offices following ratification of the Fourteenth Amendment. That pattern of disqualification with respect to state, but not federal offices provides "persuasive evidence of a general understanding" that the States lacked enforcement power with respect to the latter. *U. S. Term Limits*, 514 U. S., at 826.

. . .

Any state enforcement of Section 3 against federal officeholders and candidates, though, would not derive from Section 5, which confers power only on "[t]he Congress." As a result, such state enforcement might be argued to sweep more broadly than congressional enforcement could under our precedents. But the notion that the Constitution grants the States freer rein than Congress to decide how Section 3 should be enforced with respect to federal offices is simply implausible.

Finally, state enforcement of Section 3 with respect to the Presidency would raise heightened concerns. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest." *Anderson* v. *Celebrezze*, 460 U.S. 780, 794–795 (1983) (footnote omitted). But state-by-state resolution of the question whether Section 3 bars a particular candidate for President from serving would be quite unlikely to yield a uniform answer consistent with the basic principle that "the President . . . represent[s] *all* the voters in the Nation." *Id.*, at 795 (emphasis added).

Conflicting state outcomes concerning the same candidate could result not just from differing views of the merits, but from variations in state law governing the proceedings that are necessary to make Section 3 disqualification determinations. Some States might allow a Section 3 challenge to succeed based on a preponderance of the evidence, while others might require a heightened showing. Certain evidence (like the

congressional Report on which the lower courts relied here) might be admissible in some States but inadmissible hearsay in others. Disqualification might be possible only through criminal prosecution, as opposed to expedited civil proceedings, in particular States. Indeed, in some States—unlike Colorado (or Maine, where the secretary of state recently issued an order excluding former President Trump from the primary ballot)—procedures for excluding an ineligible candidate from the ballot may not exist at all. The result could well be that a single candidate would be declared ineligible in some States, but not others, based on the same conduct (and perhaps even the same factual record).

The "patchwork" that would likely result from state enforcement would "sever the direct link that the Framers found so critical between the National Government and the people of the United States" as a whole. *U. S. Term Limits*, 514 U. S., at 822. But in a Presidential election "the impact of the votes cast in each State is affected by the votes cast"—or, in this case, the votes not allowed to be cast—"for the various candidates in other States." *Anderson*, 460 U. S., at 795. An evolving electoral map could dramatically change the behavior of voters, parties, and States across the country, in different ways and at different times. The disruption would be all the more acute—and could nullify the votes of millions and change the election result—if Section 3 enforcement were attempted after the Nation has voted. Nothing in the Constitution requires that we endure such chaos—arriving at any time or different times, up to and perhaps beyond the Inauguration.

* * *

For the reasons given, responsibility for enforcing Section 3 against federal officeholders and candidates rests with Congress and not the States. The judgment of the Colorado Supreme Court therefore cannot stand.

. . .

The judgment of the Colorado Supreme Court is reversed.

The mandate shall issue forthwith.

It is so ordered.

JUSTICE BARRETT, concurring in part and concurring in the judgment.

I join Parts I and II–B of the Court's opinion. I agree that States lack the power to enforce Section 3 against Presidential candidates. That principle is sufficient to resolve this case, and I would decide no more than that. This suit was brought by Colorado voters under state law in state court. It does not require us to address the complicated

question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced.

The majority's choice of a different path leaves the remaining Justices with a choice of how to respond. In my judgment, this is not the time to amplify disagreement with stridency. The Court has settled a politically charged issue in the volatile season of a Presidential election. Particularly in this circumstance, writings on the Court should turn the national temperature down, not up. For present purposes, our differences are far less important than our unanimity: All nine Justices agree on the outcome of this case. That is the message Americans should take home.

JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE JACKSON, concurring in the judgment.

"If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215, 348 (2022) (Roberts, C. J., concurring in judgment). That fundamental principle of judicial restraint is practically as old as our Republic. This Court is authorized "to say what the law is" only because "[t]hose who apply [a] rule to particular cases . . . must of *necessity* expound and interpret that rule." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) (emphasis added).

Today, the Court departs from that vital principle, deciding not just this case, but challenges that might arise in the future. In this case, the Court must decide whether Colorado may keep a Presidential candidate off the ballot on the ground that he is an oathbreaking insurrectionist and thus disqualified from holding federal office under Section 3 of the Fourteenth Amendment. Allowing Colorado to do so would, we agree, create a chaotic state-by-state patchwork, at odds with our Nation's federalism principles. That is enough to resolve this case. Yet the majority goes further. Even though "[a]ll nine Members of the Court" agree that this independent and sufficient rationale resolves this case, five Justices go on. They decide novel constitutional questions to insulate this Court and petitioner from future controversy. *Ante,* at 13. Although only an individual State's action is at issue here, the majority opines on which federal actors can enforce Section 3, and how they must do so. The majority announces that a disqualification for insurrection can occur only when Congress enacts a particular kind of legislation pursuant to Section 5 of the Fourteenth Amendment. In doing so, the majority shuts the door on other potential means of federal enforcement. We cannot join an opinion that decides momentous and difficult issues unnecessarily, and we therefore concur only in the judgment.

I

[*Sotomayor summarizes the argument that she agrees with – that states cannot enforce Section 3 for the reasons given in the per curiam opinion*.]

That provides a secure and sufficient basis to resolve this case. To allow Colorado to take a presidential candidate off the ballot under Section 3 would imperil the Framers' vision of "a Federal Government directly responsible to the people." *U. S. Term Limits*, 514 U. S., at 821. The Court should have started and ended its opinion with this conclusion.

II

Yet the Court continues on to resolve questions not before us. In a case involving no federal action whatsoever, the Court opines on how federal enforcement of Section 3 must proceed. Congress, the majority says, must enact legislation under Section 5 prescribing the procedures to " ' "ascertain[ ] what particular individuals" ' " should be disqualified. *Ante*, at 5 (quoting *Griffin's Case*, 11 F. Cas. 7, 26 (No. 5,815) (CC Va. 1869) (Chase, Circuit Justice)). These musings are as inadequately supported as they are gratuitous.

To start, nothing in Section 3's text supports the majority's view of how federal disqualification efforts must operate. Section 3 states simply that "[n]o person shall" hold certain positions and offices if they are oathbreaking insurrectionists. Amdt. 14. Nothing in that unequivocal bar suggests that implementing legislation enacted under Section 5 is "critical" (or, for that matter, what that word means in this context). *Ante*, at 5. In fact, the text cuts the opposite way. Section 3 provides that when an oathbreaking insurrectionist is disqualified, "Congress may by a vote of two-thirds of each House, remove such disability." It is hard to understand why the Constitution would require a congressional supermajority to remove a disqualification if a simple majority could nullify Section 3's operation by repealing or declining to pass implementing legislation. Even petitioner's lawyer acknowledged the "tension" in Section 3 that the majority's view creates. See Tr. of Oral Arg. 31.

Similarly, nothing else in the rest of the Fourteenth Amendment supports the majority's view. Section 5 gives Congress the "power to enforce [the Amendment] by appropriate legislation." Remedial legislation of any kind, however, is not required. All the Reconstruction Amendments (including the due process and equal protection guarantees and prohibition of slavery) "are self-executing," meaning that they do not depend on legislation. *City of Boerne* v. *Flores*,521 U.S. 507, 524 (1997); see *Civil Rights Cases*, 109 U.S. 3, 20 (1883). Similarly, other constitutional rules of disqualification, like the two-term limit on the Presidency, do not require implementing legislation. See, *e.g.*, Art. II, §1, cl. 5 (Presidential Qualifications); Amdt. 22 (Presidential Term Limits). Nor does the majority suggest otherwise. It simply creates a special rule for the insurrection disability in Section 3.

. . .

* * *

"What it does today, the Court should have left undone." *Bush* v. *Gore*,531 U.S. 98, 158 (2000) (Breyer, J., dissenting). The Court today needed to resolve only a single question: whether an individual State may keep a Presidential candidate found to have engaged in insurrection off its ballot. The majority resolves much more than the case before us. Although federal enforcement of Section 3 is in no way at issue, the majority announces novel rules for how that enforcement must operate. It reaches out to decide Section 3 questions not before us, and to foreclose future efforts to disqualify a Presidential candidate under that provision. In a sensitive case crying out for judicial restraint, it abandons that course.

Section 3 serves an important, though rarely needed, role in our democracy. The American people have the power to vote for and elect candidates for national office, and that is a great and glorious thing. The men who drafted and ratified the Fourteenth Amendment, however, had witnessed an "insurrection [and] rebellion" to defend slavery. §3. They wanted to ensure that those who had participated in that insurrection, and in possible future insurrections, could not return to prominent roles. Today, the majority goes beyond the necessities of this case to limit how Section 3 can bar an oathbreaking insurrectionist from becoming President. Although we agree that Colorado cannot enforce Section 3, we protest the majority's effort to use this case to define the limits of federal enforcement of that provision. Because we would decide only the issue before us, we concur only in the judgment.

Section C. Reapportionment

Rucho v. Common Cause

588 U.S.____(2019)

Voters and other voting rights organizations challenged the congressional redistricting maps in North Carolina and Maryland. In NC plaintiffs challenged a Republican drawn plan that favored Republicans for 10 of the 13 seats, even though statewide Democrats had in recent years received more votes than Republicans or were very close to even in support. They argued that the maps should more accurately reflect the very close divide in partisan makeup of the state. In Maryland, the plaintiffs were Republican voters challenging a map drawn up by Democrats that flipped one traditionally Republican district to Democratic by moving some Republican voters out of the district and moving

some Democratic voters in. This made it far more likely that 1 rather than 2 districts would be held by Republicans. The plaintiffs argued that these partisan gerrymanders violated the Equal Protection Clause of the 14th Amendment, as well as the First Amendment, and parts of Article I. The district courts in both cases ruled for the plaintiffs and both sets of defendants appealed directly to the Supreme Court.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

. . .

These cases require us to consider once again whether claims of excessive partisanship in districting are "justiciable"—that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

. . .

II

A

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts can address only questions "historically viewed as capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968). In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.' " . . .

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth* v. *Jubelirer*,541 U.S. 267, 277 (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.*

. . . The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere. . . .

B

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. See *Vieth*, 541 U. S., at 274 (plurality opinion). During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe. Hunter, The First Gerrymander? 9 Early Am. Studies 792–794, 811 (2011). . .

In 1812, Governor of Massachusetts and future Vice President Elbridge Gerry notoriously approved congressional districts that the legislature had drawn to aid the Democratic-Republican Party. The moniker "gerrymander" was born when an outraged Federalist newspaper observed that one of the misshapen districts resembled a salamander. See *Vieth*, 541 U. S., at 274 (plurality opinion); E. Griffith, The Rise and Development of the Gerrymander 17–19 (1907). . . .

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, §4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Whether to give that supervisory authority to the National Government was debated at the Constitutional Convention. When those opposed to such congressional oversight moved to strike the relevant language, Madison came to its defense:

"[T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local coveniency or prejudices. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention of 1787, at 240–241.

. . .

Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts be "composed of contiguous territory," Act of June 25, 1842, ch. 47, 5Stat. 491, in "an attempt to forbid the practice of the gerrymander," Griffith, *supra*, at 12. Later statutes added

requirements of compactness and equality of population. Act of Jan. 16, 1901, ch. 93, §3, 31Stat. 733; Act of Feb. 2, 1872, ch. 11, §2, 17Stat. 28. (Only the single member district requirement remains in place today. 2 U. S. C. §2c.) . . . Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Force Act of 1870, ch. 114, 16Stat. 140. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections. See, *e.g.*, 52 U. S. C. §10101 *et seq*.

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. See *Baker*, 369 U. S., at 217. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. See *Wesberry* v. *Sanders*,376 U.S. 1 (1964); *Shaw* v. *Reno*, 509 U.S. 630 (1993) (*Shaw I*).

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, "it will . . . not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." The Federalist No. 59, p. 362 (C. Rossiter ed. 1961). At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

C

[*Roberts discusses the Court's past decisions regarding apportionment that guaranteed one person one vote, based on the Equal Protection Clause of the 14th Amendment, as well as its decisions prohibiting racial gerrymandering based on the 15th Amendment*.]

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth*, 541 U. S., at 296 (plurality opinion). . . . [*Roberts recounts a long list of cases about partisan gerrymandering, beginning in 1973, that the Court had*

found to be justiciable but in which it was never able to come up with a workable standard for determining when a partisan gerrymander is so egregious that it violates the Constitution.]

III

A

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." 541 U. S., at 306–308 (opinion concurring in judgment). An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Bandemer*, 478 U. S., at 145 (opinion of O'Connor, J.) . . .

As noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U. S., at 420 (opinion of Kennedy, J.). And it is vital in . . .

B

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a "norm that does not exist" in our electoral system—"statewide elections for representatives along party lines." *Bandemer*, 478 U. S., at 159 (opinion of O'Connor, J.).

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Ibid.* "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.*, at 130 (plurality opinion). See *Mobile* v. *Bolden*,446 U.S. 55, 75–76 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their

congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. See E. Engstrom, Partisan Gerrymandering and the Construction of American Democracy 43–51 (2013). That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: "their party garnered 43 percent of the statewide vote, yet did not receive a single seat." *Id.*, at 48. When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects. *Id.*, at 43–44.

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. As Justice Scalia put it for the plurality in *Vieth*:

" 'Fairness' does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." 541 U. S., at 291.

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, "[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Bandemer*, 478 U. S., at 130 (plurality opinion).

. . .

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. . . . But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can

itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity "cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not." *Vieth*, 541 U. S., at 308–309 (opinion concurring in judgment). . . .

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. . .

And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should map drawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5–3 allocation corresponds most closely to statewide vote totals, is a 6–2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. . . .

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives

that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. . . .

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. "[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." *Shaw I*, 509 U. S., at 650 (citation omitted). Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

IV

Appellees and the dissent propose a number of "tests" for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties. [*Roberts dismisses the First Amendment and Article I claims as novel and unpersuasive.*]

. . .

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," *Arizona State Legislature*, 576 U. S., at ___ (slip op., at 1), does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. . .

. . .

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. [*Roberts discusses state court decisions and ballot initiatives to create independent commissions for redistricting, and notes that the Elections Clause allows Congress to act as well and that many bills have been introduced in Congress to control partisan gerrymandering*.]

The judgments of the United States District Court for the Middle District of North Carolina and the United States District Court for the District of Maryland are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is *not* beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. . . In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

I

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core. After dutifully reciting each case's facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved. So it is necessary to fill in the gaps. To recount exactly what politicians in North Carolina and Maryland did to entrench their

parties in political office, whatever the electorate might think. And to elaborate on the constitutional injury those politicians wreaked, to our democratic system and to individuals' rights. All that will help in considering whether courts confronting partisan gerrymandering claims are really so hamstrung—so unable to carry out their constitutional duties—as the majority thinks.

A

[*Kagan explains in the detail the partisan maneuvering in the two states to ensure advantages for the Republicans in North Carolina and the Democrats in Maryland.*]

B

Now back to the question I asked before: Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.

"Governments," the Declaration of Independence states, "deriv[e] their just Powers from the Consent of the Governed." The Constitution begins: "We the People of the United States." The Gettysburg Address (almost) ends: "[G]overnment of the people, by the people, for the people." If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794).

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Madison again: "[R]epublican liberty" demands "not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people." 2 The Federalist No. 37, p. 4 (J. & A. McLean eds. 1788). Members of the House of Representatives, in particular, are supposed to "recollect[ ] [that] dependence" every day. *Id.,* No. 57, at 155. To retain an "intimate sympathy with the people," they must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." *Id.,* Nos. 52, 57, at 124, 155. Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to "rigging elections." . . . By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland. . .

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is "incompatible with democratic principles." *Ante,* at 30 (quoting *Arizona State Legislature*, 576 U. S., at ___ (slip op., at 1)). And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. . . The other is that political gerrymanders have always been with us. . . To its credit, the majority does not frame that point as an originalist constitutional argument. After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. . . The majority's idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic's earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today's gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today's world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. See Brief for Political Science Professors as *Amici Curiae* 20–22. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. See *id.,* at 22–25. While bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather's—let alone the Framers'—gerrymanders.

. . .

C

Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren't bad enough). It violates individuals' constitutional rights as well. That statement

is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years.

. . .

That practice implicates the Fourteenth Amendment's Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, "guarantees the opportunity for equal participation by all voters in the election" of legislators. *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964). And that opportunity "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.,* at 555. . .

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to "disfavored treatment"—again, counting their votes for less—precisely because of "their voting history [and] their expression of political views." *Vieth*, 541 U. S., at 314 (opinion of Kennedy, J.). And added to that strictly personal harm is an associational one. Representative democracy is "unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views." *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000) . . . In both those ways, partisan gerrymanders of the kind we confront here undermine the protections of "democracy embodied in the First Amendment." *Elrod* v. *Burns*,427 U.S. 347, 357 (1976) (internal quotation marks omitted).

. . .

II

So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

. . .

But in throwing up its hands, the majority misses something under its nose: What it says can't be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). . . And that standard does what the majority says is impossible. The standard does not use any judge-made

conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State's *own* criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders.

[*Kagan details the standards used by district courts at the trial level to assess gerrymandering claims and argues that the factfinding by the courts in these two cases demonstrated that these gerrymanders were extreme under discoverable and neutral standards.*]

III

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that "our oath and our office require no less." *Reynolds*, 377 U. S., at 566. Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. "For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Gill*, 585 U. S., at ___ (Kagan, J., concurring) (slip op., at 14). Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

. . . [*Kagan rejects the majority's argument that Congress can do something and that it has introduced a number of bills calling for redistricting reform.*] The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.

[*She also rejects their argument about state ballot initiatives as a solution.*] Fewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest (including North Carolina and Maryland), voters are dependent on legislators to make electoral changes (which for all the reasons already given, they are unlikely to do). . .

The majority's most perplexing "solution" is to look to state courts. . . But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?

We could have, and we should have...

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the

Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

Moore v. Harper
600 U.S. __(2023)

After the 2020 Census, the Republican led state legislature of North Carolina redrew its federal congressional districts to provide a distinct advantage to their party. Rebecca Harper and others challenged the maps as an impermissible partisan gerrymander, claiming that it violated Article 1 of the North Carolina Constitution, which dictates that "[a]ll elections be free," as well as constitutional provisions guaranteeing equal protection, free speech, and freedom of assembly. The state trial court agreed that an intentional and biased gerrymander had occurred but dismissed the cases as nonjusticiable. The North Carolina Supreme Court, which at the time had a Democratic majority (NC elects its judges), overruled the trial court on the matter of justiciability, and ruled for Harper et. al, striking down the maps and ordering that they be redrawn in a more equitable way. Timothy Moore, as Speaker of the North Carolina House, appealed the decision to the U.S. Supreme Court, arguing that Article 1, sec. 4 of the U.S. Constitution [the Elections Clause], gave sole authority to state legislatures to determine "[t]he Times, Places and Manner of holding elections for Senators and Representatives." He argued that this clause recognizes no role for state courts to review the decision of the state legislature in these matters. Before the Supreme Court could decide the case, the partisan make up of the NC Supreme Court changed after the 2022 midterm elections. The new Court, now with a Republican majority, reversed the earlier decision and dismissed the case. Nonetheless, the U.S. Supreme Court decided to hear the case in order to address Moore's "independent state legislature" theory.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

I

The Elections Clause provides: "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." *Ibid*. The Clause "imposes" on state legislatures the "duty" to prescribe rules governing federal elections. *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). It also guards "against the possibility that a State would refuse to provide for the election of representatives" by authorizing Congress to prescribe its own rules. *Ibid.*

. . .

II

[*After reviewing the more recent decision by the North Carolina Supreme Court and reviewing the rules for when a case continues to raise an unresolved federal question, Roberts concludes that the Court does have jurisdiction in order to decide the question of whether state courts can review state legislatures' actions taken under their Elections Clause authority.*]

. . .

III

The question on the merits is whether the Elections Clause insulates state legislatures from review by state courts for compliance with state law.

Since early in our Nation's history, courts have recognized their duty to evaluate the constitutionality of legislative acts. We announced our responsibility to review laws that are alleged to violate the Federal Constitution in *Marbury* v. *Madison*, proclaiming that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177 (1803). *Marbury* confronted and rejected the argument that Congress may exceed constitutional limits on the exercise of its authority. "Certainly all those who have framed written constitutions," we reasoned, "contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Ibid.*

Marbury proclaimed our authority to invalidate laws that violate the Federal Constitution, but it did not fashion this concept out of whole cloth. Before the Constitutional Convention convened in the summer of 1787, a number of state courts had already moved "in isolated but important cases to impose restraints on what the legislatures were enacting as law." G. Wood, The Creation of the American Republic 1776–1787, pp. 454–455 (1969). Although judicial review emerged cautiously, it matured throughout the founding era. These state court decisions provided a model for James Madison, Alexander Hamilton, and others who would later defend the principle of judicial review.

. . .

State cases, debates at the Convention, and writings defending the Constitution all advanced the concept of judicial review. And in the years immediately following ratification, courts grew assured of their power to void laws incompatible with constitutional provisions. See Treanor, 58 Stan. L. Rev., at 473, 497–498. The idea that courts may review legislative action was so "long and well established" by the time we decided *Marbury* in 1803 that Chief Justice Marshall referred to judicial review as "one of the fundamental principles of our society." 1 Cranch, at 176–177.

IV

We are asked to decide whether the Elections Clause carves out an exception to this basic principle. We hold that it does not. The Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.

A

We first considered the interplay between state constitutional provisions and a state legislature's exercise of authority under the Elections Clause in *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916). There, we examined the application to the Elections Clause of a provision of the Ohio Constitution permitting the State's voters "to approve or disapprove by popular vote any law enacted by the General Assembly." *Id.*, at 566. In 1915, the Ohio General Assembly drew new congressional districts, which the State's voters then rejected through such a popular referendum. Asked to disregard the referendum, the Ohio Supreme Court refused, explaining that the Elections Clause—while "conferring the power therein defined upon the various state legislatures"—did not preclude subjecting legislative Acts under the Clause to "a popular vote." *State ex rel. Davis* v. *Hildebrant*, 94 Ohio St. 154, 163, 114 N.E. 55, 58 (1916).

We unanimously affirmed, rejecting as "plainly without substance" the contention that "to include the referendum within state legislative power for the purpose of apportionment is repugnant to §4 of Article I [the Elections Clause]." . . .

Smiley v. *Holm*, decided 16 years after *Hildebrant*, considered the effect of a Governor's veto of a state redistricting plan. 285 U.S. 355, 361 (1932). Following the 15th decennial census in 1930, Minnesota lost one seat in its federal congressional delegation. The State's legislature divided Minnesota's then nine congressional districts in 1931 and sent its Act to the Governor for his approval. The Governor vetoed the plan pursuant to his authority under the State's Constitution. But the Minnesota Secretary of State nevertheless began to implement the legislature's map for upcoming elections. A citizen sued, contending that the legislature's map "was a nullity in that, after the Governor's veto, it was not repassed by the legislature as required by law." *Id.*, at 362. The Minnesota Supreme Court disagreed. In its view, "the authority so given by" the Elections Clause "is unrestricted, unlimited, and absolute." *State ex rel. Smiley* v. *Holm*, 184 Minn. 228, 242, 238 N.W. 494, 501 (1931). The Elections Clause, it held, conferred upon the legislature "the exclusive right to redistrict" such that its actions were "beyond the reach of the judiciary." *Id.*, at 243, 238 N. W., at 501.

We unanimously reversed. A state legislature's "exercise of . . . authority" under the Elections Clause, we held, "must be in accordance with the method which the State has prescribed for legislative enactments." *Smiley*, 285 U. S., at 367. Nowhere in the Federal Constitution could we find "provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted." *Id.*, at 368.

Smiley relied on founding-era provisions, constitutional structure, and historical practice, each of which we found persuasive. Two States at the time of the founding provided a veto power, restrictions that were "well known." *Ibid.* (citing provisions in Massachusetts and New York). Subjecting state legislatures to such a limitation "was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision

would be subject to the veto power of the President." *Ibid.*; see also *Wesberry* v. *Sanders*, 376 U.S. 1, 6 (1964) (Congress does not have "exclusive authority" under the Elections Clause, independent of other federal constitutional provisions). And "long and continuous interpretation" as evidenced by "the established practice in the states" provided further support. *Smiley*, 285 U. S., at 369. We noted that many state constitutions had adopted provisions allowing for executive vetoes, "and that the uniform practice . . . has been to provide for congressional districts by the enactment of statutes with the participation of the Governor wherever the state constitution provided for such participation." *Id.*, at 370.

This Court recently reinforced the teachings of *Hildebrant* and *Smiley* in a case considering the constitutionality of an Arizona ballot initiative. Voters "amended Arizona's Constitution to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission." *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 792 (2015). The Arizona Legislature challenged a congressional map adopted by the commission, arguing that the Elections "Clause precludes resort to an independent commission . . . to accomplish redistricting." *Ibid.* A divided Court rejected that argument. The majority reasoned that dictionaries of "the founding era . . . capaciously define[d] the word 'legislature,' " *id.*, at 813–814, and concluded that the people of Arizona retained the authority to create "an alternative legislative process" by vesting the lawmaking power of redistricting in an independent commission, *id.*, at 817. The Court ruled, in short, that although the Elections Clause expressly refers to the "Legislature," it does not preclude a State from vesting congressional redistricting authority in a body other than the elected group of officials who ordinarily exercise lawmaking power. States, the Court explained, "retain autonomy to establish their own governmental processes." *Id.*, at 816.

The significant point for present purposes is that the Court in *Arizona State Legislature* recognized that whatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution. . . .

The reasoning we unanimously embraced in *Smiley* commands our continued respect: A state legislature may not "create congressional districts independently of " requirements imposed "by the state constitution with respect to the enactment of laws." 285 U. S., at 373.

B

The legislative defendants and the dissent both contend that, because the Federal Constitution gives state legislatures the power to regulate congressional elections, only *that* Constitution can restrain the exercise of that power. . .

This argument simply ignores the precedent just described. *Hildebrant*, *Smiley*, and *Arizona State Legislature* each rejected the contention that the Elections Clause vests state legislatures with exclusive and independent authority when setting the rules governing federal elections.

The argument advanced by the defendants and the dissent also does not account for the Framers' understanding that when legislatures make laws, they are bound by the provisions of the very documents that give them life. Legislatures, the Framers recognized, "are the mere creatures of the State Constitutions, and cannot be greater than their creators." 2 Farrand 88. "What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void." *Vanhorne's Lessee* v. *Dorrance*, 2 Dall. 304, 308 (Pa. 1795). *Marbury* confirmed this understanding, 1 Cranch, at 176–177, and nothing in the text of the Elections Clause undermines it. When a state legislature carries out its constitutional power to prescribe rules regulating federal elections, the "commission under which" it exercises authority is two-fold. The Federalist No. 78, at 467. The legislature acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution. Both constitutions restrain the legislature's exercise of power.

. . .

In sum, our precedents have long rejected the view that legislative action under the Elections Clause is purely federal in character, governed only by restraints found in the Federal Constitution.

…

D

Were there any doubt, historical practice confirms that state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause. We have long looked to "settled and established practice" to interpret the Constitution. . .

Two state constitutional provisions adopted shortly after the founding offer the strongest evidence. Delaware's 1792 Constitution provided that the State's congressional representatives "shall be voted for at the same places where representatives in the State legislature are voted for, and in the same manner." Art. VIII, §2. Even though the Elections Clause stated that the "Places" and "Manner" of federal elections shall be "prescribed" by the state legislatures, the Delaware Constitution expressly enacted rules governing the "places" and "manner" of holding elections for federal office. An 1810 amendment to the Maryland Constitution likewise embodied regulations falling within the scope of the Elections and Electors Clauses. Article XIV provided that every qualified citizen "shall vote, by ballot, . . . for electors of the President and Vice-President of the United States, [and] for Representatives of this State in the Congress of the United States." If the Elections Clause had vested exclusive authority in state legislatures, unchecked by state courts enforcing provisions of state constitutions, these clauses would have been unenforceable from the start.

Besides the two specific provisions in Maryland and Delaware, multiple state constitutions at the time of the founding regulated federal elections by requiring that "[a]ll elections shall be by ballot." Ga. Const., Art. IV, §2 (1789); see also, *e.g.*, Pa.

Const., Art. III, §2 (1790); Ky. Const., Art. III, cl. 2 (1792); Tenn. Const., Art. III, §3 (1796); Ohio Const., Art. IV, §2 (1803); La. Const., Art. VI, §13 (1812). These provisions directed the "manner" of federal elections within the meaning of the Elections Clause, as Madison himself explained at the Constitutional Convention. See 2 Farrand 240 ("Whether the electors should vote by ballot or vivâ voce" falls within the "great latitude" of "regulating the times places & manner of holding elections").

The legislative defendants discount this evidence. They argue that those "by ballot" provisions spoke only "to the offices that were created by" state constitutions, and not to the federal offices to which the Elections Clause applies. Tr. of Oral Arg. 18. We find no textual hook for that strained reading. "All" meant then what it means now.

In addition, the Framers did not write the Elections Clause on a blank slate—they instead borrowed from the Articles of Confederation, which provided that "delegates shall be annually appointed in such manner as the legislature of each state shall direct." Art. V. The two provisions closely parallel. And around the time the Articles were adopted by the Second Continental Congress, multiple States regulated the "manner" of "appoint[ing] delegates," *ibid.*, suggesting that the Framers did not understand that language to insulate state legislative action from state constitutional provisions. . .

V

A

Although we conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein. "State courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise." *Murdock* v. *Memphis*, 20 Wall. 590, 626 (1875). At the same time, the Elections Clause expressly vests power to carry out its provisions in "the Legislature" of each State, a deliberate choice that this Court must respect. As in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law. [*Roberts discusses several state cases involving property rights and the takings clause of the Federal Constitution as examples of where federal law superseded state law.*]

. . .

Running through each of these examples is the concern that state courts might read state law in such a manner as to circumvent federal constitutional provisions. Therefore, although mindful of the general rule of accepting state court interpretations of state law, we have tempered such deference when required by our duty to safeguard limits imposed by the Federal Constitution.

. . . The questions presented in this area are complex and context specific. We hold only that state courts may not transgress the ordinary bounds of judicial review such that

they arrogate to themselves the power vested in state legislatures to regulate federal elections.
. . .

* * *

State courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause. But federal courts must not abandon their own duty to exercise judicial review. In interpreting state law in this area, state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution. Because we need not decide whether that occurred in today's case, the judgment of the North Carolina Supreme Court is affirmed.

It is so ordered.

JUSTICE KAVANAUGH, concurring.

I join the Court's opinion in full. The Court today correctly concludes that state laws governing federal elections are subject to ordinary state court review, including for compliance with the relevant state constitution. *Ante*, at 15, 26, 29. But because the Elections Clause assigns authority respecting federal elections to state legislatures, the Court also correctly concludes that "state courts do not have free rein" in conducting that review. *Ante*, at 26. Therefore, a state court's interpretation of state law in a case implicating the Elections Clause is subject to federal court review. . .

. . .
[T]he Court today says simply that "state courts do not have free rein" and "hold[s] only that state courts may not transgress the ordinary bounds of judicial review." *Ante*, at 26, 29. In other words, the Court has recognized and articulated a general principle for federal court review of state court decisions in federal election cases. In the future, the Court should and presumably will distill that general principle into a more specific standard. . .

With those additional comments, I agree with the Court's conclusions that (i) state laws governing federal elections are subject to ordinary state court review, and (ii) a state court's interpretation of state law in a case implicating the Elections Clause is in turn subject to federal court review.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, and with whom JUSTICE ALITO joins as to Part I, dissenting.

[*Thomas argues the Court's opinion is "plainly advisory" because there is no longer a true case or controversy since the state court reversed the decision of the earlier court.*]

I

. . .

This is a straightforward case of mootness. The federal defense no longer makes any difference to this case—whether we agree with the defense, disagree with it, or say nothing at all, the final judgment in this litigation will be exactly the same. The majority does not seriously contest that fact. Even so, it asserts jurisdiction to decide this free-floating defense that affects no live claim for relief, reasoning that a justiciable case or controversy exists as long as its opinion can in any way "alter the presently operative statutes of " a State.

. . .

II

I would gladly stop there. The majority's views on the merits of petitioners' moot Elections Clause defense are of far less consequence than its mistaken belief that Article III authorizes any merits conclusion in this case, and I do not wish to belabor a question that we have no jurisdiction to decide. Nonetheless, I do not find the majority's merits reasoning persuasive.

The Elections Clause of the Constitution provides that "[t]he 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. The question presented was whether the people of a State can place state-constitutional limits on the times, places, and manners of holding congressional elections that "the Legislature" of the State has the power to prescribe. Petitioners said no. Their position rests on three premises, from which the conclusion follows.

The first premise is that "the people of a single State" lack any ability to limit powers "given by the people of the United States" as a whole. *McCulloch* v. *Maryland*, 4 Wheat. 316, 429 (1819). This idea should be uncontroversial, as it is "the unavoidable consequence of th[e] supremacy" of the Federal Constitution and laws. *Id.*, at 436. As the Court once put it (in a case about the Article V ratifying power of state legislatures), "a federal function derived from the Federal Constitution . . . transcends any limitations sought to be imposed by the people of a State." *Leser* v. *Garnett*, 258 U.S. 130, 137 (1922).

The second premise is that regulating the times, places, and manner of congressional elections " 'is no original prerogative of state power,' " so that "such power 'had to be delegated to, rather than reserved by, the States.' " *Cook* v. *Gralike*, 531 U.S. 510, 522 (2001) (first quoting 1 J. Story, Commentaries on the Constitution of the United States §627 (3d ed. 1858) (Story); then quoting *U. S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 804 (1995)). This premise is firmly supported by this Court's precedents, which have also held that the Elections Clause is "the exclusive delegation of " such power, as "[n]o other constitutional provision gives the States authority over congressional

elections." *Cook*, 531 U. S., at 522–523; see also *United States* v. *Classic*, 313 U.S. 299, 315 (1941) . . .

The third premise is that "the Legislature thereof " does not mean the people of the State or the State as an undifferentiated body politic, but, rather, the lawmaking power as it exists under the State Constitution. This premise comports with the usual constitutional meanings of the words "State" and "Legislature," as well as this Court's precedents. . .

If these premises hold, then petitioners' conclusion follows: In prescribing the times, places, and manner of congressional elections, "the lawmaking body or power of the state, as established by the state Constitution," *id.*, at 10, 127 N. W., at 850, performs "a federal function derived from the Federal Constitution," which thus "transcends any limitations sought to be imposed by the people of a State," *Leser*, 258 U. S., at 137. . .

The majority rejects petitioners' conclusion, but seemingly without rejecting any of the premises from which that conclusion follows. Its apparent rationale—that *Hildebrant*, *Smiley*, and *Arizona State Legislature* have already foreclosed petitioners' argument—is untenable, as it requires disregarding a principled distinction between the issues in those cases and the question presented here. In those cases, the relevant state-constitutional provisions addressed the allocation of lawmaking power within each State; they defined what acts, performed by which constitutional actors, constituted an "exercise of the lawmaking power." *Smiley*, 285 U. S., at 364; cf. U. S. Const., Art. I, §7, cl. 2 (describing the processes upon completion of which a bill "become[s] a Law"). In other words, those cases addressed how to identify "the Legislature" of each State. But, nothing in their holdings speaks at all to whether the people of a State can impose substantive limits on the times, places, and manners that a procedurally complete exercise of the lawmaking power may validly prescribe. These are simply different questions . . .

This is not an arbitrary distinction, but one rooted in the logic of petitioners' argument. No one here contends that the Elections Clause *creates* state legislatures or defines "the legislative process" in any State. *Smiley*, 285 U. S., at 369. Thus, while the Elections Clause confers a lawmaking power, "the exercise of th[at] authority must" follow "the method which the State has prescribed for legislative enactments." *Id.*, at 367. But, if the power in question is not original to the people of each State and is conferred upon the constituted legislature of the State, then it follows that the people of the State may not dictate what laws can be enacted under that power—precisely as they may not dictate what constitutional amendments their legislatures can ratify under Article V. See *Leser*, 258 U. S., at 137. Accordingly, if petitioners' premises hold, then state constitutions may specify *who* constitute "the Legislature" and prescribe *how* legislative power is exercised, but they cannot control *what* substantive laws can be made for federal elections.

. . .

III

The majority opinion ends with some general advice to state and lower federal courts on how to exercise "judicial review" "in cases implicating the Elections Clause." *Ante*, at 28. As the majority offers no clear rationale for its interpretation of the Clause, it is impossible to be sure what the consequences of that interpretation will be. However, judging from the majority's brief sketch of the regime it envisions, I worry that today's opinion portends serious troubles ahead for the Judiciary.

. . .

[T]he majority opens a new field for *Bush*-style controversies over state election law—and a far more uncertain one. Though some state constitutions are more "proli[x]" than the Federal Constitution, it is still a general feature of constitutional text that "only its great outlines should be marked." *McCulloch*, 4 Wheat., at 407. When "it is a *constitution* [courts] are expounding," *ibid.*, not a detailed statutory scheme, the standards to judge the fairness of a given interpretation are typically fewer and less definite.

Nonetheless, the majority's framework appears to demand that federal courts develop some generalized concept of "the bounds of ordinary judicial review," *ante*, at 28; apply it to the task of constitutional interpretation within each State; and make that concept their rule of decision in some of the most politically acrimonious and fast-moving cases that come before them. In many cases, it is difficult to imagine what this inquiry could mean in theory, let alone practice. For example, suppose that we were reviewing *Harper I* under this framework. Perhaps we could have determined that reading justiciable prohibitions against partisan gerrymandering into the North Carolina Constitution exceeded the bounds of ordinary judicial review in North Carolina; perhaps not. If not, then, in order to ensure that *Harper I* had not "arrogate[d]" the power of regulating federal elections, *ante*, at 29, we would presumably have needed to ask next whether it exceeded the bounds of ordinary judicial review in North Carolina to find that the specific congressional map *here* violated those prohibitions. After all, in constitutional judgments of this kind, it can be difficult to separate the rule from the fact pattern to which the rule is applied. We have held, however, that federal courts are not equipped to judge partisan-gerrymandering questions *at all*. *Rucho* v. *Common Cause*, 588 U. S. ___, ___ (2019) (slip op., at 30). It would seem to follow, *a fortiori*, that they are not equipped to judge whether a state court's partisan-gerrymandering determination surpassed "the bounds of ordinary judicial review."

Even in cases that do not involve a justiciability mismatch, the majority's advice invites questions of the most far-reaching scope. What *are* "the bounds of ordinary judicial review"? What methods of constitutional interpretation do they allow? Do those methods vary from State to State? And what about *stare decisis*—are federal courts to review state courts' treatment of their own precedents for some sort of abuse of discretion? The majority's framework would seem to require answers to all of these questions and more.

In the end, I fear that this framework will have the effect of investing potentially large swaths of state constitutional law with the character of a federal question not amenable to meaningful or principled adjudication by federal courts. In most cases, it seems likely

that the “the bounds of ordinary judicial review” will be a forgiving standard in practice, and this federalization of state constitutions will serve mainly to swell federal-court dockets with state- constitutional questions to be quickly resolved with generic statements of deference to the state courts. On the other hand, there are bound to be exceptions. They will arise haphazardly, in the midst of quickly evolving, politically charged controversies, and the winners of federal elections may be decided by a federal court’s expedited judgment that a state court exceeded “the bounds of ordinary judicial review” in construing the state constitution.

I would hesitate long before committing the Federal Judiciary to this uncertain path. And I certainly would not do so in an advisory opinion, in a moot case, where “the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex parte McCardle*, 7 Wall. 506, 514 (1869).

I respectfully dissent.