# Election Law

## Cases and Materials

**SEVENTH EDITION**

# 2025 Supplement

**Daniel Hays Lowenstein**
PROFESSOR OF LAW EMERITUS
UNIVERSITY OF CALIFORNIA, LOS ANGELES
SCHOOL OF LAW

**Richard L. Hasen**
GARY T. SCHWARTZ ENDOWED CHAIR IN LAW
PROFESSOR OF POLITICAL SCIENCE
UNIVERSITY OF CALIFORNIA, LOS ANGELES
SCHOOL OF LAW

**Daniel P. Tokaji**
FRED W. & VI MILLER DEAN AND PROFESSOR OF LAW
UNIVERSITY OF WISCONSIN LAW SCHOOL

**Nicholas Stephanopoulos**
KIRKLAND & ELLIS PROFESSOR OF LAW
HARVARD LAW SCHOOL

CAROLINA ACADEMIC PRESS
Durham, North Carolina

The authors thank Sammy Zeino for assistance in compiling the 2022 supplement, Gennifer Birkenfeld-Malpass and Sam Hall for assistance in compiling the 2023 supplement, Richard Camarena III for assistance in compiling the 2024 supplement, and DeMarcus L. Williams for assistance in compiling the 2025 supplement.

This supplement was written by Professors Hasen, Tokaji, and Stephanopoulos.

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

# Table of Contents

## Chapter 4. Partisan Gerrymandering and Political Competition

ADD THE FOLLOWING AFTER THE FINAL FULL PARAGRAPH ON PAGE 207:

In the 2020 redistricting cycle, state courts took a more active role than ever before in adjudicating partisan gerrymandering claims. Some of these suits were brought under specific state constitutional prohibitions of gerrymandering, while others relied on more general state constitutional provisions. Gerrymandering claims succeeded (at least initially) in Alaska, Maryland, North Carolina, New York, and Ohio. See *In the Matter of the 2021 Redistricting Cases*, 528 P.3d 40 (Alaska 2023); *Szeliga v. Lamone*, 2022 WL 2132194 (Md. Cir. Ct., Mar. 25, 2022); *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), *overruled by* 886 S.E.2d 393 (N.C. 2023); *Harkenrider v. Hochul*, 197 N.E.3d 437 (N.Y. 2022); *Adams v. DeWine*, 195 N.E.3d 74 (Ohio 2022); *League of Women Voters of Ohio v. Ohio Redistricting Commission*, 192 N.E.3d 379 (Ohio 2022). They failed in Florida, Kansas, Kentucky, Michigan, Nevada, New Hampshire, New Mexico, and Oregon. See *Redistricting Litigation Roundup*, Brennan Ctr. for Justice, July 12, 2024, https://perma.cc/5JRD-VMGU. Note the relatively small number and unrepresentativeness of the states in which these suits were brought. At the congressional level, these features create the possibility that the bias of the House of Representatives might be *worsened* by state court rulings striking down gerrymanders. For example, when New York's Democratic gerrymander was invalidated and replaced by a more neutral map, this exacerbated the existing pro-Republican skew of the House. See Aaron Goldzimer & Nicholas Stephanopoulos, *The Novel Strategy Blue States Can Use to Solve Partisan Gerrymandering by 2024*, Slate, May 6, 2022, https://perma.cc/9BTU-WRLY.

Note also the fierce pushback to several of these state court decisions. In North Carolina, after the state supreme court became more conservative in the wake of the 2022 election, the newly constituted court overruled *Harper*, declared partisan gerrymandering nonjusticiable under the North Carolina Constitution, and authorized the state legislature to enact new plans without any state constitutional constraints. See *Harper v. Hall*, 886 S.E.2d 393 (N.C. 2023). In New York, after the state supreme court became more liberal, Democrats sought and obtained a ruling that the legislature could replace the prior court-drawn plans with new plans more to their liking. See *Hoffman v. N.Y. Independent Redistricting Comm'n*, 234 N.E.3d 1002 (N.Y. 2023). In Ohio, the Republican-dominated legislature simply refused to enact non-gerrymandered plans that would win the approval of the state supreme court, leading to a federal court's adoption of one of the legislature's previously invalidated maps. See *Gonidakis v. LaRose*, 599 F. Supp. 3d 642 (S.D. Ohio 2022). In light of these developments, how viable is state court litigation as a check on partisan gerrymandering? Are state courts consistently able to block gerrymanders desired by dominant political actors from ultimately going into effect?

ADD THE FOLLOWING AT THE END OF NOTE 8 ON PAGE 206:

Another worry about nonpartisan computer-generated maps is that they may be unintentionally biased in a particular party's favor. In particular, if Democrats are inefficiently overconcentrated in cities while Republicans are more efficiently distributed in suburban, exurban, and rural areas, then maps drawn without considering election results may systematically benefit Republicans. See Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political*

*Geography and Electoral Bias in Legislatures*, 8 Quarterly Journal of Political Science 239 (2013). Over the last few years, however, cities have become somewhat less blue, suburbs have swung from purple-red to purple-blue, and exurban and rural areas have become much redder. These developments seem to be making the country's political geography more neutral, such that, in many states, neither party is consistently advantaged by nonpartisan redistricting. See Nicholas Goedert et al., *Asymmetries in Potential for Partisan Gerrymandering*, 49 Legislative Studies Quarterly 551, 553 (2024) (noting that "while geography does advantage Republicans" in most states, "we find a substantial minority of states where the opposite is true"); Nicholas O. Stephanopoulos, *Election Law for the New Electorate*, 17 Journal of Legal Analysis (forthcoming 2025) (draft manuscript June 21, 2024 at 39, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4871529 ("The traditional Republican advantage in political geography has lately dwindled to nothing, or even flipped to a modest Democratic edge, in sizable swathes of the country.").

ADD THE FOLLOWING AFTER THE FIRST PARAGRAPH OF NOTE 11 ON PAGE 207:

The U.S. Supreme Court has left the door open for state courts to restrain partisan gerrymandering under their state constitutions, while suggesting that U.S. Constitution limits state courts' authority over congressional redistricting. The Court rejected the strongest version of the so-called "independent state legislature" theory in *Moore v. Harper*, 600 U.S. 1 (2023). That case challenged a North Carolina Supreme Court decision holding that the congressional redistricting plan drawn by the state legislature violated North Carolina's constitution. The North Carolina legislature argued that the Elections Clause (Article I, Section 4 of the U.S. Constitution) means that state legislatures cannot be constrained by state constitutions—or state courts interpreting state constitutions—when they draw congressional districts. The U.S. Supreme Court rejected that argument, but also said that state courts do not have "free rein" in this area. The Court declined to decide whether the North Carolina Supreme Court had strayed beyond the bounds of permissible state constitutional interpretation when it invalidated the state legislature's congressional redistricting plan, concluding that the issue had not properly been raised. For more on *Moore*, see Chapter 6 of this Supplement.

ADD THE FOLLOWING AT THE END OF NOTE 11 ON PAGE 208:

A subsequent bill that was passed by the House but failed to overcome a Senate filibuster, the Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. (2021), would have taken a different approach to curbing partisan gerrymandering. It would have allowed state legislatures to continue enacting congressional plans, but it would have imposed a presumptive ceiling on how biased these plans could be. Any plan with an efficiency gap above seven percent or one seat (whichever is greater) in two or more of the last four elections for President and U.S. Senator would have been presumptively unlawful. *Id.* § 5003(c)(3). Separate from this presumption, the bill would also have prohibited any plan "drawn with the intent or . . . the effect of materially favoring or disfavoring any political party." *Id.* § 5003(c)(1); see also Peter Miller & Anna Harris, *Sen. Manchin's Freedom to Vote Act Would Help Stop Gerrymandering, Our Research Finds*, Washington Post, Jan. 10, 2022, https://perma.cc/A9XU-VBKS (analyzing this bill's likely effects).

ADD THE FOLLOWING AT THE END OF NOTE 12 ON PAGE 208:

In the 2020 redistricting cycle, both parties' mapmakers aggressively gerrymandered where they had the chance, but these efforts largely maintained the status quo of the latter half of the 2010 redistricting cycle—namely, a modest Republican advantage. According to various statistical measures of partisan fairness, the House of Representatives was almost exactly as biased after congressional plans were redrawn as before. See Christopher T. Kenny et al., *Widespread Partisan Gerrymandering Mostly Cancels Nationally, but Reduces Electoral Competition*, 120 Proceedings of the National Academy of Sciences, June 13, 2023, at 1, 3; Christopher Warshaw et al., *Districts for a New Decade—Partisan Outcomes and Racial Representation in the 2021–22 Redistricting Cycle*, 52 Publius: The Journal of Federalism 428, 439 (2022). As might also be expected, nonpartisan mapmakers in the 2020 cycle (divided state governments, courts, and commissions) designed plans with small or no partisan skews relative to maps generated randomly by computers. See *id.* at 440–41; see also Nicholas O. Stephanopoulos et al., *The House's Republican Edge Is Gone. But the Gerrymander Lives*, Washington Post, Mar. 3, 2025, https://www.washingtonpost.com/opinions/interactive/2025/house-gerrymandering-bias-republicans-democrats/ (presenting data that the U.S. House had a slight aggregate bias in favor of Democrats in the 2022 and 2024 elections).

ADD THE FOLLOWING AFTER THE END OF NOTE 4 ON PAGE 219:

5. Returning to the rights/structure debate of the early 2000s, Professor Hasen argues that election law doctrine, politics, and theory have stagnated, failing to adequately protect voters' rights, and that in the face of recent attempts to subvert election outcomes (described more fully in Chapter 6), election law has retrogressed to a more basic focus on the conditions to assure free and fair elections. Richard L. Hasen, *The Stagnation, Retrogression, and Potential Pro-Voter Transformation of U.S. Election Law*, 134 Yale Law Journal 1673 (2025). He advocates for a pro-voter transformation of election law that "engages legal doctrine, political action, and election-law scholarship to further five principles: (1) all eligible voters should have the ability to register and vote easily in fair, periodic elections; (2) each voter's vote should carry equal weight; (3) free speech, a free press, and free expression should assure voters reliable access to accurate information to enhance their capacity for reasoned voting; (4) the winners of fair elections should be recognized and able to take office peacefully; and (5) political power should be fairly distributed across groups in society, with particular protection for those groups who have faced historical discrimination in voting and representation." *Id*. at 1682–83. How does this compare to a focus on (fair) political competition? To Stephanopoulos's focus on alignment?

## Chapter 5. Race and Redistricting

ADD THE FOLLOWING AFTER NOTE 6 ON PAGE 265:

In fact, in the 2020 redistricting cycle, there was little retrogression in the areas previously subject to Section 5. At the congressional level, the total number of minority ability districts in states formerly covered in full or in part *increased* by one. At the state senate level, this figure dipped by just two ability districts. And at the state house level, the total volume of ability districts in formerly covered states again *rose* by three. See Nicholas O. Stephanopoulos et al., *Non-Retrogression Without Law*, 2023 University of Chicago Legal Forum 267, 269 (2023). Why was there little retrogression given the substantial number of minority ability districts that *could* have been eliminated? The authors mention two potential explanations. "One is the status quo bias of many mapmakers. If line-drawers are frequently reluctant to disrupt existing district configurations, the number of minority ability districts should stay the same before and after redistricting in many states." *Id.* at 270. "The other factor illuminated by our analyses is the general absence of a strong partisan incentive to eliminate minority ability districts. If either party thought it could reap substantial electoral rewards from retrogression, we should see unified Democratic or unified Republican governments consistently reducing minority representation. However, this pattern doesn't materialize." *Id.*

DELETE NOTE 5 BEGINNING ON PAGE 297.

ADD THE FOLLOWING AT THE END OF THE FIRST PARAGRAPH OF NOTE 6 ON PAGE 298:

See also *Section 2 Cases Database*, Michigan Law Voting Rights Initiative, Dec. 31, 2021, https://perma.cc/UGS8-6B4R (updating the database of Section 2 decisions through the end of 2021).

ADD THE FOLLOWING NOTE AFTER NOTE 10 ON PAGE 301:

As discussed above, some conservatives are critical of the *Gingles* framework because they believe it is too aggressive, too favorable for plaintiffs alleging racial vote dilution, or too race-conscious. In *Allen v. Milligan*, 599 U.S. 1 (2023), Alabama echoed these views and launched a frontal attack on *Gingles*. Alabama had been ordered to draw a second congressional African American opportunity district by the district court, which had unanimously found liability under *Gingles*. Before the Supreme Court, Alabama argued that *Gingles*'s first prong should be rendered race-blind. That is, the question should be whether a map drawn *without considering race* includes more reasonably compact majority-minority districts than a jurisdiction's enacted plan. Alabama further argued that Section 2 does not apply to redistricting. Still more sweepingly, Alabama maintained that, if Section 2 does apply to redistricting, and if liability under the provision is not based on comparison with a race-blind baseline, then Section 2 is unconstitutional.

In *Milligan*, the Court surprisingly rejected all these claims and affirmed the continued viability of the *Gingles* framework. With respect to the race-blind baseline urged by Alabama, the Court pointed out that it "runs headlong into our precedent." *Id.* at 25. "[O]ur cases have consistently focused, for purposes of litigation, on the specific illustrative maps that a plaintiff

adduces. Deviation from [those maps] shows it is *possible* that the State's map has a disparate effect on account of race." *Id.* at 25–26. Plaintiffs' illustrative maps in Section 2 cases, however, have always been drawn with consciousness of race. "[A]ll those maps were created with an express target in mind—they were created to show, as our cases require, that an additional majority-minority district could be drawn. That is the whole point of the enterprise." *Id.* at 33.

The Court also denied that the *Gingles* framework is too easy to satisfy or leads inexorably to proportional representation by race. There was thus no need to revisit *Gingles*, in the Court's view. As to ease of satisfaction: "Since 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits. And the *only* state legislative or congressional districts that were redrawn because of successful Section 2 challenges were a handful of state house districts near Milwaukee and Houston." *Id.* at 29 (internal citations and quotation marks omitted). As to racial proportionality: "At the congressional level, the fraction of districts in which black-preferred candidates are likely to win is currently below the Black share of the eligible voter population in every state but three. . . . Only one State in the country, meanwhile, has attained a proportional share of districts in which Hispanic-preferred candidates are likely to prevail." *Id.* at 28. (internal quotation marks omitted).

The Court further expressed skepticism about the method advocated by Alabama for identifying the race-blind baseline: the generation of large numbers of maps by a computer algorithm that incorporates non-racial criteria but ignores race. "The test is flawed in its fundamentals. Districting involves myriad considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, communities of interest, and population equality." *Id.* at 35. But these many factors cannot all be programmed into an algorithm. And even when they can be coded: "Which one of these metrics should be used? What happens when the maps they produce yield different benchmark results? How are courts to decide?" *Id.*; see also *id.* at 37 ("What would the next million maps show? The next billion? The first trillion of the trillion trillions? Answerless questions all.").

While the Court considered at length Alabama's proposal of a race-blind baseline, it more quickly dismissed the state's other arguments. The Court's precedents, the statutory text, and the legislative history of Section 2 made it obvious that the provision applies to redistricting. "[W]e have applied § 2 to States' districting maps in an unbroken line of decisions stretching four decades." *Id.* at 38. "The statutory text in any event supports the conclusion that § 2 applies to single-member districts." *Id.* at 39. "Congress adopted the amended § 2 in response to the 1980 decision *City of Mobile*, a case about *districting*. . . . This was not lost on anyone when § 2 was amended. Indeed, it was the precise reason that the contentious debates over proportionality raged—debates that would have made little sense if § 2 covered only poll taxes and the like, as the dissent contends." *Id.* at 40–41.

Likewise, the Court curtly "reject[ed] Alabama's argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment." *Id.* at 41. The Court acknowledged that the Fifteenth Amendment bans only intentional racial discrimination in voting while Section 2 reaches racial disparities in representation. "But we held over 40 years ago 'that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the

Fifteenth Amendment] outlaw voting practices that are discriminatory in effect.' The VRA's 'ban on electoral changes that are discriminatory in effect,' we emphasized, 'is an appropriate method of promoting the purposes of the Fifteenth Amendment.'" *Id.* (quoting *City of Rome*).

Justice Kavanaugh wrote a short concurrence indicating his potential openness to a claim (like that in *Shelby County*) that "even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future." *Id.* at 45 (opinion of Kavanaugh, J.). For a response to Justice Kavanaugh, arguing that Section 2 may be justified as a remedy for persistent racial bias by voters, see Daniel P. Tokaji, *Racist Voting*, 76 Alabama Law Review 537 (2025).

Justice Thomas and Justice Alito each wrote dissents. Justice Thomas largely reiterated views he previously expressed in his opinion in *Holder v. Hall*, 512 U.S. 874 (1994), which we excerpt later in this chapter. Justice Alito argued that the first *Gingles* prong forbids plaintiffs' illustrative maps from being predominantly shaped by race. "Because non-predominance is a longstanding and vital feature of districting law, it must be honored in a *Gingles* plaintiff's illustrative district." *Id.* at 98 (Alito, J., dissenting). He further maintained that, here, "race played a predominant role in the production of the plaintiffs' illustrative maps and that it is most unlikely that a map with more than one majority-black district could be created without giving race such a role." *Id.* at 106.

In the wake of *Milligan*, commentators argued that the decision "should change the gestalt around racial vote dilution claims, especially for conservative judges. In recent cases, some conservative judges have seemed to believe that they can (even should) always rule for defendants . . . . *Milligan* should bring an end to this behavior. Conservative judges must now live with a controlling precedent authored by a conservative Chief Justice clearly finding liability under many of the same circumstances where they previously ruled for defendants." Nicholas Stephanopoulos, *Early Thoughts on Milligan*, Election Law Blog, June 8, 2023, https://perma.cc/SPR8-S459. Do you agree that *Milligan* will have these implications? Consistent with these predictions, a federal court ordered Alabama to use a congressional plan with two Black opportunity districts. *See Singleton v. Allen*, 690 F. Supp. 3d 1226 (N.D. Ala. 2023). Other federal courts ruled in favor of Section 2 claims after *Milligan* in Georgia, see *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136 (N.D. Ga. 2023), and Louisiana, see *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023). On the other hand, the Eighth Circuit recently held that no private right of action to enforce Section 2 exists, see *Ark. St. Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), the Eleventh Circuit immunized "quasi-judicial" bodies from Section 2 challenges, see *Rose v. Raffensperger*, 87 F.4th 469 (11th Cir. 2023), and the Fifth Circuit ruled that claims seeking multiracial "coalition districts" are not cognizable under Section 2, see *Petteway v. Galveston Cnty.*, 111 F.4th 596 (5th Cir. 2024) (en banc). Do these courts need to be chastened by another Supreme Court decision rebuffing attacks on Section 2?

ADD THE FOLLOWING NOTE AFTER NOTE 5 ON PAGE 337:

Frustrated by the many limits the Supreme Court has imposed on Section 2, numerous states have recently enacted state voting rights acts (SVRAs) providing protections for minority voters beyond those of Section 2. SVRAs have been approved in California, Colorado,

Connecticut, Florida, Illinois, Minnesota, New York, Oregon, Virginia, and Washington. Most SVRAs make it easier for plaintiffs to establish racial vote dilution, for example, by waiving the first *Gingles* prong and recognizing novel remedies such as proportional representation. Some SVRAs institute systems of preclearance analogous to those formerly in place under Section 5. Some SVRAs also facilitate racial vote denial claims, for instance, by focusing on whether a practice has a disparate racial impact and rejecting the restrictive "guideposts" recognized by the Supreme Court in *Brnovich v. Democratic National Committee*, 594 U.S. 647 (2021). Are SVRAs a good idea from a policy perspective? What are the pros and cons of making it significantly more likely that plaintiffs will prevail in voting rights suits? Like the federal VRA, SVRAs primarily rely on the tool of litigation. What do you think about using regulation instead—simply ordering localities to adopt (or abandon) certain practices, without the need for antecedent litigation? Most SVRAs include numerous references to race and race-related concepts, and they sharply increase the odds of liability being found on disparate impact grounds. Do these features cause SVRAs to be legally vulnerable under the Equal Protection Clause? See generally Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory Law Journal 299 (2023); see also *Clarke v. Town of Newburgh*, 226 N.Y.S.3d 310 (N.Y. App. Div. 2025) (reversing a lower court ruling that the New York Voting Rights Act violated the federal Equal Protection Clause).

ADD THE FOLLOWING NOTES ON PAGE 389:

7. In *Wisconsin Legislature v. Wisconsin Elections Commission*, 595 U.S. 398 (2022), the Supreme Court reversed a Wisconsin Supreme Court ruling adopting a state house plan with seven majority-Black districts. The state court endorsed this plan after the elected branches deadlocked. The Supreme Court held that the plan's seven majority-Black districts (most of whose Black majorities barely exceeded fifty percent) were designed for predominantly racial reasons. The Court further held that the state court had not properly justified the need under Section 2 for seven Black opportunity districts. "[T]he court's analysis of *Gingles*' preconditions fell short of our standards," because "the court improperly relied on generalizations to reach the conclusion that the preconditions were satisfied." *Id.* at 404. Additionally, "the court improperly reduced *Gingles*' totality-of-circumstances analysis to a single factor," "focus[ing] exclusively on proportionality." *Id.* at 405. The Supreme Court thus remanded for either a more thorough Section 2 analysis or (as actually transpired) the adoption of a plan with fewer Black opportunity districts.

8. In *Alexander v. S.C. State Conference of NAACP*, 602 U.S. 1 (2024), the Supreme Court reversed a district court ruling that South Carolina's First Congressional District was an unconstitutional racial gerrymander. Factually, this case was unusual in two respects. First, District 1 was a "stripped" rather than a "packed" district—a district whose African American population was allegedly artificially *low* because of the race-based *removal* of Black voters. The Supreme Court had never previously considered a racial gerrymandering challenge to a stripped district. Second, the plaintiffs relied in part on sets of randomly generated race-blind district maps. These maps indicated that, without race as a factor, District 1 essentially never had as low of a Black population as it did in the enacted plan. These sorts of computer simulations have featured prominently in *partisan* gerrymandering cases. But until *Alexander*, computer-created comparator maps hadn't appeared in any *racial* gerrymandering case before the Supreme Court. *See also Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229 (M.D. Fla. 2022)

(also holding unconstitutional districts artificially "stripped" of Black residents, partly based on randomly generated sets of comparator maps).

In an opinion by Justice Alito on behalf of six Justices, the Court emphasized its "starting presumption that the legislature acted in good faith." *Alexander*, 602 U.S. at 10. This presumption requires "district courts to draw the inference that cuts in the legislature's favor when confronted with evidence that could plausibly support multiple conclusions." *Id.* at 1235–36. In racial gerrymandering cases where the legislature argues that its true motivation was partisan, the Court also placed enormous weight on whether the plaintiff can submit an alternative map that achieves the legislature's partisan goals without stripping or packing minority voters to the same extent as the challenged district. "The evidentiary force of an alternative map . . . means that trial courts should draw an adverse inference from a plaintiff's failure to submit one." *Id.* at 1250. "The adverse inference may be dispositive in many, if not most, cases"—"an implicit concession that the plaintiff cannot draw a map that undermines the legislature's [partisan] defense." *Id.* The Court further treated partisan gerrymandering not as an unconstitutional activity that must be tolerated because of the (supposed) lack of standards for identifying it but rather as entirely lawful conduct. "[A]s far as the Federal Constitution is concerned," commented the Court, "a legislature may pursue partisan ends when it engages in redistricting." *Id.* at 1233.

Applying these principles, the Court rejected the circumstantial evidence of a predominant racial purpose on which the district court relied. For example, the district court found that the legislature used a racial target of 17% when it designed District 1. The Court ruled that the plaintiffs "did not offer any direct evidence to support that [target]" and that the plaintiffs' indirect evidence was insufficient to "overcome the presumption of legislative good faith." *Id.* at 1241. The Court also closely scrutinized, and ultimately dismissed, all of the plaintiffs' expert reports. For instance, as mentioned above, the plaintiffs introduced computer-generated maps in which the analogue to District 1 almost always had a larger Black population than District 1 itself. The Court held that these maps were "flawed because [they] failed to consider partisanship." *Id.* at 1244. The plaintiffs' expert "could have generated maps conditioned on District 1's vote share matching or exceeding the Benchmark Plan's Republican tilt," but "he did not take that obvious step." *Id.*

Justice Kagan dissented, joined by Justices Jackson and Sotomayor. She criticized the Court for misapplying the clear-error standard of review, which is supposed to be highly deferential to trial courts' factual findings. She condemned the Court's presumption of good faith, which seems to mean that "a trial court must resolve every plausibly disputed factual issue for the State (as if we could hardly imagine officials violating the law)." *Id.* at 1272 (Kagan, J., dissenting). She argued that the Court's emphasis on the submission of an alternative map effectively overruled *Cooper v. Harris*, which "expressly rejected a similar demand." *Id.* at 1273. And going through the plaintiffs' circumstantial evidence and expert reports, she maintained that they were more than sufficient, under the proper standard of review, to uphold the district court's judgment.

Concurring in part, Justice Thomas wrote that, in his view, racial gerrymandering and racial vote dilution claims are nonjusticiable. The central problem in the racial gerrymandering context is the difficulty in ascertaining legislative intent. "Divining legislative purpose is a dubious undertaking in the best of circumstances, but the task is all but impossible in gerrymandering cases." *Id.* at 1254 (Thomas, J., concurring in part). The difficulty of the task is compounded by

"the fact that race and politics are, at present, highly correlated in American society." *Id.* at 1255. In the racial vote dilution context, the rationale for nonjusticiability is the absence of suitable benchmarks by which to assess minority representation. Specifying a benchmark requires "[c]hoosing among theories of effective representation," but this issue is "not amenable to judicial resolution." *Id.* at 1257.

In the wake of *Alexander*, will litigants be able to use racial gerrymandering claims to pursue non-racial ends (such as fighting partisan gerrymandering)? Most likely not. "The alternative map they're now (essentially) required to produce is an instruction manual for the state explaining how it can remedy the violation alleged by the plaintiffs without disturbing its plan's partisan performance." Nicholas Stephanopoulos, *The End of Racial Gerrymandering Claims as Covert Partisan Gerrymandering Claims*, Election Law Blog, May 23, 2024, https://perma.cc/FQB4-TLYL. This might be a positive development from the perspective of maintaining the purity of racial gerrymandering law—but it's arguably problematic taking into account all of redistricting law. The concern is that, despite the Court's decision in *Rucho*, severe partisan gerrymandering *is* unconstitutional and deeply undemocratic. *Rucho* means that plaintiffs can't explicitly allege partisan gerrymandering, and *Alexander* now removes an implicit mechanism for challenging aggressive gerrymanders. *Alexander* thus "moves us from a second-best to a third-best world: one where partisan gerrymandering can't be tackled directly *or* indirectly, and simply becomes invisible as a matter of federal constitutional law." *Id.*

As for Justice Thomas's argument that racial gerrymandering claims are nonjusticiable, he has been on the Court for every one of its racial gerrymandering cases: dozens since *Shaw v. Reno* in 1993. In *Shaw* itself, his vote was necessary to create this cause of action since the case was decided by a five-four vote. How could it have taken Justice Thomas more than thirty years to come to the conclusion that racial gerrymandering is nonjusticiable, especially given that this was the position taken by the dissenting Justices in *Shaw* and other early cases? See, e.g., *Bush v. Vera*, 517 U.S. 952, 1047–70 (1996) (Souter, J., dissenting). Additionally, Justice Thomas is the Court's leading proponent of a colorblind Constitution. In light of this commitment, why should redistricting be the one area in which government officials *can* consider—and discriminate on the basis of—race without the possibility of judicial review? Lastly, Justice Thomas believes that racial gerrymandering, racial vote dilution, and partisan gerrymandering claims are nonjusticiable. What do you think his position is on the justiciability of *malapportionment* claims (the one other constitutional theory in the redistricting domain)? Must malapportionment also be nonjusticiable (contrary to *Baker v. Carr*) if every other redistricting claim is beyond courts' purview?

9. In *Louisiana v. Callais*, 606 U.S. ___, 2025 WL 1773632 (June 27, 2025), the Supreme Court set for reargument a racial gerrymandering case involving Louisiana's Sixth Congressional District. This majority-Black district stretches diagonally across the state from its northwest corner to Baton Rouge. The district was drawn after the state lost a challenge to its prior district map under Section 2 of the VRA. While the state *could* have created a reasonably-compact remedial district (as the plaintiffs demonstrated in the Section 2 case), the state chose instead to craft the contorted District 6 for political reasons. A three-judge district court found District 6 to be an unlawful racial gerrymandering, and the Supreme Court then took the case. As of this writing, it is unknown which additional issues the Court will want to be addressed when the case is reargued.

## Chapter 6. Election Administration and Remedies

ADD THE FOLLOWING AT THE END OF NOTE 9 ON PAGE 412:

One reason for the increase in election litigation may be changes to federal law that have allowed political parties to collect additional contributions that may be used only for recounts and legal fees. As a result, political party expenditures on litigation have skyrocketed:

> Between 2003 and 2015, political parties' legal expenditures—measured by examining the Democratic and Republican national committees and their congressional and senate entities—hovered around $5 million per year. That figure dipped to just below $3 million in 2008 but surpassed $7.5 million in 2012, but it remained fairly steady between 2003 and 2015.
>
> In 2016, however, legal expenses shot up to over $15 million in expenditures, more than double the 2012 total. In 2017, the total dipped to just under $10 million. In 2018, it rose again to nearly $24 million, went up again in 2019 to $28 million, and surpassed an astonishing $66 million in 2020.

Derek T. Muller, *Reducing Election Litigation*, 90 Fordham Law Review 561, 565–66 (2021); see also Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, 21 Election Law Journal 150 (2022) (disagreeing with Muller on whether reducing election litigation is necessarily a worthy goal).

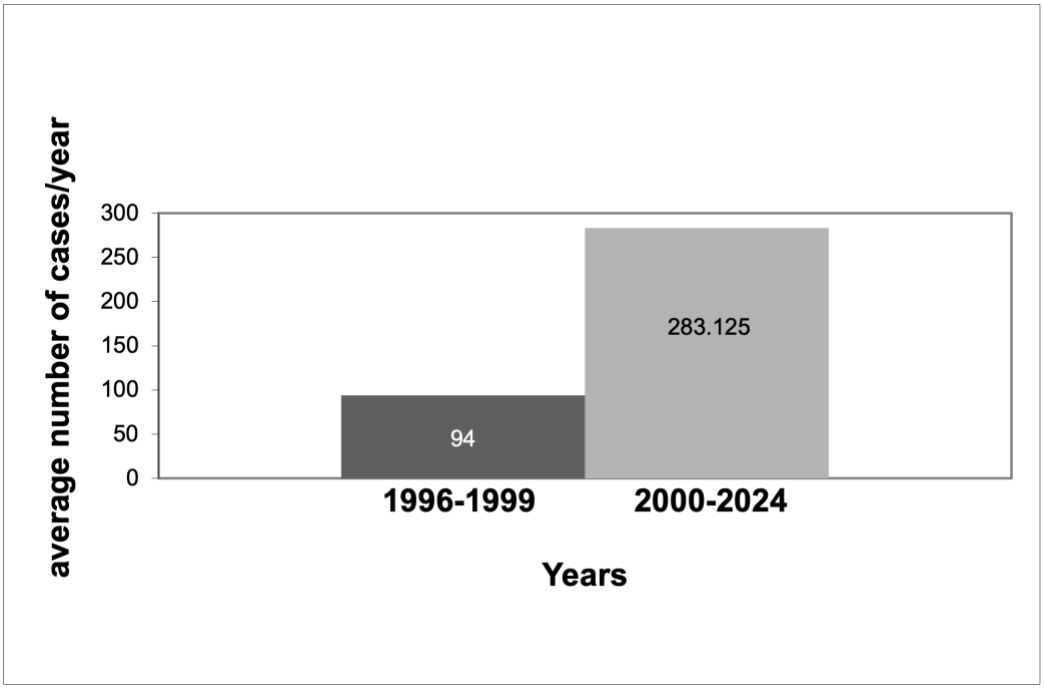
Professor Muller reported a 30 percent increase in the amount raised by the political parties for election litigation. Derek Muller, *Democratic, Republican Fundraising for Election Litigation Tops $154 Million in 2021–22 Cycle, 30 Percent Increase over 2020 Presidential Cycle*, Election Law Blog, Apr. 3, 2023, https://perma.cc/44R9-283R. Professor Hasen finds that election litigation set a new record in the 2024 election cycle and remains about triple the pre-*Bush* period:

> The 2020 election, conducted in the midst of the Covid pandemic and with Donald Trump (unsuccessfully) challenging his presidential loss to Joe Biden in multiple lawsuits, led to a record amount of election litigation in a single year (2020), but the 2023–2024 election season overall saw a 14.3 percent increase over the 2019–2020 election season overall. . . . It is remarkable that election litigation is even higher in the election after the pandemic than in the period before. My suspicion is that ongoing conflict surrounding the 2020 election created political incentives for Trump and his allies to file suits alleging the potential for fraud an irregularities in connection to the 2024 elections.

Richard L. Hasen, *Bush v. Gore's Ironic Legacy*, 53 Florida State University Law Review (forthcoming 2026) (draft manuscript March 25, 2025 at 8–9, available at https://papers.ssrn.com/abstract=5188686).

**Sample of Election Litigation Cases Per Year,**

**Before and After *Bush v. Gore***




Source: Richard L Hasen, Bush v. Gore*'s Ironic Legacy,* 53 Florida State University Law Review (forthcoming 2026); Hasen Election Litigation Database, 1996-2024, https://perma.cc/GQL3-PWEB.

ADD THE FOLLOWING AFTER THE FIRST FULL PARAGRAPH ON PAGE 414:

In the case below, the Supreme Court rejected the strongest version of the independent state legislature theory but suggested that the Elections Clause limits state courts' authority to invalidate state statutes regulating federal elections. The case arose from a North Carolina Supreme Court opinion invalidating the congressional redistricting plan drawn by the state legislature, on the ground that it violated the state constitution. After North Carolina's 2022 judicial elections, the composition of the North Carolina Supreme Court shifted from majority Democratic to majority Republican. That court subsequently overruled its earlier decision invalidating the congressional plan. This led some observers to believe that the U.S. Supreme Court might avoid the big question of whether to embrace the independent state legislature theory. But the Court did address the issue, while leaving some uncertainty over the federal constitutional constraints on state judges interpreting and applying their state constitutions:

# Moore v. Harper

600 U.S. 1 (2023)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Several groups of plaintiffs challenged North Carolina's congressional districting map as an impermissible partisan gerrymander. The plaintiffs brought claims under North Carolina's Constitution, which provides that "[a]ll elections shall be free." Art. I, § 10. Relying on that provision, as well as the State Constitution's equal protection, free speech, and free assembly clauses, the North Carolina Supreme Court found in favor of the plaintiffs and struck down the legislature's map. The Court concluded that North Carolina's Legislature deliberately drew the State's congressional map to favor Republican candidates.

In drawing the State's congressional map, North Carolina's Legislature exercised authority under the Elections Clause of the Federal Constitution, which expressly requires "the Legislature" of each State to prescribe "[t]he Times, Places and Manner of" federal elections. Art. I, § 4, cl. 1. We decide today whether that Clause vests state legislatures with authority to set rules governing federal elections free from restrictions imposed under state law.

## 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." 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.*

### A

The 2020 decennial census showed that North Carolina's population had increased by nearly one million people, entitling the State to an additional seat in its federal congressional delegation. Following those results, North Carolina's General Assembly set out to redraw the State's congressional districts. *North Carolina League of Conservation Voters, Inc. v. Representative Destin Hall*, 2021 WL 6883732 (Super. Ct. Wake Cty., N. C., Dec. 3, 2021), rev'd and remanded on other grounds, *Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022) (*Harper I* ). The General Assembly also drafted new maps for the State's legislative districts, including the State House and the State Senate. In November 2021, the Assembly enacted three new maps, each passed along party lines.

Shortly after the new maps became law, several groups of plaintiffs—including the North Carolina League of Conservation Voters, Common Cause, and individual voters—sued in state court. The plaintiffs asserted that each map constituted an impermissible partisan gerrymander in violation of the North Carolina Constitution. [After trial, a three-judge state court found that the

congressional plan was "a partisan outlier intentionally and carefully designed to maximize Republican advantage," but denied relief on the ground that the partisan gerrymandering claims are political questions under the state constitution.]

The North Carolina Supreme Court reversed, holding that the legislative defendants violated state law "beyond a reasonable doubt" by enacting maps that constituted partisan gerrymanders. It also rejected the trial court's conclusion that partisan gerrymandering claims present a nonjusticiable political question. The Court acknowledged our decision in *Rucho v. Common Cause*, which held "that partisan gerrymandering claims present political questions beyond the reach of the federal courts." 139 S. Ct. 2484, 2506–2507 (2019). But "simply because the Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts," the court explained, "it does not follow that they are nonjusticiable in North Carolina courts." The State Supreme Court also rejected the argument that the Elections Clause in the Federal Constitution vests exclusive and independent authority in state legislatures to draw congressional maps.

After holding that the 2021 districting maps "substantially infringe upon plaintiffs' fundamental right to equal voting power," the Court struck down the maps and remanded the case to the trial "court to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court." The Court entered judgment on February 15, 2022. Two days later, the General Assembly adopted a remedial congressional redistricting plan. See 2022 N. C. Sess. Laws p. 3, § 2. But the trial court rejected that plan and adopted in its place interim maps developed by several Special Masters for use in the 2022 North Carolina congressional elections. *North Carolina League of Conservation Voters, Inc. v. Representative Destin Hall*, 21 CVS 015426 etc. (Super. Ct. Wake Cty., N. C., Feb. 23, 2022), aff'd in part, rev'd in part, and remanded, *Harper v. Hall*, 383 N.C. 89, 881 S.E.2d 156 (2022) (*Harper II* ).

On February 25, 2022, the legislative defendants filed an emergency application in this Court, citing the Elections Clause and requesting a stay of the North Carolina Supreme Court's decision. We declined to issue emergency relief but later granted certiorari.

B

Following our grant of certiorari, the North Carolina Supreme Court heard an appeal concerning the trial court's remedial order. In December 2022, the Court issued a decision affirming in part, reversing in part, and remanding the case. As relevant, it agreed with the trial court's determination that the General Assembly's remedial congressional plan "fell short" of the requirements set forth in *Harper I*. *Harper II*.

The legislative defendants sought rehearing, requesting that the North Carolina Supreme Court "withdraw" its remedial opinion in *Harper II*. They also asked the Court to "overrule" its decision in *Harper I*, although they conceded that doing so would not "negate the force of its order striking down the 2021 plans." The North Carolina Supreme Court granted rehearing in *Harper II*, and we ordered the parties to submit supplemental briefing concerning our jurisdiction over this case in light of that decision. [The composition of the North Carolina Supreme Court had changed after the 2022 election, going from having a majority of Democratic-aligned justices to a majority of Republican-aligned justices. – EDS.]

Following the parties' submission of supplemental briefs in this Court, the North Carolina Supreme Court issued a decision granting the requests made by the legislative defendants. The Court withdrew its opinion in *Harper II*, concerning the remedial maps, and "overruled" its decision in *Harper I*. See *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023). Relying on our decision in *Rucho* and on a renewed look at the constitutional provisions at issue, the Court repudiated *Harper I* 's conclusion that partisan gerrymandering claims are justiciable under the North Carolina Constitution. . . .

[In Part II of its opinion, the Court concluded that it had jurisdiction, despite the North Carolina Supreme Court's overruling of *Harper I* and withdrawal of its opinion in *Harper II*.]

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."

*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. [The Court reviewed founding-era precedents in which state courts invalidated state statutes under state constitutions.]

The Framers recognized state decisions exercising judicial review at the Constitutional Convention of 1787. On July 17, James Madison spoke in favor of a federal council of revision that could negate laws passed by the States. He lauded the Rhode Island judges "who refused to execute an unconstitutional law," lamenting that the State's legislature then "displaced" them to substitute others "who would be willing instruments of the wicked & arbitrary plans of their masters." 2 Records of the Federal Convention of 1787, p. 28 (M. Farrand ed. 1911). A week later, Madison extolled as one of the key virtues of a constitutional system that "[a] law violating a constitution established by the people themselves, would be considered by the Judges as null & void." *Id.*, at 93. Elbridge Gerry, a delegate from Massachusetts, also spoke in favor of judicial

review. (Known for drawing a contorted legislative district that looked like a salamander, Gerry later became the namesake for the "gerrymander.") At the Convention, he noted that "[i]n some States the Judges had [actually] set aside laws as being agst. the Constitution." 1 *id*., at 97 (alteration in original by James Madison). Such judicial review, he noted, was met "with general approbation." *Ibid.* . . .

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. 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."

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." 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*, 114 N.E. 55, 58 (Ohio 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]." *Hildebrant*.

*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." 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*, 238 N.W. 494, 501 (Minn.

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."

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*. 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." . . .

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." A divided Court rejected that argument. The majority reasoned that dictionaries of "the founding era ... capaciously define[d] the word 'legislature,'" 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, 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."

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 Court embraced the core principle espoused in *Hildebrant* and *Smiley* "that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto." 576 U.S. at 808; see also *id.*, at 840–841 (Roberts, C. J., dissenting) (recognizing that *Hildebrant* and *Smiley* support the imposition of "some constraints on the legislature"). The Court dismissed the argument that the Elections Clause divests state constitutions of the power to enforce checks against the exercise of legislative power: "Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Arizona State Legislature* (majority opinion).

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."

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. The legislative defendants cite for support Federalist No. 78,

which explains that the wielding of legislative power is constrained by "the tenor of the commission under which it is exercised."

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, 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.

Turning to our precedents, the defendants quote from our analysis of the Electors Clause in *McPherson v. Blacker*, 146 U.S. 1 (1892). That Clause—similar to the Elections Clause—provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a [specified] Number of Electors." Art. II, § 1, cl. 2. *McPherson* considered a challenge to the Michigan Legislature's decision to allocate the State's electoral votes among the individual congressional districts, rather than to the State as a whole. We upheld that decision, explaining that in choosing Presidential electors, the Clause "leaves it to the legislature exclusively to define the method of effecting the object."

Our decision in *McPherson*, however, had nothing to do with any conflict between provisions of the Michigan Constitution and action by the State's legislature—the issue we confront today. *McPherson* instead considered whether Michigan's Legislature itself directly violated the Electors Clause (by taking from the "State" the power to appoint and vesting that power in separate districts), the Fourteenth Amendment (by allowing voters to vote for only one Elector rather than "Electors"), and a particular federal statute. Nor does the quote highlighted by petitioners tell the whole story. Chief Justice Fuller's opinion for the Court explained that "[t]he legislative power is the supreme authority *except as limited by the constitution of the State*." (emphasis added); see also *ibid.* ("What is forbidden or required to be done by a State is forbidden or required of the legislative power under state constitutions as they exist.").

The legislative defendants and Justice Thomas rely as well on our decision in *Leser v. Garnett*, 258 U.S. 130 (1922), but it too offers little support. *Leser* addressed an argument that the Nineteenth Amendment—providing women the right to vote—was invalid because state constitutional provisions "render[ed] inoperative the alleged ratifications by their legislatures." We rejected that position, holding that when state legislatures ratify amendments to the Constitution,

they carry out "a federal function derived from the Federal Constitution," which "transcends any limitations sought to be imposed by the people of a State."

But the legislature in *Leser* performed a ratifying function rather than engaging in traditional lawmaking. The provisions at issue in today's case—like the provisions examined in *Hildebrant* and *Smiley*—concern a state legislature's exercise of lawmaking power. And as we held in *Smiley*, when state legislatures act pursuant to their Elections Clause authority, they engage in lawmaking subject to the typical constraints on the exercise of such power. We have already distinguished *Leser* on those grounds. *Smiley*. In addition, *Leser* cited for support our decision in *Hawke v. Smith*, which sharply separated ratification "from legislative action" under the Elections Clause. Lawmaking under the Elections Clause, *Hawke* explained, "is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution."

*Hawke* and *Smiley* delineated the various roles that the Constitution assigns to state legislatures. Legislatures act as "Consent[ing]" bodies when the Nation purchases land, Art. I, § 8, cl. 17; as "Ratif[ying]" bodies when they agree to proposed Constitutional amendments, Art. V; and—prior to the passage of the Seventeenth Amendment—as "electoral" bodies when they choose United States Senators, *Smiley*; see also Art. I, § 3, cl. 1; Amdt. 17 (providing for the direct election of Senators).

By fulfilling their constitutional duty to craft the rules governing federal elections, state legislatures do not consent, ratify, or elect—they make laws. Elections are complex affairs, demanding rules that dictate everything from the date on which voters will go to the polls to the dimensions and font of individual ballots. Legislatures must "provide a complete code for congressional elections," including regulations "relati[ng] to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley*. In contrast, a simple up-or-down vote suffices to ratify an amendment to the Constitution. Providing consent to the purchase of land or electing Senators involves similarly straightforward exercises of authority. But fashioning regulations governing federal elections "unquestionably calls for the exercise of lawmaking authority." *Arizona State Legislature*. And the exercise of such authority in the context of the Elections Clause is subject to the ordinary constraints on lawmaking in the state constitution.

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.

C

Addressing our decisions in *Smiley* and *Hildebrant*, both the legislative defendants and Justice Thomas concede that at least some state constitutional provisions can restrain a state legislature's exercise of authority under the Elections Clause. But they read those cases to differentiate between procedural and substantive constraints. *Smiley*, in their view, stands for the proposition that state constitutions may impose only procedural hoops through which legislatures must jump in crafting rules governing federal elections. This concededly "formalistic" approach views the Governor's

veto at issue in *Smiley* as one such procedural restraint. But when it comes to substantive provisions, their argument goes, our precedents have nothing to say.

This argument adopts too cramped a view of our decision in *Smiley*. Chief Justice Hughes's opinion for the Court drew no distinction between "procedural" and "substantive" restraints on lawmaking. It turned on the view that state constitutional provisions apply to a legislature's exercise of lawmaking authority under the Elections Clause, with no concern about how those provisions might be categorized. See also *Hildebrant*.

The same goes for the Court's decision in *Arizona State Legislature*. The defendants attempt to cabin that case by arguing that the Court did not address substantive limits on the regulation of federal elections. But as in *Smiley*, the Court's decision in *Arizona State Legislature* discussed no difference between procedure and substance. . . .

The defendants and Justice Thomas do not in any event offer a defensible line between procedure and substance in this context. "The line between procedural and substantive law is hazy." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring in part). Many rules "are rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). Procedure, after all, is often used as a vehicle to achieve substantive ends. When a governor vetoes a bill because of a disagreement with its policy consequences, has the governor exercised a procedural or substantive restraint on lawmaking? *Smiley* did not endorse such murky inquiries into the nature of constitutional restraints, and we see no neat distinction today.

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. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929). And we have found historical practice particularly pertinent when it comes to the Elections and Electors Clauses. *Smiley* (Elections Clause); *Chiafalo v. Washington*, 140 S. Ct. 2316, 2325–2327 (2020) (Electors Clause). [The Court offered historical examples of state constitutional provisions regulating federal elections.]

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," 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. [The majority discussed the Takings Clause, Contracts Clause, and "adequate and independent state grounds" doctrine as examples.]

Members of this Court last discussed the outer bounds of state court review in the present context in *Bush v. Gore*, 531 U.S. 98 (2000) (*per curiam*). Our decision in that case turned on an application of the Equal Protection Clause of the Fourteenth Amendment. In separate writings, several Justices addressed whether Florida's Supreme Court, in construing provisions of Florida statutory law, exceeded the bounds of ordinary judicial review to an extent that its interpretation violated the Electors Clause.

Chief Justice Rehnquist, joined in a concurring opinion by Justice Thomas and Justice Scalia, acknowledged the usual deference we afford state court interpretations of state law, but noted "areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law." He declined to give effect to interpretations of Florida election laws by the Florida Supreme Court that "impermissibly distorted them beyond what a fair reading required." (Rehnquist, J., concurring). Justice Souter, for his part, considered whether a state court interpretation "transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the 'legislature' within the meaning of Article II." (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).

We do not adopt these or any other test by which we can measure state court interpretations of state law in cases implicating the Elections Clause. 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.

B

We decline to address whether the North Carolina Supreme Court strayed beyond the limits derived from the Elections Clause. The legislative defendants did not meaningfully present the issue in their petition for certiorari or in their briefing, nor did they press the matter at oral argument. Counsel for the defendants expressly disclaimed the argument that this Court should reassess the North Carolina Supreme Court's reading of state law. Tr. of Oral Arg. 7 ("We're not asking this Court to second-guess or reassess. We say take the North Carolina Supreme Court's

decision on face value and as fairly reflecting North Carolina law. . . . "). When pressed whether North Carolina's Supreme Court did not fairly interpret its State Constitution, counsel reiterated that such an argument was "not our position in this Court." Although counsel attempted to expand the scope of the argument in rebuttal, such belated efforts do not overcome prior failures to preserve the issue for review. See this Court's Rule 28 ("[C]ounsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal.").

* * *

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. 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. Therefore, a state court's interpretation of state law in a case implicating the Elections Clause is subject to federal court review. Federal court review of a state court's interpretation of state law in a federal election case "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*." *Bush v. Gore* (Rehnquist, C. J., concurring).

The question, then, is what standard a federal court should employ to review a state court's interpretation of state law in a case implicating the Elections Clause—whether Chief Justice Rehnquist's standard from *Bush v. Gore*; Justice Souter's standard from *Bush v. Gore*; the Solicitor General's proposal in this case; or some other standard.

Chief Justice Rehnquist's standard is straightforward: whether the state court "impermissibly distorted" state law "beyond what a fair reading required." As I understand it, Justice Souter's standard, at least the critical language, is similar: whether the state court exceeded "the limits of reasonable" interpretation of state law. And the Solicitor General here has proposed another similar approach: whether the state court reached a "truly aberrant" interpretation of state law.

As I see it, all three standards convey essentially the same point: Federal court review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication. I would adopt Chief Justice Rehnquist's straightforward standard. As able counsel for North Carolina stated at oral argument, the Rehnquist standard "best sums it up." Chief Justice

Rehnquist's standard should apply not only to state court interpretations of state statutes, but also to state court interpretations of state constitutions. And in reviewing state court interpretations of state law, "we necessarily must examine the law of the State as it existed prior to the action of the [state] court." *Bush* (Rehnquist, C. J., concurring).

Petitioners here, however, have disclaimed any argument that the North Carolina Supreme Court misinterpreted the North Carolina Constitution or other state law. For now, therefore, this Court need not, and ultimately does not, adopt any specific standard for our review of a state court's interpretation of state law in a case implicating the Elections Clause. 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 such as the one advanced by Chief Justice Rehnquist.

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.

[In Part I, Justice Thomas argued that the case was moot, given the North Carolina Supreme Court's overruling of its opinion *Harper I* and withdrawal of its opinion in *Harper II*.]

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, 17 U.S. 316 (1819). This idea should be uncontroversial, as it is "the unavoidable consequence of th[e] supremacy" of the Federal Constitution and laws. *Id.* 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*.

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*.

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. "A state, and the legislature of a state, are quite different political beings." Story § 628. "A state, in the ordinary sense of the Constitution, is a political community of free citizens ... organized under a government sanctioned and limited by a written constitution." *Texas v. White*, 7 Wall. 700, 721 (1869). "'Legislature,'" on the other hand, generally means "'the representative body which ma[kes] the laws of the people.'" *Smiley* (quoting *Hawke v. Smith*).

To be sure, the precise constitutional significance of the word "Legislature" depends on "the function to be performed" under the provision in question. *Smiley*. Because "the function contemplated by" the Elections Clause "is that of making laws," this Court's Elections Clause cases have consistently looked to a State's written constitution to determine the constitutional actors in whom lawmaking power is vested. See *Arizona State Legislature*; *Smiley*; *Hildebrant*. The definitions that most precisely explain this Court's holdings were given in a state-court case that anticipated *Hildebrant* and *Smiley* by several years: "[T]he word 'Legislature,' as used in [the Elections Clause] means the lawmaking body or power of the state, as established by the state Constitution," or, put differently, "that body of persons within a state clothed with authority to make the laws." *State ex rel. Schrader v. Polley*, 127 N.W. 848, 850–851 (S.D. 1910).

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.*, 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*. As shown, each premise is easily supported and consistent with this Court's precedents. Petitioners' conclusion also mirrors the Court's interpretation of parallel language in the Electors Clause in *McPherson*: "[T]he words, 'in such manner as the legislature thereof may direct,'" "operat[e] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Id.*

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*; 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: "There is a difference between *how* and *what*." J. Kirby, Limitations on the Power of State Legislatures Over Presidential Elections, 27 Law & Contemp. Prob. 495, 503 (1962).

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*. 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*. 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. 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.

The majority indicates that it does not perceive this distinction between "substantive" and "procedural" rules, illustrating its doubts with a rhetorical question: "When a governor vetoes a bill because of a disagreement with its policy consequences, has the governor exercised a procedural or substantive restraint on lawmaking?" The answer is straightforward: The power of approving or vetoing bills is "a part of the legislative process" because it is "a part in the making of state laws." *Smiley*. A Governor's *motives* for vetoing a certain bill are irrelevant to the effect of the veto as part of the legislative process, just as the motives that may lead one house of the legislature to reject a bill passed by the other house are irrelevant to the effect of its doing so. Put simply, when this power is conferred on the Governor of a State, it "makes him in effect a third branch *of the legislature*." T. Cooley, General Principles of Constitutional Law 50 (1880) (emphasis added).

But *substantive* constraints on what the lawmaking power can do (gubernatorial approval included) demand an entirely different justification—one that the majority never provides. It does not overrule *Cook* and *Thornton* to hold that the power to prescribe times, places, and manners for congressional elections is an original power of the people of each State. Nor does it hold that the people are themselves "the Legislature" to which the Federal Constitution delegates that power. Indeed, the majority devotes little attention to the source and recipient of the power described in the Elections Clause, notwithstanding their direct relevance to the question presented.

Instead, the majority focuses on the power of state courts to exercise "judicial review" of Elections Clause legislation. But that power sheds no light on the question presented. In every case properly before it, any court—state or federal—must ascertain and apply the substantive law that

properly governs that case. Thus, the court naturally must apply the Federal Constitution rather than any statute in conflict with it. The court must also apply the state constitution over any conflicting statute enacted under a power limited by that constitution. Petitioners' argument, however, is that legislation about the times, places, and manner of congressional elections is *not* limited by state constitutions—because the power to regulate those subjects comes from the Federal Constitution, not the people of the State. Right or wrong, this question has nothing to do with whether state courts have the power to conduct judicial review in the first place. To say that "state judicial review" authorizes applying state constitutions over conflicting Elections Clause legislation, is simply to assume away petitioners' argument.

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." 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.

The majority uses the separate writings in *Bush v. Gore*, as a loose touchstone for the kind of judicial review that it apparently expects federal courts to conduct in future cases like this one. On its face, this is an awkward analogy, for there is a significant difference between *Bush* and *Harper I*. In *Bush*, the state court's judgment was based on an interpretation of state statutory law, enacted by the state legislature. Thus, the relevant Electors Clause question was whether, in doing so, the state court had departed from "the clearly expressed intent of the legislature," *Bush* (Rehnquist, C. J., concurring), "impermissibly distort[ing]" the legislature's enactments "beyond what a fair reading required," *id*. In *Harper I*, by contrast, there was no doubt that the state court departed from the clearly expressed intent of the legislature; it rejected the legislature's enactment as unconstitutional.

By doing so, today's majority concludes, *Harper I* did not commit *per se* error, as the Elections Clause permits state courts to apply substantive state-constitutional provisions to the times, places, and manner of federal elections. At the same time, state courts are warned that they operate under federal-court supervision, lest they "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." Thus, under the majority's framework, it seems clear that the statutory-interpretation review forecast in *Bush* (or some version of it) is to be extended to state *constitutional* law.

In this way, the 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*. 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," 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, 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*. 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.

### *Notes and Questions*

1. The stakes in the debate over the independent state legislature theory are high, especially given the many state legislators who have pressed the discredited claim that the 2020 presidential

election was stolen. The chief concern is that state legislatures—if freed from state constitutional constraints – could wreak havoc on federal elections, including presidential elections. One study found that at least 357 Republican legislators in battleground states—44% of those in the nine closest states – tried to discredit or overturn the 2020 presidential election. Nick Corasaniti, Karen Yourish & Keith Collins, *How Trump's 2020 Election Lies Have Gripped State Legislatures*, N.Y. Times, May 22, 2022, https://perma.cc/MGE6-YNVM. The Court did reject the most robust version of the independent state legislature theory in *Moore v. Harper*, while leaving some big questions still to be determined.

2. Chief Justice Roberts's opinion for the majority in *Moore v. Harper* relies principally on constitutional history and precedent. The Court discusses the long history—going back even before *Marbury v. Madison*—of state courts exercising the power of judicial review over state statutes. The Court then relies on precedent to conclude that there is no exception for state statutes regulating federal elections. In dissent, Justice Thomas counters with three premises: (1) that the people of a state cannot limit the powers that the people of the United States have conferred through the U.S. Constitution; (2) that the power to regulate congressional elections is not a reserved power of the states, but one that was conferred by the Elections Clause of the U.S. Constitution; and (3) that the term "the Legislature," as used in the Elections Clause, means the representative body with the authority to make state laws. Are all of these premises correct? And if so, does it follow that state legislatures are not constrained by states constitutions when they regulate congressional elections?

Note that the U.S. Supreme Court had previously rejected the third premise in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) (excerpted on pp. 576–79 of the Casebook), holding that the Elections Clause's reference to "the Legislature" means "the power that makes laws" and not just the representative body that is delegated that power under the state constitution. Interestingly, Chief Justice Roberts had authored the dissent in that case—arguing that "the Legislature" means "the representative body which makes the laws," *id.* at 827—but authors the majority opinion in *Moore v. Harper*. Are those two positions consistent? Should we understand Chief Justice Roberts to be accepting a premise with which he disagreed at the time, but is now entitled to *stare decisis*?

3. While the Court rejected the most robust version of the independent state legislature theory in *Moore v. Harper*, its specter remains present over future federal election controversies. In Part V of its opinion, the majority emphasizes that state courts "do not have free rein" in applying their state constitutions in this context, and that they must not "transgress the ordinary bounds of judicial review." That suggests that the Elections Clause imposes some constraints on state courts' application of state constitutions to federal elections. But those boundaries remain quite uncertain. The Court declines to adopt a standard for determining whether state courts have transgressed them and does not even decide whether the North Carolina Supreme Court went too far in its interpretation of its state constitution. Should the Court have given clearer guidance? Is Justice Thomas right to suggest that this "portends serious troubles ahead for the Judiciary," given the uncertainty of the limits applicable to state courts? Will the Court's failure to articulate a clear standard invite more litigation—including cases in the U.S. Supreme Court—over federal elections? For arguments to that effect, see Richard L. Hasen, *There's a Time Bomb in Progressives' Big Supreme Court Voting Case Win*, Slate, June 27, 2023, https://perma.cc/4JC8-

7DTK, and Richard H. Pildes, *The Supreme Court Rejected a Dangerous Elections Theory. But It's Not All Good News*, N.Y. Times, June 28, 2023, https://perma.cc/B7S4-WJUZ.

Note that Justice Kavanaugh, while joining the majority opinion in full, did offer some additional guidance on the limits that the Elections Clause imposes on state courts in his solo concurrence. He would adopt the standard set forth by Chief Justice Rehnquist in his concurring opinion in *Bush v. Gore*, asking whether a state court "impermissibly distorted" state law "beyond what a fair reading required." Further quoting Chief Justice Rehnquist, Justice Kavanaugh goes on to say that, in reviewing state court interpretations of state constitutions, the Court should consider "the law of the State as it existed prior to the action of the [state] court?" Is this an administrable standard, as Justice Kavanaugh argues? Does this suggest that the Court will reject novel interpretations of state constitutions, in the context of federal elections—for example, interpreting a state constitution to expand voting rights? For worries that it does, see Leah Litman, *Anti-Novelty, the Independent State Legislature Theory in* Moore v. Harper*, and Protecting State Voting Rights*, Election Law Blog, July 3, 2023, https://perma.cc/89WC-UM3D. In previous scholarship, Professor Litman has criticized the idea that novelty connotes unconstitutionality in other contexts. Leah M. Litman, *Debunking Antinovelty*, 66 Duke Law Journal 1407 (2017). What are the downsides of construing the Elections Clause to limit novel state court interpretations of state constitutional law?

4. For pre-*Moore* scholarly criticism of the independent state legislature theory, see Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 Wisconsin Law Review 1235; Vikram D. Amar & Akhil R. Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Supreme Court Review 1 (2022); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harvard Journal of Law & Public Policy 135 (2023); and Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 University of Chicago Law Review 137 (2023). See also Miriam Seifter, *Countermajoritarian Legislatures*, 121 Columbia Law Review 1733, 1794–99 (2021) (challenging the majoritarian arguments underpinning the independent state legislature theory and arguing that state constitutional law injects "actual democracy" into federal elections). For a qualified defense of the independent state legislature theory that seeks to disentangle different aspects of it, see Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham Law Review 501 (2021).

ADD THE FOLLOWING AT THE END OF NOTE 11 ON PAGE 416:

For a recent and very thorough analysis of partisanship in U.S. elections, see Rebecca Green, *Adversarial Election Administration*, 101 North Carolina Law Review 1077 (2023). Professor Green acknowledges that the high level of distrust in the election process is a serious problem, but argues that there are benefits to vesting people from opposing parties in positions of responsibility over the running of elections. When adversaries from both major parties share power, she argues, they can keep an eye on each other and increase the transparency of the process. Building on the work of other scholars, she recommends that we resist the "knee-jerk assumption[]" that election officials' partisan leanings render them unfit to serve, and instead try to harness those partisan leanings to strengthen public faith in elections. *Id.* at 1080. Do you agree?

12. *Post-2020 Prosecutions*. Donald Trump faced state and federal criminal charges in connection with his attempt to overturn the result of the 2020 election. In August 2023, the Fulton County (Georgia) District Attorney Fani Willis obtained an indictment against former President Trump and 18 others. The sprawling indictment accuses the defendants of racketeering through their alleged plot to subvert the election, including Trump's phone call to Georgia Secretary of State Raffensperger. Four of the defendants pleaded guilty, but Trump pleaded not guilty. The state trial court dismissed some but not all of the charges against Trump. An appellate court later disqualified Willis from prosecuting the case, a ruling that she has appealed to the state supreme court.

Also in August 2023, U.S. Special Counsel Jack Smith secured an indictment against Trump that charges him with defrauding the U.S., conspiring to obstruct an official proceeding, obstructing and attempting to obstruct an official proceeding, and conspiracy to violate voting rights. Trump argued that he was immune from criminal prosecution for acts taken as President.

In *Trump v. United States*, 603 U.S. 593 (2024), a divided Supreme Court concluded that the President enjoys broad immunity for official acts. Here is the characterization of the alleged facts offered by Chief Justice Roberts for the six-justice majority:

> From January 2017 until January 2021, Donald J. Trump served as President of the United States. On August 1, 2023, a federal grand jury indicted him on four counts for conduct that occurred during his Presidency following the November 2020 election. The indictment alleged that after losing that election, Trump conspired to overturn it by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results.
>
> 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]." Second, Trump and his co-conspirators "organized fraudulent slates of electors in seven targeted states" and "caused these fraudulent electors to transmit their false certificates to the Vice President and other government officials to be counted at the certification proceeding on January 6." Third, Trump and his co-conspirators attempted to use the Justice Department "to conduct sham election 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." 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." 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." Fifth, when "a large and angry crowd . . . violently attacked the Capitol and halted the proceeding," Trump and his co-conspirators "exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification."

Justice Sotomayor's dissent (joined by Justices Kagan and Jackson) offered a more expansive and pointed characterization of Trump's alleged conduct:

> The indictment paints a stark portrait of a President desperate to stay in power. In the weeks leading up to January 6, 2021, then-President Trump allegedly "spread lies that there had been outcome-determinative fraud in the election and that he had actually won," despite being "notified repeatedly" by his closest advisers "that his claims were untrue."
>
> When dozens of courts swiftly rejected these claims, Trump allegedly "pushed officials in certain states to ignore the popular vote; disenfranchise millions of voters; dismiss legitimate electors; and ultimately, cause the ascertainment of and voting by illegitimate electors" in his favor. It is alleged that he went so far as to threaten one state election official with criminal prosecution if the official did not "'find' 11,780 votes" Trump needed to change the election result in that state. When state officials repeatedly declined to act outside their legal authority and alter their state election processes, Trump and his co-conspirators purportedly developed a plan to disrupt and displace the legitimate election certification process by organizing fraudulent slates of electors.
>
> As the date of the certification proceeding neared, Trump allegedly also sought to "use the power and authority of the Justice Department" to bolster his knowingly false claims of election fraud by initiating "sham election crime investigations" and sending official letters "falsely claim[ing] that the Justice Department had identified significant concerns that may have impacted the election outcome" while "falsely present[ing] the fraudulent electors as a valid alternative to the legitimate electors." When the Department refused to do as he asked, Trump turned to the Vice President. Initially, he sought to persuade the Vice President "to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." When persuasion failed, he purportedly "attempted to use a crowd of supporters that he had gathered in Washington, D. C., to pressure the Vice President to fraudulently alter the election results."
>
> Speaking to that crowd on January 6, Trump "falsely claimed that, based on fraud, the Vice President could alter the outcome of the election results." When this crowd then "violently attacked the Capitol and halted the proceeding," Trump allegedly delayed in taking any step to rein in the chaos he had unleashed. Instead, in a last desperate ploy to hold onto power, he allegedly "attempted to exploit the violence and chaos at the Capitol" by pressuring lawmakers to delay the certification of the election and ultimately declare him the winner. That is the backdrop against which this case comes to the Court.

In concluding that the President is generally immune from criminal prosecution for official acts, Chief Justice Roberts's majority opinion divided those acts into two categories. For actions within the President's "conclusive and preclusive" authority, the President enjoys *absolute immunity*. *Id.* at 608. An example is alleged communication between President Trump and the Acting Attorney General, encouraging him to use the Justice Department's authority to induce certain states to replace legitimate electors with fraudulent electors. *Id.* at 620–21. The second category consists of actions within the "outer perimeter" of the President's official responsibilities.

An example of actions in the second category is Trump's alleged communication with his Vice President Mike Pence, regarding the latter's role in the electoral vote certification on January 6, 2021. For such actions, the President enjoys at least *presumptive immunity* from criminal prosecution, which may be overcome only if there is no danger of "intrusion on the authority and functions of the Executive Branch." *Id.* at 624 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)). The Court remanded for the district court to determine whether the presumption of immunity was overcome as to those acts.

Although Presidents do not enjoy immunity for *unofficial* conduct (*e.g.,* their actions as candidates for office), *id.* at 615, the majority limited the evidence that courts may consider in prosecutions for unofficial conduct. Specifically, the majority held that evidence concerning a President's official acts, or the motivation for those acts, should *not* be considered. *Id.* at 618–19. Justice Barrett, who otherwise joined the majority opinion, did not join this portion. She worried that excluding all evidence regarding a President's official acts would "hamstring" prosecutors. *Id.* at 656 (Barrett, J., concurring in part). For example, she argued, it would prevent the introduction of evidence about an "official act" offered or taken in exchange for a bribe. *Id.*

Justice Sotomayor's dissent argued that the broad immunity conferred on the President by the majority "makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law." *Id.* at 657 (Sotomayor, J., dissenting). Justice Jackson's dissent likewise worried that the majority's expansive conception of presidential immunity "threatens to consume democratic self-governance and the normal operations of our Government." *Id.* at 701 (Jackson, J., dissenting).

What are the consequences of *Trump v. United States* for election subversion? It is important to bear in mind that, while the President is generally immune from prosecution for official acts, other people may still be prosecuted. For example, Trump's alleged co-defendants in the Georgia election subversion are not entitled to assert immunity under *Trump v. United States*, even if the former President can. Still, the President does have broad immunity for official acts, such as urging subordinate officials in the federal government to further his efforts to stay in office unlawfully. Does this enhance the risk of future attempts to subvert elections?

It is also important to recognize that the immunity doctrine created by *Trump v. United States* is not limited to election subversion, or even to elections. The holding seems to preclude consideration of any evidence of Presidents' official acts in future prosecutions against them, whether for election subversion, bribery, conspiracy, murder, or any other crime. Does this, as the dissents argue, put the President above the law and thus imperil American constitutional democracy?

13. *The 2024 Election and the North Carolina Supreme Court Litigation*. In marked contrast to the 2020 election, the 2024 presidential election was resolved quickly, with Vice President Kamala Harris conceding to Donald Trump the day after the election. One of the concerns leading up to the election was that local election officials sympathetic to Trump would refuse to certify the election, opening the door for potential election mischief. But with Trump prevailing in all of the key swing states, that possibility did not materialize. For discussion of a possible judicial remedy if state election officials fail to perform their duty to certify, see Derek T.

Muller, *Election Subversion and the Writ of Mandamus*, 65 William & Mary Law Review 327 (2023).

Although the 2024 presidential election did not go into overtime, there was a protracted dispute over an extremely close election for a seat on the North Carolina Supreme Court, between incumbent Justice Alison Riggs and Judge Jefferson Griffin. In an election in which over 5.5 million votes were cast, Riggs led Griffin by just 734 votes at the end of the canvassing period (a margin of 50.01% to 49.99%). Judge Griffin challenged the counting of thousands of absentee ballots on various grounds, resulting in multiple lawsuits in both state and federal courts that took several months to resolve. One of Judge Griffin's arguments was a challenge to the counting of absentee ballots cast by overseas voters who did not provide photo ID in some but not all North Carolina counties. Judge Griffin also challenged ballots cast by children of overseas North Carolinians, who indicated they had not previously lived in the U.S.

North Carolina state courts ruled in Judge Griffin's favor on these claims, concluding that both categories of ballots should be rejected, but a federal district court ultimately concluded that this would violate the Fourteenth Amendment's rights to equal protection and due process of law. *Griffin v. North Carolina State Board of Elections*, ___ F. Supp. 3d ___, 2025 WL 1292530 (E.D.N.C. May 5, 2025). Relying primarily on *Bush v. Gore*, the district court concluded that imposing different requirements for vote counting for people in different counties would violate equal protection:

> North Carolina has 100 counties. Judge Griffin challenged the absentee ballots cast by overseas military and civilian voters in no more than 6 of those 100 counties. Per the court order from North Carolina's Court of Appeals and Supreme Court, those targeted voters must, in short order, provide a copy of their driver's licenses or a completed declaration of reasonable impediment to the State Board or their votes will be discarded.
>
> As a consequence, overseas military and civilian voters who cast a ballot in Guilford County are required to undertake additional efforts in order to have their votes counted. Their neighbors in Randolph, Alamance, and Rockingham Counties need not. That disparate treatment between similarly situated voters, based solely on their casting of ballots in "different counties," amounts to "a constitutional violation" of the Equal Protection Clause. *Bush*, 531 U.S. at 107. . . .
>
> The court's conclusion here is solely that, when the underlying basis for a protest is a rule that applies statewide, a geographically selective protest raises equal protection concerns and the specter of post-election mischief. But those concerns only come to fruition and manifest as an equal protection violation when a state adopts the litigant's selectivity and retroactively applies newly announced rules to a discrete subset of citizens, and not all similarly situated voters. That is the arbitrary and disparate treatment that the Supreme Court cautioned against in *Bush v. Gore*, and that guidance operates with full force here.

*Id.* at *13–*15.

The district court went on to conclude that it would violate due process to reject votes cast in accordance with the rules that existed at the time they were cast. To reject those ballots based on subsequently announced requirements, the court held, would "change[] the rules half way through the game." *Id.* at *21 (quoting *Scheer v. City of Miami*, 15 F. Supp. 2d 1338, 1344 (S.D. Fla. 1998)). Accordingly, the retroactive invalidation of ballots violated their due process rights. *Id.* at *25.

Based on its conclusion that the state court's rulings would result in federal equal protection and due process violations, the district court ordered the election certified. *Id.* at *35. Judge Griffin did not seek to appeal the federal district court's decision, but instead conceded the election to Justice Riggs – more than six months after Election Day. Consider what would have happened if a similar dispute had arisen in a presidential election. Are there ways of expediting post-election litigation so that the winner can more quickly be determined?

14. *President Trump's Executive Order on Elections*. In March 2025, President Trump issued a sweeping executive order on election administration. Exec. Order No. 14248, 90 Fed. Reg. 14005 (Mar. 25, 2025). Among other things, the order purports to require the U.S. Election Assistance Commission to require documentary proof of citizenship on the national mail voter registration form, to direct federal agencies to assess citizenship before providing public assistance recipients with a registration form, and to order the U.S. Justice Department to enforce a ballot receipt date of Election Day. As this Supplement goes to press, two different federal courts have blocked key provisions of this executive order. *State of California v. Trump*, ___ F. Supp. 3d ___, 2025 WL 1667949 (D. Mass. June 13, 2025); *League of United Latin American Citizens v. Executive Office of the President*, ___ F. Supp. 3d ___, 2025 WL 1187730 (D.D.C. Apr. 24, 2025). To what extent should the President have the authority to direct administrative agencies on the implementation of federal election administration laws?

ADD THE FOLLOWING AT THE END OF NOTE 4 ON PAGE 440:

Is a balancing standard more appropriate for state constitutional review election laws than for federal constitutional review? In a recent article, Jessica Bulman-Pozen and Miriam Seifter argue that state courts should consider reviewing burdens on voting for "proportionality" under their state constitutions, a standard that is more demanding than *Anderson-Burdick*:

> As state courts are called on to evaluate laws regulating voting, litigants are pushing them to adopt the federal *Anderson–Burdick* test. But adopting this test, which has come to function as a sort of rational basis review, is inappropriate. Democratic proportionality requires state courts to take voting rights more seriously, to evaluate government regulation more meaningfully, and to weigh interests in the context of the concrete dispute. For example, while a federal court might accept the government's recitation of an abstract interest like combating voter fraud, a court engaged in democratic proportionality review would require the government to establish concretely and specifically how that interest would be furthered by its regulation. If the government successfully made such a showing, the court would ask whether there was a less rights-impairing way to achieve this result. And, if the law survived this stage of review, the court would proceed to engage in actual balancing, asking whether the established public benefits outweighed the intrusion on

> voting rights. At all stages of such an inquiry, state courts should be mindful of their ability to conduct context-specific analysis and to furnish tailored remedies.

Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 Columbia Law Review 1855, 1917 (2023). Note that all state constitutions – unlike the U.S. Constitution—confer an affirmative right to vote. *Id.* at 1877 & n. 125. Consider how the proportionality standard that Professors Bulman-Pozen and Seifter advocate for state courts is different from the *Anderson-Burdick* standard. Are they right to characterize *Anderson-Burdick* as a "form of rational basis review"? Do you agree that state courts should apply a more demanding standard, rather than lockstepping with federal constitutional doctrine?

ADD THE FOLLOWING AFTER NOTE 6 ON PAGE 441:

## D. Disqualification of Candidates

The U.S. Constitution prescribes the qualifications that people must satisfy to serve in federal elected office. Members of the House of Representatives, for example, must be at least 25 years old, an inhabitant of the state from which they are elected, not a holder of another federal civil office, and not disqualified by impeachment and conviction in the Senate. U.S. Constitution, Art. I, § 2, cl. 2; Art. I, § 3, cl. 7.; Art. I, § 6, cl. 2. The President must be a "natural born Citizen," at least 35 years old, a resident of the U.S. for at least 14 years, not disqualified from office by impeachment and conviction in the Senate, not an inhabitant of the same state as the Vice President, and not have served two four-year terms as President. U.S. Constitution, Art. I, § 3, cl. 7; Art II, § 1, cl. 3; Art II, § 1, cl. 5; Amend. XXII. The qualifications for state office are generally prescribed by state law. (For more on residency requirements, see the main volume, Page 715, note a.)

In addition, Section 3 of the Fourteenth Amendment to the Constitution prohibits anyone from serving in the U.S. Congress or from "hold[ing] any office, civil or military, under the United States, or under any State," if they engaged in "insurrection or rebellion" after having taken an oath to support the Constitution as a federal or state official." U.S. Constitution, Amend. XIV, § 3. The Fourteenth Amendment was, of course, enacted in the wake of the Civil War. Section 3 was intended to prohibit those who had fought for the Confederacy from holding federal or state office, and thereby returning to power.

What happens if there are questions about a candidate's qualifications for the office? May they be stricken from the ballot by an election official or a court? Or must the legislature take some action? For state and local elected officials, the answer depends on state law. For federal elected officials, the answer is complicated and, even after the next case, still not entirely clear.

For members of the U.S. House and Senate, Article I of the Constitution provides that: "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members . . . ." U.S. Constitution, Art. I, § 5. This leaves open the question whether each chamber of Congress has the *exclusive* authority to judge the qualifications of would-be members, as some lower courts have ruled. See Derek T. Muller, *Scrutinizing Federal Election Qualifications*, 90 Indiana Law Journal 559, 581 & n.166 (2015).

For presidential candidates, the question is even more complicated. The Constitution gives the states (not the federal government) authority to determine the manner in which presidential electors are appointed. U.S. Constitution, Art. II, § 1, cl. 2. Congress's role is limited to the counting of electoral counts—and that authority was further circumscribed by amendments to the Electoral Count Act adopted in 2022 (see *infra*, Chapter 8 of this Supplement).

In the following case, the U.S. Supreme Court considered what power states—and in particular, state courts—have to exclude a candidate from the ballot on the ground that they do not satisfy one of the constitutional qualifications for the presidency. The case arose from former President Trump's actions in connection with the 2020 presidential election, which culminated in the January 6, 2021 attack on the U.S. Capitol as electoral votes were being counted. A Colorado state court concluded that President Trump had engaged in insurrection, in violation of Section 3 of the Fourteenth Amendment, and should therefore be stricken from the primary ballot. The U.S. Supreme Court unanimously reversed, but with some differences among the justices on the rationale:

## Trump v. Anderson

601 U.S. 100 (2024)

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

Last September, about six months before the March 5, 2024, Colorado primary election, four Republican and two unaffiliated Colorado voters filed a petition against former President Trump and Colorado Secretary of State Jena Griswold in Colorado state court. These voters—whom we refer to as the respondents—contend that after former President Trump's defeat in the 2020 Presidential election, he disrupted the peaceful transfer of power by intentionally organizing and inciting the crowd that breached the Capitol as Congress met to certify the election results on January 6, 2021. One consequence of those actions, the respondents maintain, is that former President Trump is constitutionally ineligible to serve as President again.

Their theory turns on Section 3 of the Fourteenth Amendment. Section 3 provides:

> "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."

According to the respondents, Section 3 applies to the former President because after taking the Presidential oath in 2017, he intentionally incited the breaching of the Capitol on January 6 in order to retain power. They claim that he is therefore not a qualified candidate, and that as a result, the Colorado secretary of state may not place him on the primary ballot. See Colo. Rev. Stat. §§ 1–1–113(1), 1–4–1101(1), 1–4–1201, 1–4–1203(2)(a), 1–4–1204 (2023).

After a five-day trial, the state District Court found that former President Trump had "engaged in insurrection" within the meaning of Section 3, but nonetheless denied the respondents' petition. The court held that Section 3 did not apply because the Presidency, which Section 3 does not mention by name, is not an "office . . . under the United States" and the President is not an "officer of the United States" within the meaning of that provision.

In December, the Colorado Supreme Court reversed in part and affirmed in part by a 4 to 3 vote. Reversing the District Court's operative holding, the majority concluded that for purposes of Section 3, the Presidency is an office under the United States and the President is an officer of the United States. The court otherwise affirmed, holding (1) that the Colorado Election Code permitted the respondents' challenge based on Section 3; (2) that Congress need not pass implementing legislation for disqualifications under Section 3 to attach; (3) that the political question doctrine did not preclude judicial review of former President Trump's eligibility; (4) that the District Court did not abuse its discretion in admitting into evidence portions of a congressional Report on the events of January 6; (5) that the District Court did not err in concluding that those events constituted an "insurrection" and that former President Trump "engaged in" that insurrection; and (6) that former President Trump's speech to the crowd that breached the Capitol on January 6 was not protected by the First Amendment.

The Colorado Supreme Court accordingly ordered Secretary Griswold not to "list President Trump's name on the 2024 presidential primary ballot" or "count any write-in votes cast for him." . . . .

Under the terms of the opinion of the Colorado Supreme Court, its ruling was automatically stayed pending this Court's review. 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?" 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." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996). 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 aimed to prevent such a resurgence by barring from office "those who, having once taken an oath to support the Constitution of the United States, afterward went into rebellion against the Government of the United States." Cong. Globe, 41st Cong., 1st Sess., 626 (1869) (statement of Sen. Trumbull).

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. *Griffin's Case*, 11 F.Cas. 7, 26 (No. 5,815) (CC Va. 1869) (Chase, Circuit Justice). 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."

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. 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." 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." *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U. S. 375, 385 (1982).

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) (quoting 1 J. Story, Commentaries on the Constitution of the United States § 627, p. 435 (3d ed. 1858)). But nothing in the Constitution delegates to the States any power to enforce Section 3 against federal officeholders and candidates. . . .

The respondents . . . maintain that States may enforce Section 3 against *candidates* for federal office. But the text of the Fourteenth Amendment, on its face, does not affirmatively delegate such a power to the States. The terms of the Amendment speak only to enforcement by Congress, which enjoys power to enforce the Amendment through legislation pursuant to Section 5.

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.[1] 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

[1] The Elections Clause directs, in relevant part, that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Art. I, § 4, cl. 1. The Electors Clause similarly provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors," who in turn elect the President. Art. II, § 1, cl. 2.

limits on that power, and Congress may exercise it any time, as the respondents concede. 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. . . .

Moreover, permitting state enforcement of Section 3 against federal officeholders and candidates would raise serious questions about the scope of that power. Section 5 limits *congressional* legislation enforcing Section 3, because Section 5 is strictly "remedial." *City of Boerne*. To comply with that limitation, Congress "must tailor its legislative scheme to remedying or preventing" the specific conduct the relevant provision prohibits. *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639 (1999). Section 3, unlike other provisions of the Fourteenth Amendment, proscribes conduct of individuals. It bars persons from holding office after taking a qualifying oath and then engaging in insurrection or rebellion—nothing more. Any congressional legislation enforcing Section 3 must, like the Enforcement Act of 1870 and § 2383, reflect "congruence and proportionality" between preventing or remedying that conduct "and the means adopted to that end." *City of Boerne*. Neither we nor the respondents are aware of any other legislation by Congress to enforce Section 3.

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, 794–79 (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*. 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*. 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.

All nine Members of the Court agree with that result. Our colleagues writing separately further agree with many of the reasons this opinion provides for reaching it [citing joint concurring opinion of Justices Sotomayor, Kagan, and Jackson, and concurring opinion of Justice Barrett]. So far as we can tell, they object only to our taking into account the distinctive way Section 3 works and the fact that Section 5 vests *in Congress* the power to enforce it. These are not the only reasons the States lack power to enforce this particular constitutional provision with respect to federal offices. But they are important ones, and it is the combination of all the reasons set forth in this opinion—not, as some of our colleagues would have it, just one particular rationale—that resolves this case. In our view, each of these reasons is necessary to provide a complete explanation for the judgment the Court unanimously reaches.

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*, 5 U.S. 1 Cranch 137 (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. 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

[Justices Sotomayor, Kagan, and Jackson explained why they agree with the majority's conclusion that states lack the power to exclude presidential candidates from the ballot on the ground that they have engaged in insurrection.] 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* (quoting *Griffin's Case*). 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. Nothing in that unequivocal bar suggests that implementing legislation enacted under Section 5 is "critical" . . . . 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. . . .

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*. 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.

The majority is left with next to no support for its requirement that a Section 3 disqualification can occur only pursuant to legislation enacted for that purpose. It cites *Griffin's Case*, but that is a nonprecedential, lower court opinion by a single Justice in his capacity as a circuit judge. . . .

Ultimately, under the guise of providing a more "complete explanation for the judgment," the majority resolves many unsettled questions about Section 3. It forecloses judicial enforcement of that provision, such as might occur when a party is prosecuted by an insurrectionist and raises a defense on that score. The majority further holds that any legislation to enforce this provision must prescribe certain procedures "'tailor[ed]'" to Section 3, ruling out enforcement under general federal statutes requiring the government to comply with the law. By resolving these and other questions, the majority attempts to insulate all alleged insurrectionists from future challenges to their holding federal office.

* * *

"What it does today, the Court should have left undone." *Bush v. Gore* (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.

### *Notes and Questions*

1. All of the justices agree that a state court lacks the power to exclude a presidential candidate from that state's ballot, on the ground that the candidate has engaged in insurrection or rebellion in violation of Section 3 of the Fourteenth Amendment. Why? The per curiam opinion explains that Section 5 of the Fourteenth Amendment gives Congress the power to enforce its provisions through legislation. But Section 5 nowhere says that Congress has the *exclusive* power to enforce Section 3 (or any other part of the Fourteenth Amendment). State courts enforce the rights contained in Section 1 of the Fourteenth Amendment, including equal protection and due process, all the time. How is Section 3 different?

2. An obvious answer is that, rather than conferring rights on individuals, Section 3 denies certain people the right to hold federal office. Allowing states to exclude candidates from the ballot on the ground that they engaged in insurrection or rebellion, the majority says, would threaten to create a "patchwork," with some states excluding a presidential candidate while others leave them on. The concurring opinion of Justice Sotomayor, Kagan, and Jackson adopts the "patchwork" argument. It surely would be undesirable to have different states reaching different conclusions on the important (if uncommon) question whether a federal candidate engaged in insurrection. Isn't the solution to that problem within the Supreme Court's own hands? Because this is a federal question, the Court would have the authority to review state court rulings on the subject, and thus to ensure uniformity among the states. The per curiam opinion worries that different state courts might apply different standards and therefore arrive at different conclusions on whether a presidential candidate engaged in insurrection. But couldn't the Court resolve that problem by adopting a high evidentiary burden for exclusion from the ballot, or engaging in less deferential review of factual findings than is typical?

3. Denying states the power to exclude a federal candidate who has arguably engaged in insurrection presents practical problems of its own. What *is* the appropriate remedy? The Court says that Congress could enforce Section 3 through appropriate legislation. But a careful reading of the per curiam shows that it never says that legislation is the *only* means through which Section 3 can be enforced (although both concurrences nevertheless seem to understand the per curiam opinion to mean that congressional legislation is the only means of enforcing Section 3). Another

possibility is that Congress could enforce Section 3 by refusing to count the electoral votes of a presidential candidate who members believe to have engaged in insurrection. This raises the specter of the presidency being denied to a candidate who has actually won the election. It would be an understatement to call such a scenario a profound constitutional crisis. Isn't this much worse than the "patchwork" of different state decisions that the Court worries about? Wouldn't it be better to resolve questions about a candidate's eligibility in advance of an election, rather than after people have voted?

4. Article I, Section 4 of the Constitution gives states the power to set the time, place, and manner of congressional elections, subject to alteration by Congress. Article II, Section 1 gives states the authority to determine the manner in which presidential electors are selected. Do these provisions give states authority to exclude a federal candidate from the ballot on the ground that they do not meet the constitutional qualifications for office? Note that the Court in *Trump v. Anderson* answers this question in the negative, but only for the prohibition on federal office for those who have engaged in insurrection or rebellion. That conclusion is based in part on the concerns about state authority over governance that underlie the Fourteenth Amendment. It remains an open question whether a state court could exclude someone from the ballot on the ground that they fail to satisfy one of the other constitutional qualifications for federal office – for example, Article I's requirement that members of the U.S. House be at least 25 years old, or Article II's requirement that the President be a "natural born Citizen." Should state courts be permitted to exclude candidates from the ballot on such grounds, assuming that there is a state law requiring candidates be qualified for the office they seek to appear on the ballot?

5. The Twenty-Second Amendment to the U.S. Constitution states, in pertinent part, that: "No person shall be elected to the office of the President more than twice . . . ." Despite having been elected in both 2016 and 2024, President Trump has sometimes indicated (jokingly?) that he might try to seek a third term. If he does, would *Trump v. Anderson* preclude a state from excluding him from its primary or general election ballot?

ADD THE FOLLOWING ON PAGE 479, IMMEDIATELY BEFORE SECTION D:

Voter registration list maintenance has increasingly become a partisan battleground in recent years. Much of the controversy centers on the Electronic Registration Information Center (ERIC), a nonpartisan group founded by Democratic and Republican officials that is designed to help states share voting records. Although ERIC's work used to attract little attention, several states with Republican chief election authorities have withdrawn from ERIC. Zach Montellaro, *2 More Republican States Abruptly Depart from Interstate Voter List Program*, Politico, March 18, 2023, https://perma.cc/HF7W-CNRL. For a discussion of these controversies and some of the deeper challenges in managing voter registration lists, see Michael Morse, *Democracy's Bureaucracy: The Complicated Case of Voter Registration Lists*, 103 Boston University Law Review 2123 (2023).

ADD THE FOLLOWING AFTER THE FIRST FULL PARAGRAPH FOLLOWING THE BULLET POINTS ON PAGE 482:

A recent empirical study uses a dataset of approximately 400 voting records across multiple election cycles to estimate voter turnout gaps by race, age, and political affiliation. It finds that people of color, young people, and Democrats are much more likely to live in "turnout deserts" where voting rates are markedly lower. Here are some of the study's key findings:

> [I]n 2016 Whites voted at a rate 4 percentage points higher (9% higher relative than the base rate) than Black citizens, 20 percentage points (69%) higher than Asians, and 19 percentage points (63%) higher than Hispanics; Republicans voted at a rate 5 percentage points higher (11%) than democrats; and older citizens (>60 years old) voted at a rate 47 percentage points higher (124%) than younger citizens (<30 years old). In 2014, these gaps were further magnified—Whites voted at a rate 10 percentage points higher (36% greater) than Black citizens, 22 percentage points higher (138%) than Asians, and 24 percentage points higher (171%) than Hispanics; republicans voted at a rate 7 percentage points higher (24%) than democrats; and older citizens vote at a rate 45 percentage points higher (375%) than younger citizens. These gaps are striking. . . .
>
> These results show that voter turnout is highly segregated by race, politics, and age in the United States; minorities, young people, and democrats are much more likely to live in turnout deserts. . . . [I]f we define a turnout desert as a precinct where turnout was one standard deviation lower than the national average, Black, Hispanic, and Asian individuals are 3, 4, and 2.5 times more likely to live in a turnout desert than whites, respectively. (In the SI we look at alternative definitions of turnout deserts and find similar results.) Likewise, democrats are 2.5 times more likely to live in a turnout desert than republicans. Turnout deserts are also divided by age, albeit less than race and party, perhaps, in part, because age-based segregation is comparatively smaller in the United States. Still, young people are still much more likely (1.6x) to live in a turnout desert than older citizens. . . .
>
> In addition to clear demographic patterns (i.e. minorities are more likely to live in areas with very low turnout rates overall) we also see geographic patterns across the country. For example, California, Arizona, and Texas stand out as states with many counties where a large fraction of precincts have remarkably low turnout rates. Counties with high proportions of turnout desert precincts also appear more frequently in the Appalachian region and in the Great Lakes states of Michigan and Wisconsin. However, counties with many precinct turnout deserts appear in both urban and rural parts of country.

Michael Barber & John B. Holbein, *400 Million Voting Records Show Profound Racial and Geographic Disparities in Voter Turnout in the United States*, 17 PLoS ONE 6 at 1, June 8, 2022, https://perma.cc/D6J8-BYDY.

ADD THE FOLLOWING ON PAGE 488, AT THE END OF PART III:

The Supreme Court will consider a case in its 2025 Term, which involves the deadline for receipt of absentee ballots in federal elections. Under federal law, the first Tuesday after the first Monday in November is designated as the day of election for members of Congress and the President. 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. Many states have laws allowing for ballots to be counted if received after this date, if they are postmarked by this date. The rationale is that federal law allows ballots to be received and counted after Election Day, so long as they are voted and sent by that date. In 2024, the Fifth Circuit held that federal law preempted a Mississippi law allowing ballots to be counted if received up to five days after Election Day. *Republican National Committee v. Wetzel*, 120 F.4th 200 (5th Cir. 2024). The Seventh Circuit, however, held that voters and candidates for federal office lacked Article III standing to make a similar claim. *Bost v. Illinois Board of Elections*, 114 F.4th 634 (7th Cir. 2024). The Supreme Court granted certiorari on the standing question in the Illinois case. 2025 WL 1549779 (June 2, 2025). It may eventually address the merits in the Mississippi case or another one.

ADD THE FOLLOWING AT THE END OF PAGE 502:

In 2022, Justice Kavanaugh sought to defend application of the *Purcell* principle in a case stopping the drawing of congressional districts following redistricting where the primary was four months away and the general election nine months away. *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring). After first remarking that the "traditional test for a stay does not apply (at least not in the same way) in election cases when a lower court has issued an injunction of a state's election law in the period close to an election," *id.* at 880, he explained:

> Some of this Court's opinions, including *Purcell* itself, could be read to imply that the principle is absolute and that a district court may never enjoin a State's election laws in the period close to an election. As I see it, however, the *Purcell* principle is probably best understood as a sensible refinement of ordinary stay principles for the election context—a principle that is not absolute but instead simply heightens the showing necessary for a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures. Although the Court has not yet had occasion to fully spell out all of its contours, I would think that the *Purcell* principle thus might be overcome even with respect to an injunction issued close to an election if a plaintiff establishes at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.

*Id*. at 881.

Justice Kagan for the three liberal Justices dissented, pointing out that the Court in the past had rejected *Purcell* arguments in cases on similar timeframes. She further noted that plaintiffs were diligent in suing within hours or days of the enactment of the redistricting plan. "Alabama is

not entitled to keep violating Black Alabamians' voting rights just because the court's order came down in the first month of an election year." *Id*. at 888–89 (Kagan, J., dissenting).

In *Moore v. Harper*, 142 S. Ct. 1089 (2022), the Supreme Court refused to block a North Carolina Supreme Court order requiring new congressional districts against a claim that the state court exceeded its powers under the Constitution. Justice Kavanaugh, citing *Milligan* and its similar timeframe, concurred on *Purcell* grounds even as he expressed sympathy with the merits. *Id.* (Kavanaugh, J., concurring). Three conservative Justices, led by Justice Alito, dissented, without mentioning *Purcell*. *Id.* at 1089–90 (Alito, J., dissenting).

One difference between *Milligan* and *Moore*: In *Milligan*, applying *Purcell* benefitted Republicans and in *Moore* it benefited Democrats.

On the merits in *Milligan*, the Supreme Court affirmed the lower court in *Allen v. Milligan*, 599 U.S. 1 (2023). See this Supplement to Chapter 5. The upshot was that under *Purcell*, plaintiffs were denied their remedy for the 2022 election season but got a remedy for 2024. The Court affirmed on the merits in *Moore* as well, rejecting the claim that the state court had exceeded its powers. *Moore v. Harper*, 600 U.S. 1 (2023) (excerpted above, this Chapter of the Supplement).

For thoughts on the interaction between *Purcell* and *Moore*, see Rob Yablon, Moore v. Harper *and the* Purcell *Principle*, Election Law Blog, June 29, 2023, https://perma.cc/A7M3-H3XB. According to Professor Yablon: "*Moore* may invite litigants to argue that a state supreme court has impermissibly meddled in federal elections, but *Purcell* will likely limit the ability of those litigants to get federal court relief as an election nears." Do you agree?

In the 2023–24 term, the Supreme Court's conservative majority applied *Purcell* to preserve a new majority-Black district, with the three liberal justices dissenting. The case, *Robinson v. Callais*, 144 S. Ct. 1171 (2024), involved a redistricting plan that had created a second majority-Black congressional district in Louisiana. The district was drawn to comply with the Voting Rights Act, but plaintiffs alleged that it was an unconstitutional racial gerrymander. The district court agreed and ordered new maps drawn. The Supreme Court stayed that order, a victory for voting rights advocates who favored a second majority-Black district. Justices Sotomayor and Kagan would have denied the stay, however, and Justice Jackson wrote a brief dissent stating: "In my view, *Purcell* has no role to play here. There is little risk of voter confusion from a new map being imposed this far out from the November election." *Id*. at 1172 (Jackson, J., dissenting from grant of applications for stay). It is likely that the three dissenting justices were concerned that the *Purcell* doctrine usually hurts voting rights plaintiffs, even though it was applied to preserve a majority-Black district in this case. The Court heard argument on the merits in March 2025, then set the case for reargument in the 2025-26 term. *Louisiana v. Callais*, 606 U.S. ___, 2025 WL 1773632 (June 27, 2025) (see *supra*, Chapter 5 of this Supplement).

Recall that *Purcell* applies when federal courts are asked to issue pre-election injunctions; it does not apply to state courts deciding whether to issue such injunctions. A review of reported state-court decisions since November 2024 finds that most state courts have *not* followed the U.S. Supreme Court's approach. Robert Yablon & Derek Clinger, Purcell *Principles for States Courts*, 2024 Wisconsin Law Review 1637 (2024). But see Wilfred U. Codrington III, *Unprincipled All*

*the Way Down*, 81 Washington & Lee Law Review 1087 (2024) (discussing and criticizing state court decisions that have followed *Purcell*, for ignoring its federalism-based rationale).

## Chapter 7. Ballot Propositions

ADD THE FOLLOWING AT THE END OF NOTE 4 ON PAGE 542:

Despite *Strauss*, the California Supreme Court unanimously removed a tax-related measure, the "Taxpayer Protection and Government Accountability Act" (or "TPA"), from the ballot as an impermissible proposed revision. The court in *Legislature v. Weber*, 549 P.3d 884 (Cal. 2024) held that the proposed measure was a revision because of "the fundamental changes the TPA would make to the operation of state and local government:"

> No speculation regarding potential future consequences is needed to conclude that the TPA is a revision on its face. The measure would fundamentally restructure the most basic of governmental powers. The TPA would exclude the levying of new taxes from the Legislature's control by requiring voter approval of all such measures. In so doing, it would disturb the long settled understanding that "[t]he power of taxation is a power which the Legislature takes from the law of its creation, for it is an indispensable power, without which it would become impossible for that body to perform its functions . . . ." Further, the TPA would significantly alter the ability of state and local governments to delegate fee-setting authority to their executive or administrative officers (and ensure the provision of essential services. And the TPA would subject every revenue-raising measure enacted by state or local governments to voter approval or referendum, either because it is a tax that the voters must enact or because it is an exempt charge that can only be enacted by the legislative branch and thus becomes subject to referendum.
>
> Moreover, by enacting these changes together, along with others noted above, the effects of the TPA on our state and local governments would be intensified. Whereas a restriction on the ability of local governments to raise revenue might previously have been offset by the power of the state to raise revenue, the TPA burdens both simultaneously. And while the expansion of what constitutes an exempt charge and the requirement that such charges be adopted legislatively rather than imposed by an agency are significant in and of themselves, the TPA's extension of the referendum power to these charges magnifies their effect and creates complications of its own. The TPA's voter approval requirements, its nondelegation rules, and its expansion of the referendum power to charges previously held to be essential operate together to fundamentally rework the fiscal underpinnings of our government at every level. The TPA would shift so much authority, in such a significant manner, that it would substantially alter our framework of government.
>
> For these reasons, we conclude that the TPA would clearly "accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision" of the Constitution. (*Amador Valley*.) The measure exceeds the scope of the power to amend the Constitution via citizen initiative. (Art. II, § 8, subd. (a).) It is within the people's prerogative to make these changes, but they must be undertaken in a manner commensurate with their gravity: through the process for revision set forth in article XVIII of the Constitution.

*Id*. at *20–*21 (some citations omitted).

## Chapter 8. Major Political Parties

ADD THE FOLLOWING AT THE END OF NOTE 8 ON PAGE 614:

In the last days of the 117th Congress, President Biden signed legislation that is designed to prevent future crises in the Electoral College process. The Electoral Count Reform and Presidential Transition Act of 2022 was enacted as part of an omnibus appropriation bill. Public Law 117-328, 136 Stat. 4459, Div. P, §§ 101–111 (2022). It was supported by a bipartisan group of legislators, concerned that outmoded and ambiguous provisions of the Electoral Count Act of 1887 could be exploited in future presidential elections. Among the changes in the 2022 legislation are:

- clarifying that presidential elections are to be governed by state laws in place before Election Day,
- clarifying the timeline for certification of state election results, as well as who is responsible for sending the state's slate of electors,
- raising the bar for objections to a state's slate of electors in Congress,
- clarifying that the Vice President's role in the Electoral College process is strictly ministerial, and
- eliminating the ECA's ambiguous reference to states that "fail[] to make a choice" on Election Day, with a clearer process for emergencies that interfere with presidential elections.

Election law experts almost uniformly lauded these reforms as necessary to prevent future crises, but there remains much work to be done. With enactment of the ECA reforms, the focus now shifts largely to states. For a discussion of some of the issues that states should consider, see Derek Muller, *State Legislatures Should Examine Their Election Codes After Passage of the Electoral Count Reform Act*, Election Law Blog, Dec. 28, 2022, https://perma.cc/3J4R-GUY9. For a detailed analysis of some of the most worrisome vulnerabilities in the presidential election process that unscrupulous candidates or their supporters might try to exploit in the future, see Matthew Seligman, *Disputed Presidential Elections and the Collapse of Constitutional Norms* (draft manuscript Feb. 1, 2022, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3283457).

Former President Trump faced criminal charges for his role in seeking to overturn the 2020 election result, including the attempt to use fraudulent slates of electors in seven swing states. The Supreme Court's opinion in *Trump v. United States*, 603 U.S. 593 (2024) (discussed *supra*, Chapter 6 of this Supplement), did not extinguish those prosecutions, but confers on the former President broad immunity for any "official acts" that he engaged in while in office. The charges against Trump were dismissed after he was again elected President in 2024. In addition, dozens of "fake electors" have been charged with crimes. Betsy Woodruff Swan & Kyle Cheney, *Felons or Dupes? Treatment of Trump's Fake Electors Has Varied Wildly by State*, Politico, May 11, 2024, https://perma.cc/78TS-LUV4.

In one of his first official acts after his second inauguration in 2025, President Trump granted clemency to nearly 1600 people charged in connection with the January 6, 2021 attack on

the Capitol during the counting of electoral votes, including people convicted of attacking police and engaging in seditious conspiracy. Alan Feuer, *Trump Grants Sweeping Clemency to All Jan. 6 Rioters*, N.Y. Times, Jan. 20, 2025, https://www.nytimes.com/2025/01/20/us/politics/trump-pardons-jan-6.html. Does this action increase the likelihood of future violent attempts to subvert election results?

# Chapter 9. Third Parties and Independent Candidates

ADD THE FOLLOWING AT THE END OF NOTE 9 ON PAGE 687:

May states deny ballot access to *federal* candidates on the ground that they lack the qualifications for office set forth in the U.S. Constitution? In *Trump v. Anderson*, 601 U.S. 100 (2024), excerpted in Chapter 6 of this Supplement, the question arose in an unprecedented context. The Colorado Supreme Court ruled that former President Trump should be excluded from the state's primary ballot, because he was disqualified from the presidency by Section 3 of the Fourteenth Amendment, which prohibits people who engaged in insurrection from holding certain federal and state offices. The U.S. Supreme Court unanimously reversed. Although the Court was not unified in its rationale, all of the justices agreed that the state lacked the power to exclude Trump from the ballot on this ground. It remains unclear whether a state could exclude a candidate from the ballot on the ground that they fail to satisfy other constitutional qualifications for federal office.

ADD THE FOLLOWING AT THE END OF NOTE 7 ON PAGE 701:

A recent paper argues that the United States should pursue major structural reforms – including fusion voting – that would dismantle the "two-party doom loop" and strengthen other political parties. Lee Drutman, *More Parties, Better Parties: The Case for Pro-Parties Democracy Reform*, New America, July 7, 2023, https://perma.cc/Q4X6-E4SS. Here is an excerpt from the executive summary:

> Political parties are the central institutions of modern representative democracy. They must also be the center of reform efforts. To redirect and realign the downward trajectory of American politics, we must focus on political parties. We need them to do better. And in order for them to do better, we need more than two of them.
>
> It may seem obvious that system-level problems cannot be solved by incremental changes. Yet, for years, existential threats to American democracy have been met with small, candidate-related tweaks that have largely failed to alter the trajectory. Rather than continue to focus on bad actors or extremist individuals, then, we must understand the way in which the entire system empowers and elevates the worst instincts in political leaders, who in turn stoke the most irrational fears among citizens. We must understand how this extremism follows from the toxic combination of an anxious uncertainty and a confrontational us-against-them binary fight for total power. . . .
>
> Many proposals focus primarily on candidates and, in particular, elevating independent and moderate candidates in the immediate term. These "candidate-centric" reforms include open primaries, top-two primaries, ranked-choice voting, and blanket primaries that send the top four or five finishers regardless of party to a ranked-choice general election. This category of "candidate-centric" reforms views political parties as obstacles to good governance and see the task of reform as finding a clever way around the perceived destructiveness of parties and especially partisanship. Though these candidate-centric reforms can sometimes work in targeted circumstances, this paper argues that such

> productive circumstances are limited. More broadly, this paper argues that in addition to having mixed and uncertain immediate-term effects, these candidate-centric reforms are unlikely to have sustainable long-term positive effects, because they do not address the core questions of the political party system.
>
> Instead, this paper makes the case for pro-parties reforms both generally, and specifically for two powerful pro-parties reforms: fusion voting and proportional representation. Fusion voting allows for multiple parties to endorse the same candidate, encouraging new party formation. Proportional representation ends the single-member district, and makes it possible for multiple parties to win a proportional share of representation in larger, multi-member districts. The goal of these reforms—fusion in the short and medium terms, and proportional representation in the longer term—is to move us toward a thriving multiparty democracy in which healthy political parties perform the crucial functions essential to modern representative democracy, with less of the us-against-them, all-or-nothing, high-stakes uncertainty that sabotages self-governance.

Should the United States affirmatively pursue political reforms that are designed to move us from a two-party to a multiparty system? Are the reforms that Drutman suggests—fusion voting and proportional representation—the ones most likely to advance that goal?

In 2024, ballot measures in multiple states proposed alternative voting methods, including ranked-choice voting and all-party primaries. These proposals were rejected in Arizona, Colorado, Idaho, Montana, Nevada, Oregon, and South Dakota. Madison Fernandez, *Another 2024 Election Loser: Ranked Choice Voting*, Politico, Nov. 6, 2024, https://perma.cc/TJB7-DV7N. What does this mean for the future of alternative voting methods?

## Chapter 10. Campaigns

ADD THE FOLLOWING AFTER NOTE 3 ON PAGE 722:

4. *Hush Money.* Before he was again elected as president in 2024, Donald Trump was convicted on 34 counts of falsification of business records in a New York state court. Ben Protess et al., *Trump Convicted on All Counts to Become America's First Felon President*, N.Y. Times, May 30, 2024, https://www.nytimes.com/2024/05/30/nyregion/trump-convicted-hush-money-trial.html.

The charges arose from false records that were allegedly created to cover up hush money payments to Stormy Daniels, a former porn star who claims to have had an intimate encounter with him. The payments were allegedly made in October 2016, through Trump's then-lawyer and fixer Michael Cohen, and subsequently reimbursed by Trump's company through a series of payments that were falsely listed as for legal services. The alleged reason for buying Daniels's silence was to prevent damage to Trump's 2016 presidential campaign.

New York's criminal statute does not require that the falsification of business records be in connection with an election. New York Penal Law § 175.05. But to elevate the crime from a misdemeanor to a felony, there must be "an intent to commit another crime or to aid or conceal the commission thereof." New York Penal Law § 175.10. In Trump's case, prosecutors asserted that the false records were intended to conceal his violation of New York Election Law § 17-152:

> Conspiracy to promote or prevent election. Any two or more persons who conspire to promote or prevent the election of any person to a public office by unlawful means and which conspiracy is acted upon by one or more of the parties thereto, shall be guilty of a misdemeanor.

Note that this statute requires a conspiracy to promote or prevent someone's election by "unlawful means." So what were the "unlawful means"? Prosecutors asserted three: 1) violation of the federal contribution limit (then $2700) in the Federal Election Campaign Act (FECA), on the theory that hush money payments were disguised campaign contributions; 2) falsification of other records, namely bank records, an invoice, and tax forms; and 3) violation of city and state tax laws.

While the falsification of records charge was relatively straightforward, the elevation of charges to a felony through New York's election conspiracy law—and the partial reliance on federal campaign finance law to establish the requisite "unlawful means" —is novel. Assuming that the hush money payments were intended to influence the 2016 presidential election, is it appropriate for a state prosecutor to bring such charges, especially ones that rely on a violation of federal law?

More broadly, are hush money payments designed to influence an election a problem that warrants criminalization, either by states or the federal government? Note that this is not the first time the issue has arisen in connection with a presidential election. In 2012, former Democratic presidential candidate John Edwards was acquitted of federal charges that he had almost $1 million in hush money payments directed to a former mistress, to avoid damage to his 2008 presidential

campaign. As you read Part II, consider the First Amendment implications of a criminal prohibition on buying the silence of people who possess information harmful to a candidate, or requiring the disclosure of campaign funds given or spent for that purpose.

Trump was sentenced for the New York crimes after he won election over Kamala Harris for president in 2024 and just weeks before he assumed office again. He was given an "unconditional discharge," meaning he faced no prison time, jail time, or other penalties. The judge said he gave such an unusually light sentence for felony convictions so as not to encroach on the power of the presidency. Ximena Bustillo, *Trump is Sentenced in Hush Money Case—But Gets No Penalty or Fine*, NPR, Jan. 10, 2025, https://perma.cc/6R3D-K2D8. Trump has appealed arguing, among other things, that federal law preempts state charges based on federal campaign finance violations. Michael R. Sisak & Jennifer Peltz, *President Donald Trump Appeals His New York Hush Money Conviction*, AP, Jan. 29, 2025, https://perma.cc/F4RB-JRR7.

ADD THE FOLLOWING TO THE END OF NOTE 7 ON PAGE 738:

Two states, Florida and Texas, passed laws that require social media platforms to carry certain content under particular circumstances. In *Moody v. NetChoice*, 603 U.S. 707 (2024), the Supreme Court rejected a facial challenge brought by the social media platforms to the Florida and Texas laws. *Id.* at 723–26. But the Court in dicta strongly embraced the view that social media platforms, which are private entities, have the same rights as newspapers to engage in content moderation, including or excluding content as they see fit. As Justice Kagan wrote in her majority opinion, Texas's law, if upheld, would prevent platforms from removing posts that "advance false claims of election fraud." *Id*. at 737. The Court concluded that "a State may not interfere with private actors' speech to advance its own vision of ideological balance." *Id*. at 741.

Just before the 2024 elections, California passed a law barring the dissemination of certain maliciously created deepfakes. The law prohibits "an advertisement or other election communication containing materially deceptive content of . . . [a] candidate for any federal, state, or local elected office in California portrayed as doing or saying something that the candidate did not do or say if the content is reasonably likely to harm the reputation or electoral prospects of a candidate." Cal. Elec. Code § 20012 (2024). The law contains exceptions for such communications coming from a candidate and for "satire or parody," both of which could be shared legally so long as the communications included a label (or, in the case of audio, an audio statement) to indicate that the image or sound was "manipulated." *Id.* The law further provides that, "[f]or visual media, the text of the disclosure shall appear in a size that is easily readable by the average viewer and no smaller than the largest font size of other text appearing in the visual media." *Id.*

In *Kohls v. Bonta*, 752 F. Supp. 3d 1187 (E.D. Cal. 2024), a federal district court preliminarily enjoined the law, holding that it likely violated the First Amendment. The court "acknowledge[d] that the risks posed by artificial intelligence and deepfakes are significant, especially as civic engagement migrates online and disinformation proliferates on social media." *Id.* at 1199. But it held that the law "acts as a hammer instead of a scalpel, serving as a blunt tool that hinders humorous expression and unconstitutionally stifles the free and unfettered exchange of ideas which is so vital to American democratic debate." *Id.* The court concluded that the ban on these communications stifled too much political speech, and counterspeech was a more narrowly

tailored alternative. *Id.* at 1191. Moreover, the font size of the labeling requirement for satire or parody was too burdensome. However, the court recognized that "labelling requirements, . . . if narrowly tailored enough, could pass constitutional muster." *Id* at 1196.

ADD THE FOLLOWING AFTER NOTE 1 ON PAGE 782:

1.5. A North Carolina statute makes it a crime to publish a "derogatory report[]" about candidates for public office where the speaker "know[s] such report to be false or" acts "in reckless disregard of its truth or falsity." A local prosecutor indicated he was going to indict Josh Stein, North Carolina's attorney general and later a candidate for governor, for a statement Stein's campaign made against his opponent in his 2020 race for attorney general. Before the state could indict, Stein sought relief in federal court. The Fourth Circuit held that North Carolina's law likely violated the First Amendment, in part because it would cover *true* derogatory statements that were made with reckless disregard as to whether they were true or false. The court also held the law was an unconstitutional content-based restriction on speech. "The Act does not reach all 'derogatory reports' made with 'reckless disregard of [their] truth or falsity.' N.C. Gen. Stat. § 163-274(a)(9). Instead, it limits its prohibition to statements about a certain subject ('any candidate in any primary or election') of a particular nature or made with a particular intent ('calculated or intended to affect the chances of such candidate for nomination or election')." *Grimmett v. Freeman*, 59 F.4th 689, 694 (4th Cir. 2023). Stein won election as governor in 2024.

ADD THE FOLLOWING AFTER NOTE 5 ON PAGE 784:

6. The 2023 election for state supreme court justice in Wisconsin was at that time the most expensive judicial election on record, topping $42 million. Although the candidates there did not run with party labels, one candidate, Janet Protasiewicz, was strongly supported by Democrats and the other, Daniel Kelly, by Republicans. The state Democratic Party spent nearly $9 million supporting Protasiewicz, who won the election with $6 million more spending in support of her candidacy than Kelly had. Scott Bauer, *Spending in Wisconsin Supreme Court Race Tops $42 Million*, Associated Press, Apr. 3, 2023, https://perma.cc/V35K-XZQH.

During the campaign Protasiewicz said she likely would recuse herself from hearing any cases involving the Democratic Party of Wisconsin as a litigant. Her opponent, Kelly, did not pledge to recuse in any cases "involving GOP megadonor Richard Uihlein, whose pro-Kelly group Fair Courts America has spent millions on the former justice's campaign. 'I will consider those matters individually as I had before, as is appropriate for a justice of the court,' Kelly said." Shawn Johnson, *Supreme Court Candidate Janet Protasiewicz Says She'd Recuse Herself in Cases Involving State Democratic Party*, Wisconsin Public Radio, Mar. 1, 2023, https://perma.cc/WB7R-LGT6. Would Protasiewicz recuse in election cases in which one of the litigants is the Democratic nominee for governor or president? Should she? Consider this question after reading *Caperton*.

This judicial race was so expensive and contested because ideological control of the court was at stake, and issues such as abortion rights and redistricting loomed large over the race. Protasiewicz made clear in campaign speech her views on these issues, providing voters with a clear choice between the candidates. She defended her candor as reflecting her values. "'And the reason that I have been so clear about what my values are is that I believe the voters deserve to

know what the candidate seeking office believes . . . I also value a woman's freedom to make her own health care decisions with her doctor, family and faith.' Protasiewicz said she would not step aside in cases involving abortion, telling reporters that she had never promised to rule one way or another. 'Every single time I talk about what my personal values are, I make sure everybody understands that I will only be making decisions based on what the law is and based on what the Constitution is,' Protasiewicz said." *Id*.

Wisconsin's 2023 judicial election spending looks almost quaint in retrospect compared to the over $100 million spent (according to Brennan Center data: https://perma.cc/D7EJ-SE2T) in the 2025 Wisconsin state supreme court election race between Susan Crawford and Brad Schimel. The $54 million spent in support of Schimel—including millions spent by Elon Musk, much through his America PAC—outpaced the $46 million spent in support for Crawford. But Crawford won the race, in part because of the negative attention paid to Musk's campaigning for Schimel. Musk at that point was mired in controversy for working closely with the Trump administration on "DOGE" efforts to advance Trump's agenda. Musk appeared to be interested in the Wisconsin judicial election because of the potential for the state supreme court to change congressional redistricting rules, potentially affecting national control of the House of Representatives. He said on the Sunday before the election: "If the [Wisconsin] Supreme Court is able to redraw the districts, they will gerrymander the district and deprive Wisconsin of two seats on the Republican side. … Then they will try to stop all the government reforms we are getting done for you, the American people." Richard L. Hasen, *What Elon Musk Won in Wisconsin*, Slate, April 3, 2025, https://perma.cc/YB4F-6KVZ. (Despite Musk's prediction, following the election in which the liberal candidate won, the Wisconsin Supreme Court declined to take up the question of the constitutionality of Wisconsin's congressional redistricting in time for the 2026 elections. See Lawrence Andrea, *Wisconsin Supreme Court Rejects Bid to Reconsider Congressional Map before 2026 Midterms*, Milwaukee Journal-Sentinel, June 25, 2025, https://perma.cc/7LYB-3YGB.) Next time, Musk may again spend big, but not make himself a central figure in the campaign for the candidate he supports. *Id*.

In Georgia, a candidate for state supreme court faced potential disciplinary charges for saying in a state supreme court campaign "that the Georgia Constitution includes a right to privacy that protects a woman's right to an abortion, that he will protect that right if elected to the Georgia Supreme Court, and that his opponent cannot be trusted to do so." *Barrow v. Hydrick*, 2024 WL 2216834, *2 (N.D. Ga. May 16, 2024). A federal court declined to get involved while the matter was pending before a state judicial disciplinary board. (The candidate later lost election to the incumbent.) And in Arizona, a state supreme court justice who voted to revive a 19th century state law banning abortion wrote an op-ed complaining of the campaign against him for that vote as he faced a retention election. Ronald J. Hansen, *Arizona Supreme Court Justice Targeted for Removal Over 1864 Abortion Ban Blasts Critics*, Arizona Republic, May 20, 2024, https://perma.cc/4BNV-MTS6.

Some have lamented the politicization of these judicial campaigns. But given intense political polarization and high stakes, such campaigns seem inevitable under the rules of *White* governing campaign speech and the campaign finance rules (detailed in the next chapter) that allow unlimited sums supporting or opposing candidates to office.

# Chapter 11. Bribery

ADD THE FOLLOWING AFTER THE PROBLEM ON PAGE 814–15:

The U.S. Supreme Court's decision in *Snyder v. United States*, 603 U.S. 1 (2024), relied on a federal criminal statute's use of the term "corruptly" to conclude that it prohibited only bribes and not gratuities. The case involved the federal program statute, 18 U.S.C. § 666 (discussed on page 826, note j of the Casebook). That statute makes it a crime, punishable by up to ten years imprisonment, for state, local, or tribal government officials to:

> corruptly solicit[] or demand[] for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more . . .

The defendant in *Snyder* was the former mayor of Portage, Indiana. He was charged with receiving $13,000 from a truck company, as a reward for the city awarding a $1.1 million contract to the company. A jury convicted him of accepting an illegal gratuity, in violation of 18 U.S.C. § 666. There was no allegation of a *quid pro quo* agreement for the company to pay him $13,000 in exchange for the city awarding it the contract.

In an opinion by Justice Kavanaugh, the Supreme Court reversed Snyder's conviction, concluding that the statute reaches only bribes and not gratuities. It relied on the statute's use of the term "corruptly" —like the federal official bribery statute, 18 U.S.C. § 201(b), and unlike the federal official gratuity statute, 18 U.S.C. § 201(c). It also relied on the statutory history, the heavy punishment under § 666, and federalism concerns arising from allowing the federal government to prosecute state and local officials for gratuities. Justice Jackson dissented, joined by Justices Sotomayor and Kagan. Her opinion relied on the statute's use of the term "rewarded," which she thought to encompass gratuities.

Perhaps the meaning of the statute is less certain than either the majority or the dissent admit. The term "corruptly" is ordinarily used in statutes prohibiting bribery, not gratuities. But the term "rewarded" suggests that it does reach gratuities. Acknowledging this uncertainty, Justice Gorsuch concurred. He thought that "any fair reader of this statute would be left with a reasonable doubt about whether it covers the defendant's charged conduct." Given that doubt, he applied the rule of lenity, concluding that the statute did not cover Snyder's acceptance of a gratuity.

For an examination of the meaning of corrupt intent in a different context see *Eastman v. Thompson*, 594 F. Supp. 3d 1156 (C.D. Cal. 2022). *Eastman* involved a federal statute, 18 U.S.C. § 1512(c)(2), that criminalizes the corrupt obstruction of an official proceeding. Presented with evidence that former President Donald Trump and his lawyer John Eastman acted deceitfully and with knowledge that their actions were wrongful, in planning to disrupt the electoral count on January 6, 2021, the district court found it more likely than not that they acted "corruptly" under § 1512. The Supreme Court in a separate case more recently limited the scope of this section to when a defendant obstructs official proceedings through some sort of interference with evidence. *Fischer v. United States*, 603 U.S. 480 (2024). The Court ordered a lower court to reconsider

application of this section to someone who invaded the U.S. Capitol on January 6, 2024. President Trump had also been charged under this statute, and in the immunity case described in this Supplement to Chapter 6, the Supreme Court indicated that those charges against him would need to be reexamined in light of *Fischer. Trump v. United States*, 603 U.S. 593, 603 n.1 (2024). Of course, with Trump's election in 2024, the Department of Justice will not pursue these charges further.

ADD THE FOLLOWING AT THE END OF NOTE 4 ON PAGE 833:

The Sixth Circuit recently addressed the question whether an explicit promise or agreement is required, in a case involving a Cincinnati city council member's alleged acceptance of campaign contributions for supporting a property development. The council member did not expressly promise to support the development in exchange for the contribution and, at one point, expressly said: "[N]othing can be illegal like . . . illegally *nothing can be a quid, quid quo pro [sic].* And I know that's not what you're saying either." *United States v. Sittenfeld,* 128 F.4th 752, 764 (6th Cir. 2025). But he later accepted $20,000 in contributions to his political action committee and, in the same meeting, expressed support for the development and his intent to help secure votes for it. He was later convicted of extortion under the Hobbs Act and federal programs bribery. *Id.* at 767.

A divided Sixth Circuit upheld the convictions. Writing for the two-judge majority, Judge Nalbandian understood *McCormick* and *Evans* to require "an *explicit* quid pro quo," *id.* at 768, but held that this may be shown by "'something short of a formalized and articulated contractual arrangement,' so 'merely knowing the payment was made in return for official acts is enough.'" *Id.* at 769 (quoting *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994)). According to the majority, "unambiguous evidence" of an agreement is not required "so long as the jury can infer the content of the quid pro quo." *Id.* That would seem to vitiate the requirement that the quid pro quo be "explicit," but the majority drew a distinction between an "explicit" and "express" agreement saying that the former is required but the latter is not. *Id.* at 769.

Confused yet? We are too—and so seem to be the other judges in *Sittenfeld*. Judge Murphy wrote an anguished concurrence, joining the majority opinion but expressing First Amendment concerns about the danger to First Amendment-protected political speech raised by this vague standard. *Id.* at 786, 787 (Murphy, J., concurring). Judge Bush dissented, finding insufficient evidence of "an explicit agreement on *both* sides of the transaction," and urging that the Supreme Court clarify the standard for bribery and extortion. *Id.* at 796, 805–806 (Bush, J., dissenting).

A cert petition is expected.

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 835:

The Supreme Court decided two more cases at the end of its 2022–23 term under the mail and wire fraud statutes, 18 U.S.C. §§ 1343, 1346. Both arose from allegations of corruption in connection with the administration of former New York Governor Andrew Cuomo.

In *Percoco v. United States*, 598 U.S. 319 (2023), the Court rejected as overly vague a jury instruction on whether a top aide to Cuomo had conspired to commit honest services fraud under

these statutes. During the period in question, Percoco had resigned from his position in the Governor's office to manage Cuomo's reelection campaign, only to resume his role as Executive Deputy Secretary later that year. Significantly, the Court rejected Percoco's argument that a private citizen can *never* be convicted of honest services fraud, while also concluding that this duty does not extend to all private citizens. The trial judge had instructed the jury that Percoco owed a duty if he "dominated and controlled any governmental business" and "people working in the government actually relied on him because of a special relationship he had with the government." The Court found these instructions overly vague, without providing much clarity on what a permissible instruction would look like.

The other case, *Ciminelli v. United States*, 598 U.S. 306 (2023), addressed whether potentially valuable economic information can be considered "property" under the wire fraud statute. The defendant in that case was convicted for an alleged scheme to rig the bidding process for a state-funded development project. The Court held that the statute includes only "traditional property interests," *id.* at 316, and reversed the conviction on that ground.

ADD THE FOLLOWING AFTER NOTE 5 ON PAGE 851:

6. The second Trump Administration has raised unprecedented concerns about political corruption and the potential for bribery. President Trump hosted an exclusive dinner for over 200 investors in his $TRUMP cryptocurrency. His family has opened a Washington club called "the Executive Branch," with an admission fee of $500,000. The President has accepted a luxury 747 jetliner as a gift from the government of Qatar, with an estimated value of $200 million. And the list goes on. See Peter Baker, *As Trumps Monetize Presidency, Profits Outstrip Protests*, N.Y. Times, May 25, 2025, https://www.nytimes.com/2025/05/25/us/politics/trump-money-plane-crypto.html; David Frum, *The Trump Presidency's World-Historical Heist*, The Atlantic, May 28, 2025, https://perma.cc/3TVD-DDVE.

It would presumably violate federal bribery law, if a promise or agreement to receive something of value (like a jet) for an official act could be proven. What is the likelihood of such a case being brought by federal prosecutors? If President Trump were prosecuted after he leaves office, would he enjoy immunity under *Trump v. United States* (Chapter 6 of this Supplement)? Are there other means by which to prevent political corruption and enforce bribery laws?

## Chapter 12. The *Buckley* Framework

ADD THE FOLLOWING AFTER FIRST FULL PARAGRAPH ON PAGE 854:

Using somewhat different methodology, and with the caveat that data "are incomplete due to disclosure limitations," the editors of the new *Financing the 2020 Election* volume calculate spending on federal election activity in 2020 as follows: "at least $16.8 billion was spent during the 2020 election . . . These figures more than doubled the comparable figures of $8.1 billion for the 2016 election . . ." Molly E. Reynolds and John C. Green, *Financing the 2020 Election: Change and Continuity*, at 7, in Financing the 2020 Election (Molly E. Reynolds & John C. Green eds., 2023).

Early figures on federal spending in the 2024 elections compiled by Open Secrets [https://tinyurl.com/ytnukzfz] show that, adjusted for inflation, spending actually fell in 2024, to just under $16 billion, compared to 2020.

## Chapter 13. Spending Limits

ADD THE FOLLOWING AFTER NOTE 5 ON PAGE 987:

5.5 Ohio passed a statute that went beyond federal law regulating foreign election spending in two ways: it barred legal permanent residents from contributing or spending money in state campaigns and extended the foreign ban to state ballot measure elections. See Ohio Rev. Stat. § 3517.121. It also limits nonprofits such as labor unions that take money from members who include legal permanent residents from spending commingled funds on contributions and expenditures in Ohio. The statute does not limit the political contributions and spending of foreign-owned American corporations.

A federal district court enjoined the law as it applied to permanent legal residents and nonprofits taking political money from them, but a divided Sixth Circuit stayed that injunction, holding that the Ohio law was likely constitutional. *OPAWL—Building AAPI Feminist Leadership v. Yost*, 118 F.4th 770 (6th Cir. 2024). The majority followed *Bluman* in holding democratic self-government serves as a compelling interest to justify the ban on contributions and spending by legal permanent residents and suggested that *Citizens United* might bar similar limits on such activity by foreign-owned American corporations. *Id.* at 784–85. A convincing distinction?

The dissenter thought not, and also wrote that Ohio did not have a compelling interest in limiting the contributions and spending of legal permanent residents, who "have a lawful, though conditional, right to live in the United States permanently, and . . . have a different relationship with this country than do other groups of noncitizens. . . . LPRs share in many of the responsibilities, and the rights, of United States citizens. For instance, LPRs register for selective service in the United States military, pay taxes and they can be employed in the United States without any additional paperwork. LPRs can be found in communities small and large where they often work, raise families, and share in citizens' desire to support efforts that promote the general welfare of the communities in which they live." *Id*. at 789 (Davis, J., dissenting).

Moving in a different direction from Ohio, some opponents of *Citizens United* have tried to limit corporate spending in elections by using the presence of some foreign investment in or control over a corporation as a reason to limit the corporation's spending under *Bluman*. In *Central Maine Power Co. v. Maine Commission on Governmental Ethics and Election Practices*, 721 F. Supp. 3d 31 (D. Me. 2024), a federal court preliminarily enjoined enforcement of a Maine law passed by ballot initiative that, among other things, limited spending on state referenda and candidate elections by corporations with at least 5 percent ownership by a foreign government or foreign government-controlled entity. The court held that such a limit was likely unconstitutionally overbroad. The case is currently on appeal to the First Circuit.

Some of these laws go even further, for example, by limiting the campaign spending of corporations with foreign ownership (and not just foreign *government* ownership) of a mere one percent of the corporation. Lawsuits are underway. For an overview, see Jason Abel, Adie J. Olson & Elizabeth Goodwin, *Growing List of States and Localities Prohibit Foreign Political Spending*, Steptoe Political Law Blog, Jan. 5, 2024, https://perma.cc/HF5K-7ARX. On the Federal Election Commission's treatment of domestic subsidiaries of foreign corporations, see the sources cited on

this FEC information page, FEC Record, Foreign Nationals, June 23, 2017, https://perma.cc/JUZ7-WCT5.

In April 2024, President Trump directed the United States Department of Justice to investigate ActBlue, a fundraising platform used heavily by Democrats for online fundraising, ostensibly on grounds that the platform was too lax in policing credit card donations to assure they were not coming from foreign individuals. Democrats and others saw this directive instead as an effort to go after Trump's political opponents. Maggie Haberman, Reid J. Epstein, & Kenneth P. Vogel, *Trump Directs Justice Dept. to Investigate ActBlue, Democrats' Cash Engine*, N.Y. Times, Apr. 24, 2025, https://www.nytimes.com/2025/04/24/us/politics/trump-actblue-democrats.html.

## Chapter 14. Contribution Limits

NOTE THE FOLLOWING CORRECTION TO PAGE 1018:

Just before "Notes and Questions," remove the line "Justice SOUTER delivered the opinion of the Court."

ADD THE FOLLOWING AT THE END OF NOTE 2 ON PAGE 1020:

After the Ninth Circuit struck down Alaska's individual campaign finance limits, Alaska legislators considered but were unable to reach a deal imposing new limits. Alaska has now gone from a state with one of the lowest individual contribution limits to one in which a donor may give directly to a candidate for office any size donation. Since then, campaign spending in Alaska unsurprisingly has surged. Zachariah Hughes, *Conservatives Close Fundraising Gap in Assembly Races with Help of Big Donors and Independent Expenditure Group*, Anchorage Daily News, April 4, 2023, https://perma.cc/Q2EA-9CVA. A ballot measure has qualified for the 2026 ballot to impose new limits, but the state legislature may pass new limits first. James Brooks, *With Lawmakers' Help, Alaska Political Donation Limits Could Come Before 2026 Election*, Alaska Beacon, May 1, 2025, https://perma.cc/CL5P-TTYM.

ADD THE FOLLOWING AT THE END OF NOTE 1 ON PAGE 1028:

More recently, the National Senatorial Campaign Committee, then-Senator (and now Vice President) J.D. Vance of Ohio and Representative Steve Chabot of Ohio launched a new attack on the limits on party coordinated spending. They sued the FEC, arguing that *Colorado II* was factually distinguishable from the issues they face and that subsequent Supreme Court authority has undermined *Colorado II*. The Sixth Circuit, sitting en banc to consider the question pursuant to a jurisdictional provision of FECA, rejected the challenge. It held that, as an inferior court, it was bound by the Supreme Court's decision in *Colorado II*. *National Republican Senatorial Committee v. FEC*, 117 F.4th 389 (6th Cir. 2024). One judge dissented, and a number of judges in concurring opinions debated whether to use a "history and tradition" test to consider First Amendment challenges to campaign finance laws. The Supreme Court has granted cert. *NRSC v. FEC*, 2025 WL 1787717 (June 30, 2025). It agreed to allow the Democratic National Committee to intervene to defend the law, and it appointed an independent amicus, attorney Roman Martinez, to argue to the Court on behalf of the law's constitutionality.

ADD THE FOLLOWING AT THE END OF NOTE 2 ON PAGE 1028:

For a case striking down some New Mexico state limits on political party contributions to candidates and other political party committees as violating the First Amendment, see *Republican Party of New Mexico v. Torrez*, 687 F. Supp. 3d 1095 (D.N.M. 2023). The Court relied heavily on the *Randall* factors in examining each limit.

ADD THE FOLLOWING AT THE END OF NOTE 2 ON PAGE 1040:

"When Super PACs first came into existence, a common concern was that businesses would spend substantial amounts from their general treasury funds 'open[ing] the floodgates to special interests.' [Compiled data show that] "[c]learly, the primary funders of Super PACs are not business treasuries per se (a primary concern of critics of *Citizens United*) but individuals. In the 2020 election cycle, Super PACs received $2.7 billion, almost doubling the $1.5 billion received in 2016. Of that $2.7 billion, individuals contributed $2.4 billion (89 percent), while corporation and union treasuries contributed about $160 million each (6 percent each)." Jay Goodliffe. *Interest Group Money in the 2020 Election*, at 169, in Financing the 2020 Election (Molly E. Reynolds & John C. Green eds., 2023). Why so little from corporations and labor unions? Why so much from individuals?

Professor Hasen gives one answer to the latter question in Richard L. Hasen, *Faux Campaign Finance Regulation and the Pathway to American Oligarchy* (draft manuscript April 28, 2025, available at: https://ssrn.com/abstract=5229707). First, using Open Secrets data, he notes a major shift in the willingness of ultrawealthy donors to spend in elections:

> In the 2024 elections, the top six donors supporting or opposing federal candidates each reported contributing at least $100 million. These donors—Elon Musk ($291.5 million), Timothy Mellon ($197 million), Miriam Adelson ($148.3 million), Richard and Elizabeth Uihlein ($143.5 million), Ken Griffin ($108.4 million), and Jeffrey and Janine Yass ($101.1 million)—all exclusively supported Donald Trump and other Republican candidates (except for the Yasses, who gave a nominal $1,500 contribution on the Democratic side). The biggest donor on the liberal side (after Trump-supporting $64.8 million donor Paul Singer) was former New York City mayor and publisher Michael Bloomberg, who gave $64.3 million total, with all but $1 million going to the Democratic side.
>
> We have never seen so many nine-figure donors in an election. In the 2022 midterm elections, the sole nine-figure donor was George Soros ($178.8 million), with his contributions going to help Democrats. In earlier election seasons, nine-figure donors also were rare: there were two in 2020 (Sheldon and Miriam Adelson and Michael Bloomberg), one in 2018 (Sheldon Adelson), and none before then.
>
> These numbers do not include all of the spending and contributing by these ultrawealthy individuals (including amounts contributed to non-disclosing political organizations). Take the spending of the world's richest man, Elon Musk. Even the $291.5 million figure does not include the value of content on his social media platform X (formerly Twitter), which reaches hundreds of millions of users. Musk reportedly tweaked the platform's algorithm to promote content favorable to Donald Trump, something quite valuable but hard to precisely value. Nor do these figures include the value of the publicity for his controversial get-out-the-vote effort in swing states which include a $1 million per day lottery for registered voters that could well have violated federal law.

> Aside from these nine-figure donors, the ultrawealthy more broadly have an oversized influence in politics. Open Secrets data show that the top 100 donors gave almost 70 percent of total money to outside groups like super PACs. The top 1 percent of donors gave 98 percent of the outside money. And thanks to changes in technology such as the rise in social media, the ultrawealthy have new ways to transform their economic heft into political might without running afoul of any regulation.
>
> Then, Hasen opines on possible reasons for the changes:
>
> It is hard to know whether the severely lopsided spending by the ultrawealthy in 2024 in favor of Republicans is a new trend or a blip. Looking at the top 10 donors in each of the last few elections from 2012 to 2024 does not show a clear pattern of conservative dominance until 2024. Indeed, in some races, such as when Democrats were trying to retake the House in 2018, liberal spending outpaced conservative spending. The question is how the ultrawealthy will react in 2026 and 2028 to both the 2024 spending and the current volatile political conditions in the United States. . . .
>
> It is also hard to pinpoint what exactly changed with donors psychologically in 2024 to unleash this torrent of $100 million+ donors. The Super PAC path had been available in a few previous election cycles. Perhaps it is that the few who spent this much in earlier elections faced no public backlash for the extravagant spending. Perhaps it is because large donors (like many others) have become more polarized and see more at stake and are therefore willing to part with more money. In any case, a psychological barrier seems to have been broken.
>
> There was some backlash to Elon Musk's $20 million spending in a high profile 2025 Wisconsin state supreme court race. That reaction might cause some very large donors to become less willing to be out there publicly promoting candidates in the way that Musk did. It may also push more money into nondisclosing 501(c)(4) groups and other entities. We will need a few more election cycles to see precisely where things may lead with the ultrawealthy.

ADD THE FOLLOWING AT THE END OF NOTE 5 ON PAGE 1040:

Campaign committees run by candidates and supportive Super PACs have found new creative ways to coordinate their messages and themes without running afoul of technical Federal Election Commission coordination rules. "To work around the prohibition on directly coordinating with super PACs, candidates are posting their instructions to them inside the red boxes on public pages that super PACs continuously monitor. [¶] The boxes highlight the aspects of candidates' biographies that they want amplified and the skeletons in their opponents' closets that they want exposed. Then, they add instructions that can be extremely detailed: Steering advertising spending to particular cities or counties, asking for different types of advertising and even slicing who should be targeted by age, gender and ethnicity." Shane Goldmacher, *The Little Red Boxes Making a Mockery of Campaign Finance Laws*, N.Y. Times, May 16, 2022, https://www.nytimes.com/2022/05/16/us/politics/red-boxes-campaign-finance-democrats.html.

Gabriel Foy-Sutherland & Suarav Ghosh, *Coordination in Plain Sight: The Breadth and Uses of "Redboxing" in Congressional Elections*, 23 Election Law Journal 149, 151 (2024), https://doi.org/10.1089/elj.2023.0038, found that over "two hundred candidates for federal office employed redboxing during the 2022 electoral cycle, and these same candidates frequently benefitted from super PAC spending that was hundreds of times greater than candidates who did not redbox."

An FEC ruling sought by Democrats in 2024 (but relied upon far more heavily by the Trump presidential campaign in 2024) freed up super PACs to work with candidates on canvassing and get-out-the-vote activities without running afoul of coordination rules. Federal Election Commission Advisory Opinion 2024-01 (Texas Majority PAC), https://perma.cc/9KXA-VU53. Many thought that the Trump campaign's outsourcing of such efforts to an allied Super PAC backed by billionaire Elon Musk would backfire. Steve Contorno & Fredreka Schouten, *Trump's Ground Game Relies on Untraditional Strategies to Draw Out Battleground Voters*, CNN, Oct. 4, 2024, https://perma.cc/FY6V-KWLP. But it seemed to work out fine for Trump.

What's left of the rules against "coordination" between candidates and super PACs?

ADD THE FOLLOWING AT THE END OF NOTE 7 ON PAGE 1070:

With no noted dissents, the Supreme Court once again turned down a case raising the constitutionality of the federal ban on direct corporate contributions to candidates. *Lundergan v. United States*, 142 S. Ct. 2676 (2022). The reason is somewhat of a mystery. See Richard Briffault, *The Surprising Survival—So Far—of the Corporate Contribution Ban*, 3 University of Chicago Business Law Review 399 (2024).

ADD THE FOLLOWING AT THE END OF NOTE 8 ON PAGE 1073:

In *Federal Election Commission v. Cruz for Senate*, 596 U.S. 289 (2022), the Supreme Court struck down another part of the McCain-Feingold law as violating the First Amendment. The opinion confirmed the consistent conservative-liberal split on the constitutionality of campaign finance limits, but it appeared to break little new doctrinal ground.

The contested provision essentially made it illegal for a campaign to pay back a candidate for loans the candidate made to the campaign in excess of $250,000 with funds raised after the election. "The Government argues that the contributions at issue raise a heightened risk of corruption because of the use to which they are put: repaying a candidate's personal loans. It also maintains that post-election contributions are particularly troubling because the contributor will know—not merely hope—that the recipient, having prevailed, will be in a position to do him some good." *Id.* at 306.

The Court majority was unpersuaded, seeing the law as a "drag" on the willingness of candidates to lend money to their campaigns, thereby burdening their First Amendment-protected activity:

> We greet the assertion of an anticorruption interest here with a measure of skepticism, for the loan-repayment limitation is yet another in a long line of "prophylaxis-upon-prophylaxis approach[es]" to regulating campaign finance. *McCutcheon* (quoting *WRTL*) (opinion of Roberts, C.J.). . . .
>
> There is no cause for a different conclusion here. Because the Government is defending a restriction on speech as necessary to prevent an anticipated harm, it must do more than "simply posit the existence of the disease sought to be cured." *Colorado Republican*. It must instead point to "record evidence or legislative findings" demonstrating the need to address a special problem. *Ibid.* We have "never accepted mere conjecture as adequate to carry a First Amendment burden." *McCutcheon* (quoting *Shrink Missouri*).
>
> Yet the Government is unable to identify a single case of quid pro quo corruption in this context—even though most States do not impose a limit on the use of post-election contributions to repay candidate loans. Cf. Brief for Campaign Legal Center et al. as *Amici Curiae* 17–18 (citing the 10 States that do impose such a prohibition). Our previous cases have found the absence of such evidence significant. See *Citizens United* (the Government did not claim that the political process was corrupted in the 26 States that allowed unrestricted independent expenditures by corporations); *McCutcheon* (the Government presented no evidence of corruption in the 30 States that did not impose aggregate limits on individual contributions).
>
> The Government instead puts forward a handful of media reports and anecdotes that it says illustrate the special risks associated with repaying candidate loans after an election. But as the District Court found, those reports "merely hypothesize that individuals who contribute after the election to help retire a candidate's debt might have greater influence with or access to the candidate." That is not the type of *quid pro quo* corruption the Government may target consistent with the First Amendment. See *McCutcheon*.

*Id.* at 306–08.

Justice Kagan, for the three liberal dissenters, saw the matter differently:

> A candidate for public office extends a $500,000 loan to his campaign organization, hoping to recoup the amount from benefactors' post-election contributions. Once elected, he devotes himself assiduously to recovering the money; his personal bank account, after all, now has a gaping half-million-dollar hole. The politician solicits donations from wealthy individuals and corporate lobbyists, making clear that the money they give will go straight from the campaign to him, as repayment for his loan. He is deeply grateful to those who help, as they know he will be—more grateful than for ordinary campaign contributions (which do not increase his personal wealth). And as they paid him, so he will pay them. In the coming months and years, they receive government benefits—maybe favorable legislation, maybe prized appointments, maybe lucrative contracts. The politician is happy; the donors are happy. The only loser is the public. It inevitably suffers from government corruption.

> The campaign finance measure at issue here has for two decades checked the crooked exchanges just described. The provision, Section 304 of the Bipartisan Campaign Reform Act of 2002, prohibited a candidate from using post-election donations to repay loans exceeding $250,000 that he made to his campaign. The theory of the legislation is easy to grasp. Political contributions that will line a candidate's own pockets, given after his election to office, pose a special danger of corruption. The candidate has a more-than-usual interest in obtaining the money (to replenish his personal finances), and is now in a position to give something in return. The donors well understand his situation, and are eager to take advantage of it. In short, everyone's incentives are stacked to enhance the risk of dirty dealing. At the very least—even if an illicit exchange does not occur—the public will predictably perceive corruption in post-election payments directly enriching an officeholder. Congress enacted Section 304 to protect against those harms.
>
> In striking down the law today, the Court greenlights all the sordid bargains Congress thought right to stop. The theory of the decision (unlike of the statute) is hard to fathom. The majority says that Section 304 violates the candidate's First Amendment rights by interfering with his ability to "self-fund" his campaign. But the candidate can in fact *self*-fund all he likes. The law impedes only his ability to use *other people*'s money to finance his campaign—much as standard (and permissible) contribution limits do. And even that third-party restriction is a modest one, applying only to post- (not pre-) election donations to repay sizable (not small) loans. So the majority overstates the First Amendment burdens Section 304 imposes. At the same time, the majority understates the anti-corruption values Section 304 serves. In the majority's view, there is "scant" danger here of *quid pro quo* corruption; loan repayments produce only the "sort of 'corruption'" in which contributors wield "greater influence" over candidates than they otherwise would. Assume away all objections to that distinction, which even the majority concedes is "vague,"; for better or worse, it underlies this Court's recent campaign finance decisions. Still, the conduct targeted by Section 304 threatens, if anything does, both corruption and the appearance of corruption of the *quid pro quo* kind. That is because the regulated transactions—as Members of Congress well knew from experience—personally enrich those already elected to office. In allowing those payments to go forward unrestrained, today's decision can only bring this country's political system into further disrepute.

*Id*. at 314–15 (Kagan, J., dissenting).

# Chapter 16. Disclosure

ADD THE FOLLOWING AT THE END OF NOTE 6 ON PAGE 1192:

Relying in part upon *Bonta*, a federal appeals court held some broad campaign finance disclosure rules in Wyoming, similar to federal "electioneering communications" disclosure rules, violated the First Amendment. *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1247–50 (10th Cir. 2023). The rules appeared to require disclosure of funding for some non-election-related political activities. The court recognized the government interests served by disclosure, and it suggested ways that Wyoming could narrow its disclosure rules so that they would be more likely to satisfy exacting scrutiny and not violate plaintiffs' rights. It described other cases upholding disclosure rules in similar circuits as "pre-*Bonta*" and held that *Bonta* required more careful tailoring.

The Ninth Circuit in contrast recently upheld a district court's denial of a preliminary injunction challenging the constitutionality of new Alaska campaign finance disclosure and disclaimer requirements. It described the exacting scrutiny standard as requiring that disclosure regulations be "reasonably narrowly tailored." *Smith v. Helzer*, 95 F.4th 1207, 1215 (9th Cir. 2024). The Supreme Court denied cert. *Smith v. Stillie*, 145 S. Ct. 567 (2024).

Professor Hasen argues that nonprofit entities, especially religious entities, are attractive plaintiffs for opponents of campaign finance disclosure and other regulation seeking to use courts to push further deregulation. Richard L. Hasen, *Nonprofit Law as the Tool to Kill What Remains of Campaign Finance Law: Reluctant Lessons from Ellen Aprill*, 56 Loyola of Los Angeles Law Review 1233 (2024).

ADD THE FOLLOWING AT THE END OF NOTE 7 ON PAGE 1193:

The en banc court in the *CREW* case, over the dissent of two judges, affirmed FEC Commissioners' use of prosecutorial discretion to insulate those decisions from judicial review. 55 F.4th 918 (D.C. Cir. 2022) (en banc). The D.C. Circuit is now considering the issue en banc. See *End Citizens United PAC v. FEC*, 2024 WL 4524248 (D.C. Cir. Oct. 15, 2024), granting rehearing en banc. In the meantime, the FEC lacks a quorum to do business, thanks to two resignations and President Trump's decision to terminate one of the Democratic commissioners, Ellen Weintraub. Weintraub is challenging her firing. Jessica Piper, *Departure on FEC Hobbles the Election Enforcement Agency*, Politico, April 30, 2025, https://www.politico.com/news/2025/04/30/fec-quorum-00318077.

NOTE THE FOLLOWING CORRECTION TO PAGE 1194:

Delete the final paragraph on this page.