2020 UPDATE TO

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Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century

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CHAPTER 3

THE CONSTITUTION AND RACIAL DISCRIMINATION

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SECTION 2. THE STATE ACTION DOCTRINE AS A LIMIT ON THE JUDICIAL POWER TO ADDRESS RACIAL DISCRIMINATION

B. THE PUBLIC/PRIVATE DISTINCTION TODAY

Page 263. Insert after the final paragraph:

In *Manhattan Community Access Corporation v. Halleck*, __ U.S. __. 139 S.Ct. 1921 (2019), the Supreme Court, by a 5-4 vote, underscored that the public functions doctrine offers an exceedingly narrow route to establishing state action. In *Halleck*, two public producers for a public access cable channel were suspended after a film they made aired and generated complaints. They claimed the channel abridged their free speech by suspending them based on the content of their film. The question was whether this public access channel on Time Warner's cable system in Manhattan was a state actor for purposes of the First Amendment. Although state regulations *required* New York City to ensure that a cable system would provide public access channels if the city granted it a cable franchise, the public access channel itself was operated by a private entity. "It is not enough that the federal, state, or local government exercised the function in the past, or still does," said Justice Kavanaugh for the majority, nor is it sufficient that "the function serves the public good or public interest in some way." Instead, the government must have "traditionally *and* exclusively performed the function," and "'very few' functions fall into that category." In justifying its restrictive approach to public functions, the Court offered a full-throated normative defense of the state-action requirement, noting that "[n]umerous private entities in American obtain government licenses, government contracts, or government-granted monopolies" and subjecting them to constitutional constraints would be inconsistent with what the Court took to be the normative underpinnings of the state action doctrine: "enforc[ing] a critical boundary between the government and the individual," "protect[ing]" a robust sphere of individual liberty" and avoiding principles that "would expand governmental control while restricting individual liberty and private enterprise." In her dissent, Justice Sotomayor emphasized that the public access channel was not a garden-variety private actor operating "against a regulatory backdrop," but instead a private actor specifically delegated a "constitutional responsibility" to operate a public forum for purposes of the First Amendment (see Chapter 6, §4A). Having been legally tasked to operate a such a forum, she argued, the public access station must "be accountable to the Constitution's demands."

CHAPTER 4

SEX AND GENDER DISCRIMINATION AND OTHER EQUAL PROTECTION CONCERNS

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SECTION 3: WHAT LEVEL OF SCRUTINY FOR OTHER "SUSPICIOUS" CLASSIFICATIONS?

B. LANGUAGE AND ETHNICITY

Page 448. Insert at the end of Note 1, following *Hernandez v. New York*:

In a highly charged recent case, the Court emphasized the relevance of just this sort of comparative inquiry about how prospective jurors had been questioned. In *Flowers v. Mississippi*, 139 S.Ct. 2228, 2019 WL 2552489 (June 21, 2019), the Court, by a 7-2 margin, upheld the *Batson* claim of Curtis Flowers, a black defendant who was convicted of murder and had challenged the prosecution's peremptory strikes against five of six black prospective jurors. This was the sixth trial for Flowers on the murder charge, and all but one of those past trials had involved *Batson* claims challenging the same prosecutor's use of race-based strikes. Recently, the case had garnered considerable media attention. In an extended analysis reaffirming the link between *Batson* and the Fourteenth Amendment's core ban on race discrimination, Justice Kavanaugh included among the factors judges may consider in assessing *Batson* challenges "disparate questioning and investigation of black and white prospective jurors in the case." In a further effort to clarify how a trial judge can identify pretextual justifications as part of the inquiry, the majority also included as relevant factors:

> • statistical evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case; ***
>
> • a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
>
> • relevant history of the State's peremptory strikes in past cases; or
>
> • other relevant circumstances that bear upon the issue of racial discrimination.

The Kavanaugh opinion drew a sharply worded dissent from Justice Thomas, who argued that Flowers' conviction should stand, and that *Batson* is a misguided doctrine that wrongly limits the use of peremptory strikes. Rather than being seen as discriminatory, Thomas argued that race-based strikes should be legitimate trial strategy

that can help all litigants, including black defendants who wish to strike "potentially hostile white jurors."

Page 483. Insert after Problem 4-6:

PROBLEM 4-7:

BOSTOCK V. CLAYTON COUNTY*: WHAT IMPLICATIONS FOR EQUAL PROTECTION CLAIMS?*

Title VII of the Civil Rights Act of 1964 bans discrimination in employment based on race and sex, among other protected characteristics. Its language does not specifically refer to discrimination based on sexual orientation or gender identity. In *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), the Supreme Court interpreted the language of Title VII to mean that an employer who fires an employee for being gay or transgender has fired that employee "because of" sex. The landmark ruling means that LGBT employees now have federal protection against employment discrimination.

Bostock is a statutory interpretation decision that emphasizes the force of the text rather than the unwritten purpose or expectations of the lawmakers who passed the law in 1964. It is not a constitutional holding. But the dissenting justices emphasized its potential impact on equal protection claims involving sexual orientation and gender identity. Consider what impact the decision may have in the constitutional domain.

The first thing to note is the decision's reasoning. Writing for a 6-3 majority, Justice Gorsuch reasoned that:

> An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision

In the opinion, Gorsuch focused on the language in Title VII banning discrimination "because of" sex and relied on previous case law applying the but-for

causation test to that statutory language. While that approach flows from law developed under Title VII, it has potentially significant implications for the many other federal statutes that ban sex discrimination. Indeed, in a vigorous dissent, Justice Alito collected over 100 such statutes in an appendix and said that, because of them, it was "virtually certain" that the holding would have "far reaching consequences." As a statutory holding, then, *Bostock* worked a significant change to the legal landscape for LGBT persons.

Does the logic of *Bostock* dictate that discrimination by government based on sexual orientation and gender identity are also per se forms of sex discrimination, and thus subject to intermediate scrutiny? The majority opinion was silent on this question. But Justice Alito's dissent argued that the decision "may exert a gravitational pull in constitutional cases" because "[b]y equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review." He went on to cite pending litigation challenging discrimination based on gender identity in the realms of military service, access to bathrooms and competitive sports, among others. Justice Kavanaugh's dissent also touched on the issue in the course of arguing that sexual orientation discrimination is not the same thing as sex discrimination. He noted that none of the Court's major constitutional decisions on gay rights had employed constitutional principles of sex discrimination.

Revisit the issue of discrimination against gay, lesbian and transgender teachers addressed in Problem 4-6. Drawing on *Bostock*, what arguments could plaintiffs challenging that discrimination make in support of raising the level of scrutiny to intermediate? What arguments could the government make in response? Which, in your view, should prevail.

CHAPTER 5

PROTECTING FUNDAMENTAL RIGHTS

SECTION 1. SHOULD COURTS EVER ENFORCE UNENEUMERATED RIGHTS?

Page 508. Add after note 5:

6. In *Ramos v. Louisiana*, 140 S.Ct. 1390, 2020 WL 1906545 (2020), the Court revisited the question whether the Sixth Amendment's guarantee of an impartial jury requires jury unanimity in state criminal proceedings. Only Louisiana and Oregon permitted criminal convictions without a unanimous verdict. Ramos contested his conviction by a Louisiana jury that was split 10-2. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Court had been asked to incorporate the jury unanimity requirement, but a splintered set of opinions failed to do so. Four justices thought the jury unanimity requirement should apply in both state and federal proceedings, but a different four thought that unanimity was required in *neither* setting. That left Justice Powell's opinion as determinative, and he thought the unanimity requirement only applied to federal trials.

In *Ramos*, a 6-3 majority ruled that the unanimity requirement is, indeed, incorporated against the states. Justice Gorsuch began his majority opinion with a pointed review of the racially-charged origins of laws permitting convictions in the absence of unanimity. He went to argue that there were good reasons to overrule *Apodaca*. He identified as the key criteria in deciding whether to overrule a prior decision "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." He went to observe that "no one on the Court is prepared to say [*Apodaca*] was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true." In other portions of his opinion not joined by all members of the majority, Gorsuch questioned whether the divided ruling in *Apodaca* was even "a governing precedent" entitled to *stare decisis* effect. In dissent, Justice Alito offered an extended argument for according *stare decisis* effect to *Apodaca*. He was joined by the Chief Justice and, for most of his opinion, by Justice Kagan. Alito placed special emphasis on the potentially destabilizing effect on past convictions of changing the rules about jury unanimity. It is notable that the Chief Justice joined the dissent. Concerns about overruling precedent in *Ramos* echoed the theme of his concurrence in *June Medical Services v. Russo*, the abortion ruling addressed below. Justice Kavanaugh also focused on *stare decisis*, noting in his concurrence that every member of the Court had voted to overrule precedents in some contexts and listing an extensive set of "notable and consequential" rulings that overruled a prior case. He argued that the Court needed a more consistent methodology and suggested reliance on three factors: whether the precedent (1) was not only wrong but "grievously or egregiously wrong;" (2) "caused significant negative jurisprudential or real-world consequences"; and (3) if overruled would "unduly upset reliance interests."

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SECTION 3. EQUAL PROTECTION AND "FUNDAMENTAL INTERESTS"

A. VOTING

Page 538. Add at the end of the Note on Political Gerrymandering:

In its opinion in *Rucho v. Common Cause*, __ S. Ct. __, 2019 WL 2619470 (June 27, 2019) (covered in Chapter 9 of this Supplement), the Court ended the years of uncertainty and ruled that partisan gerrymandering claims are non-justiciable political questions.

Page 639. Add after the Notes on Whole Woman's Health v. Hellerstedt:

June Medical Services v. Russo

140 S.Ct. ___, 2020 WL 3292640 (June 29, 2020)

In 2014, Louisiana passed Act 620, which required physicians performing abortions to secure admitting privileges at a hospital within 30 miles of the clinic at which abortions are performed. Violations of the Act subjected physicians and clinics to various penalties. The Louisiana requirement bore obvious similarities to the Texas admitting privileges requirement struck down in *Whole Woman's Health v. Hellerstedt*. Indeed, in a plurality opinion striking down the Louisiana law, Justice Breyer characterized it as "almost word-for-word identical" to the Texas law.

In striking down the law, the plurality employed the balancing approach adopted in *Whole Woman's Health* and relied on extensive factual findings made by the District Court supporting the conclusion that the law imposed substantial burdens while offering no benefits to women. The Fifth Circuit had attempted to distinguish the Louisiana law from its Texas counterpart, arguing that it provided some "minimal benefit" to women through a credentialing function; and that the burdens of the law were not substantial because the affected doctors could have done more to secure privileges and any clinic closures that might result would not cause the capacity problems at issue in Texas. The plurality engaged closely with the evidence in the record and ultimately rejected each of these arguments. It concluded that the District Court's findings were not "clearly erroneous," such that the Court must uphold:

> its determination that Louisiana's law poses a "substantial obstacle" to women seeking an abortion; its determination that the law offers no significant health-related benefits; and its determination that the law consequently imposes an "undue burden" on a woman's constitutional right to choose to have an abortion.

Justice Breyer's plurality opinion was a fairly straightforward application of *Whole Woman's Health*. And the dissenting justices rehearsed familiar objections to abortion doctrine. Perhaps most surprising was the vote of Chief Justice Roberts. The Chief Justice had

never before voted to strike down a restriction on abortion. Indeed, he noted that he had "joined the dissent in *Whole Woman's Health* and continue[d] to believe that the case was wrongly decided." Nevertheless, he said, the question in *June Medical* "is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case." His concurring opinion offered an extended ode to stare decisis:

> *Stare decisis* ("to stand by things decided") is the legal term for fidelity to precedent. It has long been "an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." This principle is grounded in a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them. Because the "private stock of reason ... in each man is small, ... individuals would do better to avail themselves of the general bank and capital of nations and of ages."
>
> Adherence to precedent is necessary to "avoid an arbitrary discretion in the courts." The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). The constraint of precedent distinguishes the judicial "method and philosophy from those of the political and legislative process." Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944).
>
> The doctrine also brings pragmatic benefits. Respect for precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."
>
> *Stare decisis* is not an "inexorable command." But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly. The Court accordingly considers additional factors before overruling a precedent, such as its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered.

Although the Chief Justice vigorously underscored the importance of precedent, much of his concurrence went on, paradoxically, to challenge key parts of the very decision to which he professed the duty of fealty. Roberts expressly rejected the idea that application of *Casey* requires judges to balance benefits against burdens. He argued that "nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts," and that, properly understood, *Casey* instead focuses on "the existence of a substantial obstacle, the sort of inquiry familiar to judges across a variety of contexts."

He also offered a more categorical attack on the legitimacy of balancing tests. Citing Justice Scalia for the idea that, '[u]nder such tests, "equality of treatment is ... impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired." Roberts argued that such tests are especially problematic in the realm of abortion:

> courts applying a balancing test would be asked in essence to weigh the State's interests in "protecting the potentiality of human life" and the health of the woman, on the one hand, against the woman's liberty interest in defining her "own concept of existence, of meaning, of the universe, and of the mystery of human life" on the other. There is no plausible sense in which anyone, let alone

> this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. Attempting to do so would be like "judging whether a particular line is longer than a particular rock is heavy."

Ultimately, the Chief Justice argued that the balancing test should simply be read out of *Whole Woman's Health*. With that revision in place, he agreed "with the plurality that the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law." In light of Justice Breyer's reaffirmation of the balancing test in his plurality opinion, is the Chief's interpretation of *Whole Woman's Health* a plausible one? Is it a coherent application of *stare decisis*? Several of the dissenting justices thought not. Justice Alito argued that one cannot rely on a precedent and "at the same time, [vote] to overrule [it] insofar as it changed the *Casey* test." Striking a similar note, Justice Gorsuch argued that *stare decisis* "cannot demand allegiance to a nonexistent ruling inconsistent with the approach actually taken by the Court."

One further reference in the Chief Justice's opinion may prove significant. In introducing his discussion of the *Casey* standard, he noted that "[n]either party has asked us to reassess the constitutional validity of that standard." Should that reference be taken to mean that the Chief would be open to reconsidering *Casey*--and perhaps what remains of *Roe*—if expressly asked to do so? Or does his extended praise of *stare decisis* suggest that he does not view that door as open?

Should the Court at some point elect to revisit and restrict abortion rights under *Roe* and *Casey*, state constitutions would likely become a new focal point for litigation. Indeed, in between *Whole Woman's Health* and *June Medical*, several state supreme courts interpreted their state's constitution to protect the right to choose abortion and used versions of the kind of strict scrutiny that *Roe* required before *Casey* modified the doctrine. *See State v. Planned Parenthood of the Great Nw*., 436 P.3d 984, 988 (Alaska 2019); *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1247 (Fla. 2017); *Planned Parenthood of the Heartland v. Reynolds* ex rel. *State*, 915 N.W.2d 206, 212 (Iowa 2018); *Hodes & Nauser MDs, P.A. v. Schmidt*, 440 P.3d 461, 502 (Kan. 2019).

CHAPTER 6

THE FIRST AMENDMENT

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SECTION 4. SPEECH WITH A GOVERNMENT NEXUS

A. PUBLIC FORUM DOCTRINE

NOTES ON THE IMPLICATIONS OF MATAL

Page 805. Insert after note 3:

4. *Extending* Matal. In *Iancu v. Brunetti*, 139 S.Ct. ---- (2019), the Court struck down another provision of the Lanham Act, which prohibited registration of "immoral" or "scandalous" matter. In an opinion by Justice Kagan, the Court concluded that the provision was viewpoint-based:

> The meanings of "immoral" and "scandalous" are not mysterious, but resort to some dictionaries still helps to lay bare the problem. When is expressive material "immoral"? According to a standard definition, when it is "inconsistent with rectitude, purity, or good morals"; "wicked"; or "vicious . . . And when is such material "scandalous"? Says a typical definition, when it "giv[es] offense to the conscience or moral feelings"; "excite[s] reprobation"; or "call[s] out condemnation." . . . . Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation.

Returning to the problem of hate speech, is it possible to draft restrictions on hate speech that would avoid being categorized as viewpoint-based?

Page 816. Insert after note 4:

5. R*ound Two of* AID. In 2020, the Supreme Court ruled in *AID II* that it was constitutional to apply the same funding restriction on the plaintiff's foreign affiliates. Agency for International Development v. Alliance for Open Society Int'l, Inc., — U.S. —, — S.Ct. —, — L.Ed.2d — (2020). The Court rested that conclusion on two "bedrock principles" of U.S. law: "foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution," and "separately incorporated organizations are separate legal units with distinct legal rights and obligation." The dissent argued that it was really the constitutional rights of the U.S. parent group that were at stake. The foreign affiliates existed only as arms of its activities, and often they were separately incorporated only because the host country required that.

Page 840: Insert after note 3 (and renumber the Problem on p. 854 accordingly):

PROBLEM 6-3

RELIGIOUS FREEDOM IN A PANDEMIC

During the coronavirus pandemic, the California Governor Newsome issued an emergency order limiting public gatherings. Church services were limited to 25% of building capacity or a maximum of 100 attendees. A church sued for an injunction against the restriction. After the lower courts denied an immediate injunction, the church requested such an injunction from the Supreme Court. The Court ruled against the Church in a 5-4 vote. South Bay United Pentecostal Church v. Newsom, — U.S. —, — S.Ct. —, — L.Ed.2d — (2020).

As is customary in cases seeking stays and other temporary relief, the majority noted the denial of the injunction without explanation. Chief Justice Roberts filed a concurring opinion. He noted that the church faced an especially high burden of proof in seeking relief before the case was before the Court on the merits. In his view, that burden had not been met:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

In a dissent joined by Justices Thomas and Gorsuch, Justice Kavanaugh argued that the Governor's order was unconstitutional. "The basic constitutional problem," he argued, "is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries." Because the order discriminated against religion, the state was required to show a compelling interest for the difference in treatment. In Justice Kavanaugh's view, no such showing had been made, since alternatives such as mandating social distancing measures inside the church could have been used instead.

Given that the state imposed similar restrictions on other public gatherings but not on secular businesses, does the state order qualify as a neutral rule of general applicability under *Smith*? If not, how much of a factual showing should be required that the restriction is required by public health?

Page 844. Insert after note 3:

4. *The scope of the ministerial exemption.* In Our Lady of Guadalupe School. Morrissey-Berru, — U.S. —, — S.Ct. —, — L.Ed.2d — (2020), the Court held that the ministerial exemption extends more broadly than to the formally designated and trained teachers involved in *Hosanna-Tabor*. The lower court held that the ministerial exception did not apply because the teachers in question lacked ministerial training, credentials, and ministerial background, all of which were present in *Hosanna-Tabor*. The Court disagreed:

> Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities.

The Court indicated that a church's description of the nature of a position was "important," but it did not adopt the approach taken by Justice Thomas and Gorsuch, under which courts must "defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'"

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SECTION 6. THE RELIGION CLAUSES

Page 855. Insert after the first full paragraph on p. 846:

ESPINOZA V. MONTANA DEPARTMENT OF REVENUE

— U.S. —, —S. Ct. —, —L.Ed.2d—(2020).

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools. The program grants a tax credit to anyone who donates to certain organizations that in turn award scholarships to selected students attending such schools. When petitioners sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program. The Court relied on the "no-aid" provision of the State Constitution, which prohibits any aid to a school controlled by a "church, sect, or denomination." The question presented is whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision. * * *

Shortly after the scholarship program was created, the Montana Department of Revenue promulgated "Rule 1," over the objection of the Montana Attorney General. That administrative rule prohibited families from using scholarships at religious schools. It did so by changing the definition of "qualified education provider" to exclude any school "owned or controlled in whole or in part by any church, religious sect, or denomination." The Department explained that the Rule was needed to reconcile the scholarship program with the no-aid provision of the Montana Constitution. * * *

The question for this Court is whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program. For purposes of answering that question, we accept the Montana Supreme Court's interpretation of state law—including its determination that the scholarship program provided impermissible "aid" within the meaning of the Montana

Constitution—and we assess whether excluding religious schools and affected families from that program was consistent with the Federal Constitution. * * *

In *Trinity Lutheran*, Missouri provided grants to help nonprofit organizations pay for playground resurfacing, but a state policy disqualified any organization "owned or controlled by a church, sect, or other religious entity." Because of that policy, an otherwise eligible church-owned preschool was denied a grant to resurface its playground. Missouri's policy discriminated against the Church "simply because of what it is—a church," and so the policy was subject to the "strictest scrutiny," which it failed. We acknowledged that the State had not "criminalized" the way in which the Church worshipped or "told the Church that it cannot subscribe to a certain view of the Gospel." But the State's discriminatory policy was "odious to our Constitution all the same."

Here too Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. This is apparent from the plain text. The provision bars aid to any school "controlled in whole or in part by any church, sect, or denomination." The provision's title — "Aid prohibited to sectarian schools"—confirms that the provision singles out schools based on their religious character. And the Montana Supreme Court explained that the provision forbids aid to any school that is "sectarian," "religiously affiliated," or "controlled in whole or in part by churches." The provision plainly excludes schools from government aid solely because of religious status. * * *

Seeking to avoid *Trinity Lutheran*, the Department contends that this case is instead governed by *Locke* v. *Davey*, 540 U. S. 712 (2004). *Locke* also involved a scholarship program. The State of Washington provided scholarships paid out of the State's general fund to help students pursuing postsecondary education. The scholarships could be used at accredited religious and nonreligious schools alike, but Washington prohibited students from using the scholarships to pursue devotional theology degrees, which prepared students for a calling as clergy. This prohibition prevented Davey from using his scholarship to obtain a degree that would have enabled him to become a pastor. We held that Washington had not violated the Free Exercise Clause.

Locke differs from this case in two critical ways. First, *Locke* explained that Washington had "merely chosen not to fund a distinct category of instruction": the "essentially religious endeavor" of training a minister "to lead a congregation." Thus, Davey "was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." Apart from that narrow restriction, Washington's program allowed scholarships to be used at "pervasively religious schools" that incorporated religious instruction throughout their classes. By contrast, Montana's Constitution does not zero in on any particular "essentially religious" course of instruction at a religious school. Rather, as we have explained, the no-aid provision bars all aid to a religious school "simply because of what it is," putting the school to a choice between being religious or receiving government benefits. At the same time, the provision puts families to a choice between sending their children to a religious school or receiving such benefits.

Second, *Locke* invoked a "historic and substantial" state interest in not funding the training of clergy, explaining that "opposition to ... funding 'to support church leaders' lay at the historic core of the Religion Clauses." As evidence of that tradition, the Court in *Locke* emphasized that the propriety of state-supported clergy was a central subject of founding-era debates, and that most state constitutions from that era prohibited the expenditure of tax dollars to support the clergy.

But no comparable "historic and substantial" tradition supports Montana's decision to disqualify religious schools from government aid. In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones. "Far from prohibiting such support, the early state constitutions and statutes actively encouraged this policy." * * * Local governments provided grants to private schools, including religious ones, for the education of the poor. Even States with bans on government-supported clergy, such as New Jersey, Pennsylvania, and Georgia, provided various forms of aid to religious schools.

The Department argues that a tradition *against* state support for religious schools arose in the second half of the 19th century, as more than 30 States—including Montana—adopted no-aid provisions Such a development, of course, cannot by itself establish an early American tradition. Justice Sotomayor questions our reliance on aid provided during the same era by the Freedmen's Bureau, but we see no inconsistency in recognizing that such evidence may reinforce an early practice but cannot create one. In addition, many of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s. That proposal—which Congress nearly passed—would have added to the Federal Constitution a provision similar to the state no-aid provisions, prohibiting States from aiding "sectarian" schools. The Blaine Amendment was "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general"; many of its state counterparts have a similarly "shameful pedigree." The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause. * * *

Because the Montana Supreme Court applied the no-aid provision to discriminate against schools and parents based on the religious character of the school, the "strictest scrutiny" is required. That "stringent standard" is not "watered down but really means what it says."). To satisfy it, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."

The Montana Supreme Court asserted that the no-aid provision serves Montana's interest in separating church and State "more fiercely" than the Federal Constitution. But "that interest cannot qualify as compelling" in the face of the infringement of free exercise here.). A State's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause."

The Department, for its part, asserts that the no-aid provision actually *promotes* religious freedom. In the Department's view, the no-aid provision protects the religious liberty of taxpayers by ensuring that their taxes are not directed to religious organizations, and it safeguards the freedom of religious organizations by keeping the government out of their operations. An infringement of First Amendment rights, however, cannot be justified by a State's alternative view that the infringement advances religious liberty. Our federal system prizes state experimentation, but not "state experimentation in the suppression of free speech," and the same goes for the free exercise of religion.

Furthermore, we do not see how the no-aid provision promotes religious freedom. As noted, this Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices. A school, concerned about government involvement with its religious activities, might reasonably decide for itself not to participate in a government program. But we doubt that the school's liberty is enhanced by eliminating any option to participate in the first place. * * *

A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.

The Department argues that, at the end of the day, there is no free exercise violation here because the Montana Supreme Court ultimately eliminated the scholarship program altogether. According to the Department, now that there is no program, religious schools and adherents cannot complain that they are excluded from any generally available benefit. * * *

The Montana Legislature created the scholarship program; the Legislature never chose to end it, for policy or other reasons. The program was eliminated by a court, and not based on some innocuous principle of state law. Rather, the Montana Supreme Court invalidated the program pursuant to a state law provision that expressly discriminates on the basis of religious status. The Court applied that provision to hold that religious schools were barred from participating in the program. Then, seeing no other "mechanism" to make absolutely sure that religious schools received no aid, the court chose to invalidate the entire program.

The final step in this line of reasoning eliminated the program, to the detriment of religious and non-religious schools alike. But the [Montana] Court's error of federal law occurred at the beginning. When the Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation. Had the Court recognized that this was, indeed, "one of those cases" in which application of the no-aid provision "would violate the Free Exercise Clause, the Court would not have proceeded to find a violation of that provision. And, in the absence of such a state law violation, the Court would have had no basis for terminating the program. Because the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds.

JUSTICE GINSBURG, with whom **JUSTICE KAGAN** joins, dissenting.

Petitioners argue that the Montana Supreme Court's decision fails when measured against *Trinity Lutheran*. I do not see how. Past decisions in this area have entailed *differential treatment* occasioning a burden on a plaintiff 's religious exercise. This case is missing that essential component. Recall that the Montana court remedied the state constitutional violation by striking the scholarship program in its entirety. Under that decree, secular and sectarian schools alike are ineligible for benefits, so the decision cannot be said to entail differential treatment based on petitioners' religion. Put somewhat differently, petitioners argue that the Free Exercise Clause requires a State to treat institutions and people neutrally when doling out a benefit—and neutrally is how Montana treats them in the wake of the state court's decision.

Accordingly, the Montana Supreme Court's decision does not place a burden on petitioners' religious exercise. Petitioners may still send their children to a religious school. And the Montana Supreme Court's decision does not pressure them to do otherwise. Unlike the law in *Trinity Lutheran*, the decision below puts petitioners to no "choice": Neither giving up their faith, nor declining to send their children to sectarian schools, would affect their entitlement to scholarship funding. There simply are no scholarship funds to be had.

JUSTICE THOMAS's concurrence, joined by **JUSTICE GORSUCH**, reiterated his view that "the Establishment Clause does not prohibit States from favoring religion," so long as it does not compel adherence or support for a religion.]

JUSTICE BREYER, with whom **JUSTICE KAGAN** joins as to Part I, dissenting. [Only

Part I is excerpted here.]

The First Amendment's Free Exercise Clause guarantees the right to practice one's religion. At the same time, its Establishment Clause forbids government support for religion. Taken together, the Religion Clauses have helped our Nation avoid religiously based discord while securing liberty for those of all faiths.

This Court has long recognized that an overly rigid application of the Clauses could bring their mandates into conflict and defeat their basic purpose. And this potential conflict is nowhere more apparent than in cases involving state aid that serves religious purposes or institutions. In such cases, the Court has said, there must be constitutional room, or " 'play in the joints,' " between "what the Establishment Clause permits and the Free Exercise Clause compels." Whether a particular state program falls within that space depends upon the nature of the aid at issue, considered in light of the Clauses' objectives.

The majority barely acknowledges the play-in-the-joints doctrine here. It holds that the Free Exercise Clause forbids a State to draw any distinction between secular and religious uses of government aid to private schools that is not required by the Establishment Clause. The majority's approach and its conclusion in this case, I fear, risk the kind of entanglement and conflict that the Religion Clauses are intended to prevent. I consequently dissent. * * *

The majority finds that the school-playground case, *Trinity Lutheran*, and not the religious-studies case, *Locke*, controls here. I disagree. In my view, the program at issue here is strikingly similar to the program we upheld in *Locke* and importantly different from the program we found unconstitutional in *Trinity Lutheran*. Like the State of Washington in *Locke*, Montana has chosen not to fund (at a distance) "an essentially religious endeavor"—an education designed to " 'induce religious faith.' " *Locke*, 540 U. S., at 716, 721. That kind of program simply cannot be likened to Missouri's decision to exclude a church school from applying for a grant to resurface its playground.

The Court in *Locke* recognized that the study of devotional theology can be "akin to a religious calling as well as an academic pursuit." Indeed, "the shaping, through primary education, of the next generation's minds and spirits" may be as critical as training for the ministry, which itself, after all, is but one of the activities necessary to help assure a religion's survival. That is why many faith leaders emphasize the central role of schools in their religious missions. It is why at least some teachers at religious schools see their work as a form of ministry. And petitioners have testified that it is a "major reason" why they chose religious schools for their children. * * *

What, then, is the difference between *Locke* and the present case? And what is it that leads the majority to conclude that funding the study of religion is more like paying to fix up a playground (*Trinity Lutheran*) than paying for a degree in theology (*Locke*)? The majority's principal argument appears to be that, as in *Trinity Lutheran*, Montana has excluded religious schools from its program "solely because of the religious character of the schools." The majority seeks to contrast this *status*-based discrimination with the program at issue in *Locke*, which it says denied scholarships to divinity students based on the religious *use* to which they put the funds—*i.e.*, training for the ministry, as opposed to secular professions.

It is true that Montana's no-aid provision broadly bars state aid to schools based on their religious affiliation. But this case does not involve a claim of status-based discrimination. The schools do not apply or compete for scholarships, they are not parties to this litigation, and no one here purports to represent their interests. We are instead faced with a suit by *parents* who assert that *their* free exercise rights are violated by the application of the no-aid provision to prevent them from *using* taxpayer-supported scholarships to attend the schools of

their choosing. In other words, the problem, as in *Locke*, is what petitioners " 'propos[e] *to do*—use the funds to' " obtain a religious education. * * *

The majority next contends that there is no " 'historic and substantial' tradition against aiding" religious schools "comparable to the tradition against state-supported clergy invoked by *Locke*." *Ante*, at 16. But the majority ignores the reasons for the founding era bans that we relied upon in *Locke*.

"Perhaps the most famous example" is the 1786 defeat of a Virginia bill (often called the Assessment Bill) that would have levied a tax in support of "learned teachers" of "the Christian Religion." In his Memorial and Remonstrance against that proposal, James Madison argued that compelling state sponsorship of religion in this way was "a signal of persecution" that "degrades from the equal rank of citizens all those whose opinions in religion do not bend to those of the Legislative authority." Even among those who might benefit from such a tax, Madison warned, the bill threatened to "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced among its several sects.".

The opposition galvanized by Madison's Remonstrance not only scuttled the Assessment Bill; it spurred Virginia's Assembly to enact a very different law, the Bill for Religious Liberty drafted by Thomas Jefferson.

Like the Remonstrance, Jefferson's bill emphasized the risk to religious liberty that state-supported religious indoctrination threatened. "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves," the preamble declared, "is sinful and tyrannical." The statute accordingly provided "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." Similar proscriptions were included in the early constitutions of many States.

I see no meaningful difference between the concerns that Madison and Jefferson raised and the concerns inevitably raised by taxpayer support for scholarships to religious schools. In both instances state funds are sought for those who would "instruc[t] such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge" in the tenets of religious faith. In both cases, that would compel taxpayers "to support the propagation of opinions" on matters of religion with which they may disagree, by teachers whom they have not chosen. And, in both cases, the allocation of state aid to such purposes threatens to "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced among its several sects."

The majority argues that at least some early American governments saw no contradiction between bans on compelled support for clergy and taxpayer support for religious schools or universities. That some States appear not to have read their prohibitions on compelled support to bar this kind of sponsorship, however, does not require us to blind ourselves to the obvious contradiction between the *reasons* for prohibiting compelled support and the effect of taxpayer funding for religious education. Madison and Jefferson saw it clearly. They opposed including theological professorships in their plans for the public University of Virginia and the Commonwealth hesitated even to grant charters to religiously affiliated schools. * * *

If, for 250 years, we have drawn a line at forcing taxpayers to pay the salaries of those who teach their faith from the pulpit, I do not see how we can today require Montana to adopt a different view respecting those who teach it in the classroom.

JUSTICE SOTOMAYOR, dissenting.

The majority holds that a Montana scholarship program unlawfully discriminated

against religious schools by excluding them from a tax benefit. The threshold problem, however, is that such tax benefits no longer exist for anyone in the State. The Montana Supreme Court invalidated the program on state-law grounds, thereby foreclosing the as-applied challenge petitioners raise here. Indeed, nothing required the state court to uphold the program or the state legislature to maintain it. The Court nevertheless reframes the case and appears to ask whether a longstanding Montana constitutional provision is facially invalid under the Free Exercise Clause, even though petitioners disavowed bringing such a claim. But by resolving a constitutional question not presented, the Court fails to heed Article III principles older than the Religion Clause it expounds.

Today's ruling is perverse. Without any need or power to do so, the Court appears to require a State to reinstate a tax-credit program that the Constitution did not demand in the first place. We once recognized that "[w]hile the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." Today's Court, by contrast, rejects the Religion Clauses' balanced values in favor of a new theory of free exercise, and it does so only by setting aside well-established judicial constraints.

NOTES ON ESPINOZA

1. *Play in the Joints?* Justice Breyer invokes the idea that there is an area of state discretion regarding the treatment of religion. The majority invoked a similar idea in *Smith* to suggest that some religious accommodations do not violate the Establishment Clause, even though those accommodations are not required by the Free Exercise Clause. The majority opinion in *Espinoza* seems to leave very little room for such leeway in the converse situation, where the Establishment Clause does not bar state assistance to religion but a state may wish to do so. Is this asymmetrical treatment justified? Or would it be sounder to hold that there is no daylight between the two clauses. Under that view, any state support for religion would be limited to what the Free Exercise Clause requires, and any restriction on state aid is limited to what the Establishment Clause requires.

2. *Background on State Aid to Religious Schools.* For space reasons, our treatment of the Establishment Clause is truncated. In general, the Court has had great difficulty in determining what forms of government assistance to religious schools are permissible. The Court originally made a strong effort to distinguish between assistance to the school's religious mission and assistance to education on secular subjects. That effort has greatly weakened over time but has not entirely disappeared. The most important recent case is Zelman v. Simmons-Harris, 536 U.S. 639 (2002), in which the Court upheld a school voucher program. The parties agreed that the program had a purely secular purpose; the local public schools were a disaster, and the legislature wanted to provide some viable alternatives for poor students. A scholarship program provided tuition aid for some students to attend private schools, as well as funding for suburban schools accepting those students and for new "charter" schools in the public system. It also provided some tutorial aid for eligible students who chose to remain enrolled in their usual public schools. The majority opinion by Chief Justice Rehnquist found this to be a program of "true private choice," in which a neutral government program provides aid directly to a broad class of individuals, who in turn direct the aid to institutions of their own choosing. The majority was unimpressed by the fact that 96% of the participating students who attended private schools went to religious schools, or by the fact that none of the suburban public schools had agreed to participate. The four dissenters, led by Justice Stevens, protested that "the overwhelming proportion of large appropriations of voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of tuition."

3. *State Regulation of Religious Schools*. Given *Espinoza*, it is clear that school vouchers and similar programs must include religious schools. This raises the question of what conditions the state can apply to religious schools participating in these programs. In his dissent in *Zelman*, Justice Breyer emphasized that recipient schools in the voucher program were required to meet certain criteria. They were required to accept students of all religions. They were also forbidden to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." Do these restrictions violate free speech under unconstitutional conditions cases such as *Agency for International Development* [Casebook p. 811]? If not, do they violate the free exercise rights of religions with contrary views? What about state laws requiring that schools teach the theory of evolution, as applied to religious schools that favor creationism?

Page 864. Insert at end of the page:

The Court continues to remain badly divided on Establishment Clause issues, as illustrated by *American Legion v. American Humanist Association*, 139 S. Ct. – (2019). The case involved a 32-foot tall cross commemorating World War I. Six Justices filed opinions in the case. Justice Alito wrote the majority opinion, holding that the monument's age and historical context muted any message of religious endorsement. In a portion of the opinion joined only by Chief Justice Roberts and Justice Kavanaugh, he wrote that the *Lemon* test had failed to provide an effective unifying framework for Establishment Clause cases and that the Court had since followed a more context-based approach that looked to history for guidance. Justice Thomas argued that the Establishment Clause should not apply to the states and in any event should not prevent the government from using sectarian symbols. He also joined a separate opinion by Justice Gorsuch arguing that the case should be dismissed for lack of standing because the offense felt by onlookers at religious symbols did not constitute injury in fact. Justice Kavanaugh wrote separately to indicate that each category of Establishment Clause case had its own doctrinal approach. Justice Kagan also concurred, emphasizing her view that Lemon retained significance: "Although I agree that rigid application of the Lemon test does not solve every Establishment Clause problem, I think that test's focus on purposes and effects is crucial in evaluating government action in this sphere—as this very suit shows." Justices Ginsburg and Sotomayor dissented, emphasizing that the cross has always been a religious symbol and even in the war context has been used only for the graves of Christian soldiers. In short, while there seems to be a clear majority that Lemon is either unworkable or inapplicable to some types of cases, the balance of power on the Court seems to be with Justices taking a more ad hoc approach and unwilling to embrace any overriding standard.

CHAPTER 7

FEDERALISM: CONGRESSIONAL POWER AND STATE AUTHORITY

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SECTION 1. ENUMERATED FEDERAL POWER, RESERVED STATE AUTHORITY?

Page 880. Insert the following Note right after *Thornton*:

NOTE ON FISSION, FUSION, AND THE CONSTITUTION'S THEORY OF SOVEREIGNTY

In the Arkansas Term Limits Case, Justice Stevens asserts that the states retained their sovereign status under the Constitution, but the federal government owed its sovereign authority to We the People. Justice Thomas asserts that federal sovereignty is entirely derivative of authority granted by the states. Justice Kennedy says the Framers "split the atom of sovereignty." Two recent historical examinations suggest that Kennedy came closest to the "original public meaning" associated with the Constitution of 1789—but the implications of "popular sovereignty" were completely different in the early Republic than they are today.

Thus, Gregory Ablavsky argues in *Empire States: The Coming of Dual Federalism*, 128 Yale L.J. 1792 (2019), that the period of the American Revolution saw popular sovereignty triumph at all levels, just as Kennedy supposed. Unlike Kennedy, who saw fission, Ablavsky finds fusion: popular sovereignty had the effect of centralizing both national and state power. The new sovereignty was uniform within its domain. Hence, the immediate effects of dual federalism was to empower elected state governments against local centers of power (churches, municipalities, tribes). In the longer term, popular sovereignty justified empowerment of the national government, but in the 1790s and early 1800s the national government was modest and largely inactive.

In *The Imperial Treaty Power,* U. Pa. L. Rev. ___ (2019), Brian Richardson develops another consequence of popular sovereignty. The Tenth Amendment says that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or *to the people*" (emphasis added). As Richardson documents, a central debate in the nineteenth century concerned the authority of the state to acquire or cede property. Constitutionalists as distinguished as Daniel Webster maintained that We the People retained "eminent dominion" over the lands as well as people within the nation and the states—and that neither the national nor the state governments could alienate that dominion without the consent of We the People.

Does the work of these two legal historians after your views about the "original meaning" of the Constitution, as applied to the Term Limits Case? *McCulloch*? Consider, too, the cases that follow.

■ ■ ■

SECTION 4. BEYOND THE COMMERCE AND CIVIL RIGHTS ENFORCEMENT POWERS

Pages 1005-07. Replace the Notes after *Missouri v. Holland* with the following Notes:

NOTES ON THE TREATY POWER AND ORIGINAL MEANING

Missouri v. Holland is a "nationalist" reading of the Treaty Clause: Treaty obligations entered into by the President, with the advice and consent of the Senate, create domestic law under the Supremacy Clause (Art. VI, cl. 2) even if not supported by an independent Article I ground for federal authority.[1] Through most of our history, there has been a counter vision of the Treaty Clause, a "states' rights" reading: Treaty obligations are not the law of the land unless they fall under one of the powers delegated to the national government under Article I.[2]

As recent scholarship has established, the Framing era and the early Republic also took seriously a third understanding: that neither the state nor federal government had authority to cede the "eminent dominion" that We the People retained over the territory of the states or the country.[3] The Tenth Amendment "reserves" to the states ***or*** to the people those powers "not delegated to the United States." Indeed, Missouri made precisely this argument in *Holland*: it claimed eminent dominion over the birds within its territory and argued that only a popular ratification could alienate the property of the people of the state.

Justice Holmes dismissed that argument out of hand. By 1920, the imperial ambitions of the United States had overtaken Missouri's argument, which was inconsistent with American annexation of Puerto Rico and other territories after the Spanish-American War of 1898. Under these circumstances, not only was the popular-control argument no longer plausible, but there was an historical thumb on the scale in favor of plenary national authority. See George Sutherland, *Constitutional Power and World Affairs* (1918). Justice Holmes seems friendly to the Sutherland view and cites the Necessary and Proper Clause, which allows Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [those in Article I], and all other Powers vested by this Constitution in the Government of the United States," including Article II's Treaty Clause. Typically, Holmes did not explain exactly how the constitutional text supported his national-authority holding.

As Nicholas Rosenkranz has argued, if you put these clauses together, you have the following power of Congress: "To make all Laws which shall be necessary and proper for carrying into Execution * * * [the] Power * * * to make Treaties."[4] Rosenkranz says that the plain meaning of the Constitution reveals that Justice Holmes was flat wrong: the migratory birds statute was *not* needed to carry into execution Congress's power to "make Treaties." Instead, it was a congressional implementation of a treaty already made, but without any basis (in 1921) in the Constitution's delegation of limited authority to Congress. Can the Holmes position be salvaged? David Golove and Louis Henkin, among others, believe that original meaning supports *Missouri v. Holland*. Curtis Bradley and Nick Rosenkranz do not. Consider the evidence.

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[1] David M. Golove, *Treaty-Making and the Nation: The Historic Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000).

[2] Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 391 (1998).

[3] Brian Richardson, *The Imperial Treaty Power*, U. Pa. L. Rev. ___ (2019).

[4] Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005).

1. *Pre-1787 Practice*. In eighteenth-century England, treaties were made by the King, and they were binding on the nation. The Articles of Confederation vested the exclusive right to enter into treaties with Congress, with the proviso that no commercial treaty could interfere with state legislative power to impose equal taxes on foreigners as they impose on their own citizens or from regulating trade in goods or commodities (Art. IX). The Articles also prohibited the states from imposing imposts or duties inconsistent with treaties proposed for France and Spain (Art. VI). These limitations, explicitly recognizing state power as a limit on the national treaty power, bedeviled American negotiators of the Treaty of Peace entered into with Great Britain in 1782. The nationalist-versus-states' rights debate over the treaty power began during this period. Most of the statesmen in the national government—including Jefferson and Madison—took the nationalist position, that Congress could accrue new commerce-regulatory powers through treaties than it was otherwise vested with by the Articles (Golove, *Treaty-Making*). Statesmen at the local level tended to disagree; Virginia, for example, insisted it was not bound to enforce the Treaty of Peace provision enforcing debt obligations to the British. But see *Ware v. Hylton*, 3 U.S. 199 (1796) (upholding Art. IV of the Peace Treaty, requiring restitution of confiscated debts to British citizens). Moreover, other countries doubted the United States had this power either, and refused to enter into commercial treaties with the new country for that reason.

2. *The Philadelphia Convention and the Ratifying Debates*. The frustrations of the Articles period created consensus at Philadelphia supporting a rule that the national treaty power trumps state law, but there was also a consensus that the national government would be one of limited authority, confined to those powers delegated to it by the Constitution. It is not apparent that anyone gave thought to the proposition that a treaty power in Article II could reach subjects about which Article I did not authorize Congress to legislate. Louis Henkin argues that an early draft of the Necessary and Proper Clause explicitly included the power to "enforce treaties," but that language was struck because it was "superfluous." Rosenkranz responds that the language struck was from the Militia Clause and that the Necessary and Proper Clause never had language relating to treaties.[5]

During the state ratifying debates, Anti-Federalists attacked the Constitution's treaty power on the ground that it was unbounded—and therefore represented an important threat to the viability of autonomous states (Golove, *Treaty-Making*). Of particular concern was the possibility that the President and Senate might cede territorial rights over individual state objections. In the Virginia ratifying debates, Madison confessed that the treaty power under both the Articles and the Constitution gave no power of "dismembering" the country, "or alienating any part of it," because that was not a treaty power recognized by the law of nations. (This was an early version of the idea that neither state nor national governments could alienate territory vested in the polity.)

The opponents, particularly Patrick Henry, also argued that the treaty power could override individual rights. The Federalists generally denied that this would be legal, but without detailed reasoning from their constitutional text—except for this defense by George Nicholas: The President and Senate can "make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers." Scholars vigorously debate how Nicholas' statement should be interpreted and how broadly to attribute it to other Federalists.[6]

3. *Early Interpretation and Practice*. The Jay Treaty with Great Britain ignited a great debate between the nationalist and states' rights visions of the treaty power. Article 9 of the

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[5] Compare Louis Henkin, *Foreign Affairs and the Constitution* 481 n.111 (2d ed. 1996), with Rosenkranz, *Executing the Treaty Power*, 1912–18.

[6] Compare Bradley, *Treaty Power,* 413, with Golove, *Treaty-Making*, 1148.

treaty overrode state law to assure property rights of British subjects in the American states, and opponents argued that this was beyond the authority of the President and Senate to accomplish. These arguments were rejected by President Washington, who upon the advice of Hamilton signed and supported the treaty; by two-thirds of the Senate, which ratified the treaty; by a slender majority in the House, which voted to give the treaty effect (Golove, *Treaty-Making,* 1154–61); and by the U.S. Supreme Court in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), which applied the treaty to override state law. On the other hand, some supporters of the Constitution opined that the treaty power did not authorize national action beyond the powers delegated by Article I. Jefferson opposed the Jay Treaty on this ground and wrote his view into the Senate's earliest manual of parliamentary practice, which said that the treaty power could not extend to objects not normally regulated by treaties, to matters where the Constitution vested the House with a role, or to matters "reserved to the States: for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way" (Bradley, *Treaty Power*, 415, quoting the manual). As President, however, Jefferson was not so particular about the treaty power when he used it to make the Louisiana Purchase (Golove, *Treaty-Making*, 1188–95). Later in the nineteenth century, Jefferson's private reservations about the legality of the Louisiana Purchase came to light and fueled the argument that neither level of government could alienate territorial or property within the eminent dominion (Richardson, *Imperial Treaty Power*).

Bottom line: Was *Missouri v. Holland* wrongly decided? Should it be overruled? Can *stare decisis* save *Holland*?

■ ■ ■

SECTION 6. NATIONALIST LIMITATIONS UPON STATE REGULATORY AUTHORITY

A. DORMANT COMMERCE CLAUSE DOCTRINE

Page 1241. Insert the following Note Case and Problem right after *Granholm*:

Tennessee Wine & Spirits Ass'n v. Thomas
139 S.Ct. ___, 2019 WL 2605555 (June 26, 2019)

Tennessee law imposes durational-residency requirements on persons and companies wishing to operate retail liquor stores, requiring applicants for an initial license to have resided in the State for the prior two years; requiring an applicant for renewal of a license to reside in the State for 10 consecutive years; and providing that a corporation cannot obtain a license unless all of its stockholders are residents. The lower court invalidated all three requirements, but the state only appealed its loss on the two-year residency requirement. Writing for a 7-2 Court, **Justice Alito** ruled that the residency requirement was a "blatant" violation of the Dormant Commerce Clause and was not saved by the Twenty-First Amendment's savings clause.

Justice Alito started his opinion for the Court with a lengthy apologia for the "Dormant" (i.e., Nontextual) Commerce Clause, which he justified based upon the expectations of the Framers. "[W]ithout the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising.

"That is so because removing state trade barriers was a principal reason for the adoption of the Constitution. Under the Articles of Confederation, States notoriously obstructed the interstate shipment of goods. "Interference with the arteries of commerce was cutting off the very life-blood of the nation." M. Farrand, The Framing of the Constitution of the United States 7 (1913). The Annapolis Convention of 1786 was convened to address this critical problem, and it culminated in a call for the Philadelphia Convention that framed the Constitution in the summer of 1787. At that Convention, discussion of the power to regulate interstate commerce was almost uniformly linked to the removal of state trade barriers, see Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 470–471 (1941), and when the Constitution was sent to the state conventions, fostering free trade among the States was prominently cited as a reason for ratification. In The Federalist No. 7, Hamilton argued that state protectionism could lead to conflict among the States, and in No. 11, he touted the benefits of a free national market. In The Federalist No. 42, Madison sounded a similar theme."

Under the Court's precedents, Justice Alito had no difficulty striking down an open discrimination against interstate commerce, which was not "narrowly tailored" to serve a "legitimate local interest." Tennessee's main defense rested upon § 2 of the Twenty-First Amendment:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"Although the interpretation of any provision of the Constitution must begin with a consideration of the literal meaning of that particular provision, reading § 2 to prohibit the transportation or importation of alcoholic beverages in violation of *any* state law would lead to absurd results that the provision cannot have been meant to produce. Under the established rule that a later adopted provision takes precedence over an earlier, conflicting provision of equal stature, such a reading of § 2 would mean that the provision would trump any irreconcilable provision of the original Constitution, the Bill of Rights, the Fourteenth Amendment, and every other constitutional provision predating ratification of the Twenty-first Amendment in 1933. This would mean, among other things, that a state law prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex would be immunized from challenge under the Equal Protection Clause."

Finding that absurd, Justice Alito looked to the history of the Twenty-First Amendment, which suggested that it was meant to constitutionalize the constitutional status quo that preceded Prohibition—a status quo that *Granholm* (Casebook, p. 1122) had interpreted as barring discriminatory state liquor regulation. Defenders of the Tennessee law argued that *Granholm* only invalidated a discrimination against out-of-state shipments and producers, while their law applied only to in-state distribution of alcohol. The Court rejected that distinction as immaterial for Dormant Commerce Clause purposes. Moreover, the Twenty-First Amendment did not seem to address the Tennessee approach nearly as clearly as it seemed to address the New York approach invalidated in *Granholm*.

Justice Gorsuch, joined by Justice Thomas, dissented. "States may impose residency requirements on those who seek to sell alcohol within their borders to ensure that retailers comply with local laws and norms. In fact, States have enacted residency requirements for at least 150 years, and the Tennessee law at issue before us has stood since 1939. Today and for

the first time, the Court claims to have discovered a duty and power to strike down laws like these as unconstitutional. Respectfully, I do not see it."

Picking up themes developed in Justice Thomas's *Granholm* dissent, Justice Gorsuch argued that the Webb-Kenyon Act authorized state regulation of the liquor trade and immunized it from Dormant Commerce Clause attack, which the Twenty-First Amendment constitutionalized. The dissenters were baffled that a nontextual constitutional doctrine was trumping the clear text of the Twenty-First Amendment.

Query: Does the Court's opinion in *Tennessee Wine and Liquor* close the door on the complaints from Justices Thomas and Gorsuch that the Dormant Commerce Clause ought to be retired (Casebook, pp. 1121, 1127-32)? While the *Pike-Kassel* balancing approach for state laws having an "effect" on interstate commerce might have outlived its usefulness, the current Court seems keen on enforcing the Dormant Commerce Clause against explicit state discriminations. Notice that the Court's conservatives and liberals joined the Alito opinion.

Chapter 8

SEPARATION OF POWERS

■ ■ ■

SECTION 1. ISSUES OF EXECUTIVE AGGRANDIZEMENT (IMPERIAL PRESIDENCY)

A. THE POST-NEW DEAL FRAMEWORK

Page 1182. Insert the following case right before Part B:

Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC

140 S.Ct. 1649 (June 1, 2020)

In 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA). 130 Stat. 549, 48 U.S.C. § 2101 *et seq*. The statute created a Financial Oversight and Management Board, whose seven members were appointed by the President without "the advice and consent of the Senate," *i.e.*, without Senate confirmation. A creditor argued that the Board was invalid under Article II, section 2, clause 2's requirement that "Officers of the United States" be appointed by the President, with Senate confirmation.

In an opinion by **Justice Breyer**, the Court nonetheless upheld the statutory appointments scheme. Two provisions of the Constitution empower Congress to create local offices for the District of Columbia and for Puerto Rico and the Territories. See Art. I, § 8, cl. 17; Art. IV, § 3, cl. 2. This structure suggests that when Congress governs a "territory" under Article IV, its officials might be considered "local" officers rather than "Officers of the United States."

As in *Noel Canning*, Justice Breyer looked to history and found that the term "Officers of the United States" had never been understood to cover those whose powers and duties are primarily local in nature and derive from these two constitutional provisions. "When the First Congress legislated for the Northwest Territories, for example, it created a House of Representatives for the Territory with members selected by election. It also created an upper house of the territorial legislature, whose members were appointed by the President (without Senate confirmation) from lists provided by the elected, lower house. And it created magistrates appointed by the Governor." Apparently, no one thought Congress was violating the Appointments Clause in such a scheme of territorial governance. Congress followed that approach for the next 200 years—including its statutes organizing the government of Puerto Rico after the Spanish-American War. Thus, "while the Appointments Clause *does* restrict the appointment of 'Officers of the United States' with duties in or related to the District of Columbia or an Article IV entity, it *does not* restrict the appointment of local officers that Congress vests with primarily local duties under Article IV, § 3, or Article I, § 8, cl. 17." (**Justice Thomas** concurred in the Court's judgment. Based on the Northwest Ordinance, he did not agree with the federal-versus-local duties test.)

Justice Sotomayor criticized the Court's Article IV analysis in light of Puerto Rico's history of self-government under a constitution adopted by its people and ratified by Congress.

"Puerto Rico's compact with the Federal Government and its republican form of government may not alter its status as a Territory. But territorial status should not be wielded as a talismanic opt out of prior congressional commitments or constitutional constraints." In light of the congressional super-statute ratifying Puerto Rico's republican governance structure, any statutory adjustment required a clear statement, which PROMESA did not pretend to offer.

"Viewed against that backdrop, the result of these cases seems anomalous. The Board members, tasked with determining the financial fate of a self-governing Territory, exist in a twilight zone of accountability, neither selected by Puerto Rico itself nor subject to the strictures of the Appointments Clause. I am skeptical that the Constitution countenances this freewheeling exercise of control over a population that the Federal Government has explicitly agreed to recognize as operating under a government of their own choosing, pursuant to a constitution of their own choosing. Surely our Founders, having labored to attain such recognition of self-determination, would not view that same recognition with respect to Puerto Rico as a mere act of grace." Because these issues had not been briefed and argued, Justice Sotomayor "reluctantly" concurred in the Court's judgment.

Cross-Reference: For another recent Supreme Court decision interpreting the Appointments Clause, see *Lucia v. SEC* (Casebook, pp. 1308-09).

Page 1228. Insert the following case right before Problem 8-4:

Donald J. Trump v. Cyrus R. Vance Jr.

140 S.Ct. ___, 2020 WL 3848062 (July 9, 2020)

The Manhattan District Attorney convened a grand jury to investigate financial transactions that may have violated state law. The office served a subpoena *duces tecum* on Mazars USA, LLP, the personal accounting firm of President Trump. The subpoena directed Mazars to produce financial records relating to the President and business organizations affiliated with him, including "[t]ax returns and related schedules," from "2011 to the present." The President, acting in his personal capacity but supported by the Department of Justice, sued to enjoin enforcement of the subpoena, on the gound that, under Article II and the Supremacy Clause, a sitting President enjoys absolute immunity from state criminal process. The DA took the position that under *United States v. Nixon* (Casebook, pp. 1212-18), the President had no defense and had to turn over the documents.

Chief Justice Roberts delivered the opinion for the Court, rejecting the President's absolute Article II defense to enforcement of the subpoenas against Mazars. In *United States v. Burr* (1807), Chief Justice Marshall himself granted the defense motion for a *subpoena duces tecum* requiring President Jefferson to produce documents relevant to former Vice-President Aaron Burr's treason trial. Since Jefferson's acquiescence in the subpoena, every President has complied with similar requests in connection with federal criminal trials—until President Nixon refused and was rebuked in *United States v. Nixon* (1974).

Vance's subpoena was the first against a President in connection with *state* (rather than federal) criminal proceedings, and the Department of Justice joined Trump's personal lawyers in arguing that the Supremacy Clause and Article II gave the President absolute immunity from compliance. The Chief Justice did not see any reason to treat state criminal investigations differently from federal ones: in both kind of proceedings, the defendant might need the President's evidence, and no person should be exempt from the law. Roberts rejected the President's claims of distraction and potential harassment for the same reasons the Court

had given in *Clinton v. Jones* (1997) (Casebook, pp. 1225-26).

That the President enjoyed no absolute immunity from state grand jury subpoena was an issue on which the Court was *unanimous*. The Court was also *unanimous* in remanding the case back to the district court, which could rule on particular objections the President might have to the subpoenas. The terms of the remand produced divisions within the Court.

The Solicitor General maintained that a state subpoena to the President ought to meet heightened standards, such as a requirement that the requested information was truly "necessary" for the state investigation and could not be secured elsewhere. Speaking for the Court, **Chief Justice Roberts** rejected this contention. "First, such a heightened standard would extend protection designed for official documents to the President's private papers." The Solicitor General's proposed test was derived from executive privilege cases that trace back to *Burr*. But Marshall said this in *Burr*: "If there be a paper in the possession of the executive, which is *not of an official nature*, he must stand, as respects that paper, in nearly the same situation with any other individual." ([E]mphasis added). And it is only "nearly"—and not "entirely"—because the President retains the right to assert privilege over documents that, while ostensibly private, "partake of the character of an official paper."

Second, Roberts concluded that the Solicitor General had not supplied the Court with sufficient cause to say that "heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions." The asserted "risk of harassment" and "unwarranted burdens" were not enough to support President Nixon's opposition to the Watergate subpoenas, and the Court refused in impose a "double standard" on state as opposed to federal subpoenas. "For if the state subpoena is not issued to manipulate, the documents themselves are not protected [by executive privilege], and the Executive is not impaired, then nothing in Article II or the Supremacy Clause supports holding state subpoenas to a higher standard than their federal counterparts."

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

On remand, Trump could raise the following kinds of objections, if supported by the evidence: (1) "any grounds permitted by state law, which usually include bad faith and undue burden or breadth"; (2) a substantiated claim that the subpoena is "an attempt to influence the performance of his official duties, in violation of the Supremacy Clause"; and (3) a showing that "compliance with a particular subpoena would impede his constitutional duties." As a result, "once the President sets forth and explains a conflict between judicial proceeding and public duties," or shows that an order or subpoena would "significantly interfere with his efforts to carry out" those duties, "the matter changes." [*Clinton v. Jones* (Breyer).] At that point, a court should use its inherent authority to quash or modify the subpoena, if necessary to ensure that such "interference with the President's duties would not occur." [*Id.*]

Justice Kavanaugh (joined by **Justice Gorsuch**) concurred in the Court's judgment

and would have directed the district court on remand to quash the subpoena if the prosecutors were not able to satisfy the standards applied to protect "executive privilege" in *Nixon v. United States,* namely, that there is a "demonstrated specific need" for the President's evidence. Although executive privilege was not at stake with regard to the President's tax returns, Article II and Supremacy Clause require such a well-tested burden of proof.

Justice Kavanaugh concluded that the different directives entailed in the Court's and other opinions might in the long term boil down to the same inquiries: "lower courts in cases of this sort involving a President will almost invariably have to begin by delving into why the State wants the information; why and how much the State needs the information, including whether the State could obtain the information elsewhere; and whether compliance with the subpoena would unduly burden or interfere with a President's official duties."

Justice Thomas dissented. In contrast to legislative immunities conferred on speech and debate in Article I, Article II gives the President no absolute immunities, as reflected by the early precedent in *United States v. Burr*. But Justice Thomas would have allowed the President to escape enforcement of the subpoena if he could show on remand that "his duties as chief magistrate demand his whole time for national objects," *United States* v. *Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.).

Justice Alito also wrote a dissenting opinion. He maintained that the Court neglected the structurally special role of the President in our system. "Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people." Amar & Katyal, *Executive Privileges and Immunities*: *The Nixon and Clinton Cases*, 108 Harv. L. Rev. 701, 713 (1995). Alito too the presidential distraction argument very seriously: "Without a President who is able at all times to carry out the responsibilities of the office, our constitutional system could not operate, and the country would be at risk. That is why the Twenty-fifth Amendment created a mechanism for temporarily transferring the responsibilities of the office to the Vice President if the President is incapacitated for even a brief time. The Amendment has been explicitly invoked on only two occasions, each time for a period of about two hours. This mechanism reflects an appreciation that the Nation cannot be safely left without a functioning President for even a brief time."

Another concern arose out of federalism, and the possibility of state and local governments interfering with the presidency—similar to the concern that prevented Maryland from interfereing with the Bank of the United States in *MCulloch* (Casebook, pp. 866-76). "Building on this principle of federalism, two centuries of case law prohibit the States from taxing, regulating, or otherwise interfering with the lawful work of federal agencies, instrumentalities, and officers. The Court premised these cases on the principle that 'the activities of the Federal Government are free from regulation by any State. No other adjustment of competing enactments or legal principles is possible.' *Mayo* v. *United States*, 319 U. S. 441, 445 (1943)."

Given these interests, Justice Alito agreed that the President did not enjoy absolute immunity and that the district court should evaluate the President's fact-specific objections—but under the *Nixon* standard suggested by the Solicitor General and not the Court's standard.

Quaere: Address the issues in Problem 8-4 in light of this case as well as the *Clinton* and Nixon cases preceding it in the Casebook. Justice Alito opined that neither state nor federal prosecutors could indict a sitting President. How would the current Court answer the questions in Problem 8-4? Could President Trump be prosecuted by either state or federal

prosecutors after he leaves office? What if the statute of limitations had run out by then? Could he self-pardon?

DONALD J. TRUMP V. MAZARS USA, LLP
United States Supreme Court, 2020
140 S.Ct. ___, 2020 WL 3848061 (July 9, 2020)

[This companion case is excerpted on page 46 of this E-Supplement.]

SECTION 2. ISSUES OF LEGISLATIVE OVERREACHING

A. "EXCESSIVE" DELEGATION OF CONGRESSIONAL DELEGATIONS AND THE ARTICLE I, SECTION 7 STRUCTURE FOR LAWMAKING

Page 1241. Insert the following Case and Notes to replace Problem 8–7:

UNITED STATES V. GUNDY
139 S.Ct. ___, 2109 WL 2527473 (June 20, 2019)

JUSTICE KAGAN delivered the judgment of the Court and delivered an opinion in which Justices GINSBURG, BREYER, and SOTOMAYOR joined.

[Herman Avery Gundy was convicted of committing sexual assault in Maryland while on supervised release for a prior federal offense. After serving his sentence for the Maryland sex offense, Gundy was to be transferred to federal custody to serve his sentence for violating his supervised release. As a part of this transfer, Gundy received permission to travel unsupervised by bus from Pennsylvania to New York. Gundy made the trip, but did not register as a sex offender in either Maryland or New York, as required by state law.

[In January 2013, Gundy was indicted under 18 U.S.C. § 2250, the Sex Offender Notification and Registration Act (SORNA), for traveling from Pennsylvania to New York and then staying in New York without registering as a sex offender. Based on rules developed by the Department of Justice to implement SORNA, he was convicted and sentenced to time served, along with five years of supervised release. The Second Circuit affirmed the conviction, and Gundy secured review to determine whether the Department's regulation violated the nondelegation doctrine.

[Under SORNA, 34 U.S.C. § 20913(b), a sex offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" (or, if the offender is not sentenced to prison, "not later than [three] business days after being sentenced"). Subsection (d) addresses (in its title's words) the "[i]nitial registration of sex offenders unable to comply with subsection (b)":

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex

> offenders who are unable to comply with subsection (b) [relating to the original registration].

The Supreme Court affirmed the conviction and the validity of the Department's regulations, but without an opinion for the Court.]

[A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. See, *e.g., Whitman v. American Trucking Assns.*, Inc., 531 U.S. 457, 473 (2001) (construing the text of a delegation to place constitutionally adequate "limits on the EPA's discretion"). Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I. And indeed, once a court interprets the statute, it may find that the constitutional question all but answers itself.

That is the case here, because § 20913(d) does not give the Attorney General anything like the "unguided" and "unchecked" authority that Gundy says. The provision, in Gundy's view, "grants the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time." If that were so, we would face a nondelegation question. But it is not. This Court has already interpreted § 20913(d) to say something different—to require the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible. [*Reynolds v. United States*, 565 U.S. 432, 442–443 (2012).] And revisiting that issue yet more fully today, we reach the same conclusion. The text, considered alongside its context, purpose, and history, makes clear that the Attorney General's discretion extends only to considering and addressing feasibility issues. [As the Court reasoned in *Reynolds*, SORNA was always intended to regulate pre-Act offenders, but Congress wanted a transition period so that national standards could be devised and then integrated with the state registration systems.]

In that context, the delegation in SORNA easily passes muster (as all eleven circuit courts to have considered the question found). The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible. Under the law, the feasibility issues he could address were administrative—and, more specifically, transitional—in nature. Those issues arose, as *Reynolds* explained, from the need to "newly register[ ] or reregister[ ] 'a large number' of pre-Act offenders" not then in the system. And they arose, more technically, from the gap between an initial registration requirement hinged on imprisonment and a set of pre-Act offenders long since released. Even for those limited matters, the Act informed the Attorney General that he did not have forever to work things out. By stating its demand for a "comprehensive" registration system and by defining the "sex offenders" required to register to include pre-Act offenders, Congress conveyed that the Attorney General had only temporary authority. Or again, in the words of *Reynolds*, that he could prevent "*instantaneous* registration" and impose some "implementation delay." That statutory authority, as compared to the delegations we have upheld in the past, is distinctly small-bore. It falls well within constitutional bounds.

Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive

officials to implement its programs. Consider again this Court's long-time recognition: "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta* [Casebook, pp. 1236-38]. Or as the dissent in that case agreed: "[S]ome judgments ... must be left to the officers executing the law." Among the judgments often left to executive officials are ones involving feasibility. In fact, standards of that kind are ubiquitous in the U.S. Code. See, *e.g.,* 12 U.S.C. § 1701z–2(a) (providing that the Secretary of Housing and Urban Development "shall require, to the greatest extent feasible, the employment of new and improved technologies, methods, and materials in housing construction[ ] under [HUD] programs"); 47 U.S.C. § 903(d)(1) (providing that "the Secretary of Commerce shall promote efficient and cost-effective use of the spectrum to the maximum extent feasible" in "assigning frequencies for mobile radio services"). In those delegations, Congress gives its delegee the flexibility to deal with real-world constraints in carrying out his charge. So too in SORNA. * * *

JUSTICE ALITO, concurring in the judgment. * * *

If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.

Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.

JUSTICE GORSUCH, with whom the CHIEF JUSTICE and JUSTICE THOMAS join, dissenting. * * *

The breadth of the authority Congress granted to the Attorney General in these few words can only be described as vast. As the Department of Justice itself has acknowledged [in its brief to the Court in *Reynolds*], SORNA "does not require the Attorney General" to impose registration requirements on pre-Act offenders "within a certain time frame or by a date certain; it does not require him to act at all." If the Attorney General does choose to act, he can require all pre-Act offenders to register, or he can "require some but not all to register." For those he requires to register, the Attorney General may impose "some but not all of [SORNA's] registration requirements," as he pleases. And he is free to change his mind on any of these matters "at any given time or over the course of different [political] administrations." Congress thus gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country—a situation that promised to persist for years or decades until pre-Act offenders passed away or fulfilled the terms of their registration obligations and post-Act offenders came to predominate.

[Justice Gorsuch argued that this relatively unfettered delegation of lawmaking authority to the Attorney General was in tension with the Framers' careful structuring of legislative authority in Article I and was not justified by carefully framed allowances for delegations in the early Republic.]

First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to "fill up the details." In *Wayman* v. *Southard*, [23 U.S. (10 Wheat.) 1 (1825)], this Court upheld a statute that instructed the federal courts to borrow state-court procedural rules but allowed them to make certain "alterations and additions." Writing for the Court, Chief Justice Marshall distinguished between those "important subjects, which must be entirely regulated by the

legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act... to fill up the details." The Court upheld the statute before it because Congress had announced the controlling general policy when it ordered federal courts to follow state procedures, and the residual authority to make "alterations and additions" did no more than permit courts to fill up the details. * * *

Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding. Here, too, the power extended to the executive may prove highly consequential. During the Napoleonic Wars, for example, Britain and France each tried to block the United States from trading with the other. Congress responded with a statute instructing that, if the President found that either Great Britain or France stopped interfering with American trade, a trade embargo would be imposed against the other country. In *Cargo of Brig Aurora* v. *United States*, [11 U.S. (7 Cranch) 382, 388 (1813)], this Court explained that it could "see no sufficient reason, why the legislature should not exercise its discretion [to impose an embargo] either expressly or *conditionally*, as their judgment should direct." * * *

Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities. While the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch. So, for example, when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if "the discretion is to be exercised over matters already within the scope of executive power." Though the case was decided on different grounds, the foreign-affairs-related statute in *Cargo of the Brig Aurora* may be an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II. *Wayman* itself might be explained by the same principle as applied to the judiciary: Even in the absence of any statute, courts have the power under Article III "to regulate their practice."

[In the modern era, the "intelligible principle" idea discussed by Chief Justice Taft in *J.W. Hampton* (Casebook, p. 1234) became the governing "test" during and after the New Deal.] We sometimes chide people for treating judicial opinions as if they were statutes, divorcing a passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling. But that seems to be exactly what happened here. For two decades, no one thought to invoke the "intelligible principle" comment as a basis to uphold a statute that would have failed more traditional separation-of-powers tests. In fact, the phrase sat more or less silently entombed until the late 1940s. Only then did lawyers begin digging it up in earnest and arguing to this Court that it had somehow displaced (*sub silentio* of course) all prior teachings in this area [Casebook, pp. 1235-36].

This mutated version of the "intelligible principle" remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked. Judges and scholars representing a wide and diverse range of views have condemned it as resting on "misunderst[ood] historical foundations." [*Department of Transp. v. Association of American Railroads*, 135 S.Ct. 1225, 1240-52 (2015) (Thomas, J., dissenting).] * * *

[Justice Gorsuch would abandon the vague and malleable "intelligible principle" test and return to the original allowances discussed above—filling in details, executive

fact-finding, and facilitating executive functions. None of those allowances justified SORNA's delegation. Instead, it resembled the delegations in the two New Deal decisions striking down excessive delegations.]

* * * If allowing the President to draft a "cod[e] of fair competition" for slaughterhouses was "delegation running riot," then it's hard to see how giving the nation's chief prosecutor the power to write a criminal code rife with his own policy choices might be permissible. [*Schechter Poultry* (Casebook, p. 1235).] And if Congress may not give the President the discretion to ban or allow the interstate transportation of petroleum, then it's hard to see how Congress may give the Attorney General the discretion to apply or not apply any or all of SORNA's requirements to pre-Act offenders, and then change his mind at any time. [*Panama Refining* (Casebook, p. 1235).] If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people [the number of pre-Act sex offenders]. * * *

It would be easy enough to let this case go. After all, sex offenders are one of the most disfavored groups in our society. But the rule that prevents Congress from giving the executive *carte blanche* to write laws for sex offenders is the same rule that protects everyone else. Nor is it hard to imagine how the power at issue in this case—the power of a prosecutor to require a group to register with the government on pain of weighty criminal penalties—could be abused in other settings. To allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing—to " 'unit[e]' " the " 'legislative and executive powers ... in the same person' "—would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.[88]

Nor would enforcing the Constitution's demands spell doom for what some call the "administrative state." The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions like those implicated by SORNA. What is more, Congress is hardly bereft of options to accomplish all it might wish to achieve. It may always authorize executive branch officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers. Congress can also commission agencies or other experts to study and recommend legislative language. Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution. * * *

NEW PROBLEM 8-7

HOW FAR DOES THE NONDELEGATION DOCTRINE NOW REACH?

Apparently, Justice Alito voted with the majority so that the Gorsuch dissent could be published; if he had joined the dissenters, the Court would have split 4-4, with no opinions. Justice Kavanaugh did not participate but seems to be a voice for enforcing separation of powers limitations as well, e.g., *PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d. 75 (D.C. Cir. en banc 2018) (Kavanaugh, J., dissenting), but his vote may be up for grabs. You are a law clerk to both Alito and Kavanaugh: How should they vote in the following hypothetical case?

Assume that industry groups challenge the EPA's Ambient Air Quality Standards as a violation of the nondelegation doctrine. The delegation is set forth in this provision of Title 34:

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator--

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Does this delegation meet the *Hampton* "intelligible principle" test? The Supreme Court said that it did, in *American Trucking* (Casebook, p. 1238). But Justice Scalia's opinion for the Court did not address the question whether the nondelegation doctrine ought to be

reconsidered (Justice Thomas flagged that possibility in a concurring opinion) and so did not apply the approach outlined in Justice Gorsuch's *Gundy* dissent.

So Justices Alito and Kavanaugh face three issues: (1) Should the "intelligible principle" test be retired or tightened? If the latter, how? (2) If the former, should the Court adopt the three-allowances outlined in the Gorsuch dissent, or should there be other allowances for delegated authority? (3) If the Court follows the Gorcuch approach, is the § 7409 delegation constitutional? Should *American Trucking* be overruled?

If both Kavanaugh and Alito join the Gorsuch approach, should the Supreme Court reconsider the SORNA delegation and overrule *Gundy*?

B. CONGRESSIONAL AND PRESIDENTIAL POWER TO CONTROL "EXECUTIVE" OFFICIALS

Pages 1291-95: Replace *PHH Corp.* with the following Supreme Court decision and notes:

SEILA LAW LLC v. CONSUMER FINANCIAL PROTECTION BUREAU

United States Supreme Court, 2020
140 S.Ct. ___, 2020 WL 3492641 (June 29, 2020)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III.

[In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, P.L. 111–203, Congress established the Consumer Financial Protection Bureau (CFPB). The CFPB is a financial regulator that applies a set of preexisting statutes to financial services marketed "primarily for personal, family, or household purposes." 12 U.S.C. § 5481(5)(A); *see also id.* §§ 5481(4), (6), (15). Congress has historically given a modicum of independence to financial regulators like the Federal Reserve, the FTC, and the Office of the Comptroller of the Currency. Rather than a multi-member commission, the CFPB's chief decision-maker is its Director, who is appointed by the President for a five-year term. The Director in 2017 would have seen his term expire in 2018; the next expiration date would be 2023, and so forth. The Director may be fired only for "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3)—the same language the Supreme Court approved for the independent commission in *Humphrey's*.

[The Director has a considerable amount of authority. He or she sets the agency's general agenda; determines what proposed rules ought to be advanced for public comment; decides whether to issue a final rule, after notice and comment; manages the agency's budget; and accepts or rejects adjudicatory decisions rendered by administrative law judges (ALJs), who conduct the formal hearings and draft proposed orders and decisions. The primary issue on appeal was whether the CFPB's structure violated the Constitution's separation of powers and/or Article II.]

[III.A] Article II provides that "[t]he executive Power shall be vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.*, § 3. The entire "executive Power" belongs to the President alone. But because it would be "impossib[le]" for "one man" to "perform all the great business of the State," the

Constitution assumes that lesser executive officers will "assist the supreme Magistrate in discharging the duties of his trust." 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).

These lesser officers must remain accountable to the President, whose authority they wield. As Madison explained, "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789). That power, in turn, generally includes the ability to remove executive officials, for it is "only the authority that can remove" such officials that they "must fear and, in the performance of [their] functions, obey." *Bowsher*.

The President's removal power has long been confirmed by history and precedent. It "was discussed extensively in Congress when the first executive departments were created" in 1789. *Free Enterprise Fund*. "The view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal." *Ibid.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004)). [The First Congress recognized this as a constitutional rule in the Decision of 1789, as did the Court's decision in *Myers* and subsequent precedents, culminating in *Free Enterprise Fund*, where the Court declined to extend earlier allowances of congressional removal restrictions to "a new situation not yet encountered by the Court"—an official insulated by *two* layers of for-cause removal protection.]

Free Enterprise Fund left in place two exceptions to the President's unrestricted removal power. First, in *Humphrey's Executor*, decided less than a decade after *Myers*, the Court upheld a statute that protected the Commissioners of the FTC from removal except for "inefficiency, neglect of duty, or malfeasance in office." In reaching that conclusion, the Court stressed that Congress's ability to impose such removal restrictions "will depend upon the character of the office."

Because the Court limited its holding "to officers of the kind here under consideration," the contours of the *Humphrey's Executor* exception depend upon the characteristics of the agency before the Court. Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising "no part of the executive power." Instead, it was "an administrative body" that performed "specified duties as a legislative or as a judicial aid." It acted "as a legislative agency" in "making investigations and reports" to Congress and "as an agency of the judiciary" in making recommendations to courts as a master in chancery. "To the extent that [the FTC] exercise[d] any executive *function*[,] as distinguished from executive *power* in the constitutional sense," it did so only in the discharge of its "quasi-legislative or quasi-judicial powers." * * *

We have recognized a second exception for *inferior* officers in two cases, *United States* v. *Perkins* and *Morrison* v. *Olson*. In *Perkins*, we upheld tenure protections for a naval cadet-engineer. And, in *Morrison*, we upheld a provision granting good-cause tenure protection to an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials. Backing away from the reliance in *Humphrey's Executor* on the concepts of "quasi-legislative" and "quasi-judicial" power, we

viewed the ultimate question as whether a removal restriction is of "such a nature that [it] impede[s] the President's ability to perform his constitutional duty." Although the independent counsel was a single person and performed "law enforcement functions that typically have been undertaken by officials within the Executive Branch," we concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because "the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."

These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—"represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *PHH*, 881 F.3d at 196 (Kavanaugh, J., dissenting). [In Part III.B, the Chief Justice found both *Humphrey's* and *Morrison* distinguishable. So the issue was whether or not their exceptions should be extended to the CFPB.]

[III.C] "Perhaps the most telling indication of [a] severe constitutional problem" with an executive entity "is [a] lack of historical precedent" to support it. Free *Enterprise Fund*. An agency with a structure like that of the CFPB is almost wholly unprecedented.

After years of litigating the agency's constitutionality, the Courts of Appeals, parties, and *amici* have identified "only a handful of isolated" incidents in which Congress has provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission. "[T]hese few scattered examples"—four to be exact—shed little light. *Noel Canning*. [The Comptroller of the Currency enjoyed removal protection for one year during the Civil War. The Office of Special Counsel, enforcing certain rules governing federal employment since 1978, has a single director, but Presidents Carter and Reagan objected to the constitutionality of its removal protections. Also controversially, the Social Security Administration (SSA) has been run by a single Administrator since 1994. Created in 2008 in response to the same crisis as the CFPB, the Federal Housing Finance Agency (FHFA), took responsibility for Fannie Mae and Freddie Mac, government-sponsored enterprises. The Fifth Circuit recently held its removal protections unconstitutional.]

With the exception of the one-year blip for the Comptroller of the Currency, these isolated examples are modern and contested. And they do not involve regulatory or enforcement authority remotely comparable to that exercised by the CFPB. The CFPB's single-Director structure is an innovation with no foothold in history or tradition.

In addition to being a historical anomaly, the CFPB's single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual. [See The Federalist No. 51; *Chadha*.]

The Executive Branch is a stark departure from all this division. The Framers viewed the legislative power as a special threat to individual liberty, so they divided that power to ensure that "differences of opinion" and the "jarrings of parties" would "promote

deliberation and circumspection" and "check excesses in the majority." See The Federalist No. 70, at 475 (A. Hamilton); see also *id.*, No. 51, at 350. By contrast, the Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities. See *id.*, No. 70, at 475–478. As Madison put it, while "the weight of the legislative authority requires that it should be . . . divided, the weakness of the executive may require, on the other hand, that it should be fortified." *Id.*, No. 51, at 350.

The Framers deemed an energetic executive essential to "the protection of the community against foreign attacks," "the steady administration of the laws," "the protection of property," and "the security of liberty." *Id.*, No. 70, at 471. Accordingly, they chose not to bog the Executive down with the "habitual feebleness and dilatoriness" that comes with a "diversity of views and opinions." *Id.*, at 476. Instead, they gave the Executive the "[d]ecision, activity, secrecy, and dispatch" that "characterise the proceedings of one man." *Id.*, at 472.

To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people." *Id.,* at 479. The President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch." *Free Enterprise Fund.*

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President's oversight, "the chain of dependence [is] preserved," so that "the lowest officers, the middle grade, and the highest" all "depend, as they ought, on the President, and the President on the community." 1 Annals of Cong. 499 (J. Madison).

The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. See The Federalist No. 58, at 394 (J. Madison) (describing the "power over the purse" as the "most compleat and effectual weapon" in representing the interests of the people). Yet the Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.

The CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional. But several other features of

the CFPB combine to make the Director's removal protection even more problematic. In addition to lacking the most direct method of presidential control—removal at will—the agency's unique structure also forecloses certain indirect methods of Presidential control.

Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may *never* appoint one. That means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda. To make matters worse, the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.

The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control. The President normally has the opportunity to recommend or veto spending bills that affect the operation of administrative agencies. See Art. I, § 7, cl. 2; Art. II, § 3. And, for the past century, the President has annually submitted a proposed budget to Congress for approval. See Budget and Accounting Act, 1921, ch. 18, § 201, 42 Stat. 20. Presidents frequently use these budgetary tools "to influence the policies of independent agencies." *PHH* (Henderson, J., dissenting) (citing Pasachoff, The President's Budget as a Source of Agency Policy Control, 125 Yale L. J. 2182, 2191, 2203–2204 (2016)). But no similar opportunity exists for the President to influence the CFPB Director. Instead, the Director receives over $500 million per year to fund the agency's chosen priorities. And the Director receives that money from the Federal Reserve, which is itself funded outside of the annual appropriations process. This financial freedom makes it even more likely that the agency will "slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund*.

[In Part IV, the Chief Justice, writing only for himself and Justices Alito and Kavanaugh, ruled that the invalid nonremovability provision was severable form the remainder of Dodd-Frank, including those provisions creating the CFPB. The Chief Justice emphasized the *Alaska Airlines* (and *Sebelius*) presumption in favor of severability, which was buttressed by Dodd-Frank's general severability provision. Justices Ginsburg, Breyer, Sotomayor, and Kagan agreed with the Chief Justice on severability. So the CFPB survived, and the Court remanded the case to the lower courts to determine what relief should be granted Seila Law.]

JUSTICE THOMAS, joined by **JUSTICE GORSUCH**, concurring in part and dissenting in part.

[Justice Thomas would not have severed the nonremoval provisions from the remainder of Dodd-Frank that created and defined the CFPB; he objected to the Court's severability jurisprudence, as inviting judges to reach beyond their narrow Article III powers and revise legislation. He would also have overruled *Humphrey's Executor*. Its quasi-legislative, quasi-judicial reasoning was rejected in *Morrison*, and its holding was

inconsistent with the structural analysis in *Free Enterprise Fund* and the opinion for the Court here.] In light of these decisions, it is not clear what is left of *Humphrey's Executor*'s rationale. But if any remnant of that decision is still standing, it certainly is not enough to justify the numerous, unaccountable independent agencies that currently exercise vast executive power outside the bounds of our constitutional structure.

Continued reliance on *Humphrey's Executor* to justify the existence of independent agencies creates a serious, ongoing threat to our Government's design. Leaving these unconstitutional agencies in place does not enhance this Court's legitimacy; it subverts political accountability and threatens individual liberty. We have a "responsibility to 'examin[e] without fear, and revis[e] without reluctance,' any 'hasty and crude decisions' rather than leaving 'the character of [the] law impaired, and the beauty and harmony of the [American constitutional] system destroyed by the perpetuity of error.' " *Gamble* v. *United States*, 139 S.Ct. 1960, 1984, 204 L.Ed.2d 322 (2019) (Thomas, J., concurring) (quoting 1 J. Kent, Commentaries on American Law 444 (1826); some alterations in original). We simply cannot compromise when it comes to our Government's structure. Today, the Court does enough to resolve this case, but in the future, we should reconsider *Humphrey's Executorin toto*. And I hope that we will have the will to do so.

JUSTICE KAGAN, joined by **JUSTICES GINSBURG, BREYER,** and **SOTOMAYOR**, concurring in the judgment with respect to severability and dissenting in part.

* * * The Court today fails to respect its proper role. It recognizes that this Court has approved limits on the President's removal power over heads of agencies much like the CFPB. Agencies possessing similar powers, agencies charged with similar missions, agencies created for similar reasons. The majority's explanation is that the heads of those agencies fall within an "exception"—one for multimember bodies and another for inferior officers—to a "general rule" of unrestricted presidential removal power. And the majority says the CFPB Director does not. That account, though, is wrong in every respect. The majority's general rule does not exist. Its exceptions, likewise, are made up for the occasion—gerrymandered so the CFPB falls outside them. And the distinction doing most of the majority's work—between multimember bodies and single directors—does not respond to the constitutional values at stake. If a removal provision violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions. But with or without a for-cause removal provision, the President has at least as much control over an individual as over a commission—and possibly more. That means the constitutional concern is, if anything, ameliorated when the agency has a single head. Unwittingly, the majority shows why courts should stay their hand in these matters. "Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration" and the way "political power[ ] operates." *Free Enterprise Fund* (Breyer, J., dissenting).

[I.A. Justice Kagan maintained that the Court overread the separation of powers, by neglecting the checks and balances contained in the Constitution's text.] One way the Constitution reflects that vision is by giving Congress broad authority to establish and organize the Executive Branch. Article II presumes the existence of "Officer[s]" in "executive Departments." § 2, cl. 1. But it does not, as you might think from reading the majority opinion, give the President authority to decide what kinds of officers—in what

departments, with what responsibilities—the Executive Branch requires. See *ante* ("The entire 'executive Power' belongs to the President alone"). Instead, Article I's Necessary and Proper Clause puts those decisions in the legislature's hands. Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" not just its own enumerated powers but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." § 8, cl. 18. Similarly, the Appointments Clause reflects Congress's central role in structuring the Executive Branch. Yes, the President can appoint principal officers, but only as the legislature "shall . . . establish[ ] by Law" (and of course subject to the Senate's advice and consent). Art. II, § 2, cl. 2. And Congress has plenary power to decide not only what inferior officers will exist but also who (the President or a head of department) will appoint them. So as Madison told the first Congress, the legislature gets to "create[ ] the office, define[ ] the powers, [and] limit[ ] its duration." 1 Annals of Cong. 582 (1789). The President, as to the construction of his own branch of government, can only try to work his will through the legislative process.

The majority relies for its contrary vision on Article II's Vesting Clause, but the provision can't carry all that weight. Or as Chief Justice Rehnquist wrote of a similar claim in *Morrison*, "extrapolat[ing]" an unrestricted removal power from such "general constitutional language"—which says only that "[t]he executive Power shall be vested in a President"—is "more than the text will bear." Dean John Manning has well explained why, even were it not obvious from the Clause's "open-ended language." Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1971 (2011). The Necessary and Proper Clause, he writes, makes it impossible to "establish a constitutional violation simply by showing that Congress has constrained the way '[t]he executive Power' is implemented"; that is exactly what the Clause gives Congress the power to do. *Id.,* at 1967. Only "a *specific* historical understanding" can bar Congress from enacting a given constraint. *Id.,* at 2024. And nothing of that sort broadly prevents Congress from limiting the President's removal power. * * * [N]ote two points about practice before the Constitution's drafting. First, in that era, Parliament often restricted the King's power to remove royal officers—and the President, needless to say, wasn't supposed to be a king. See Birk, Interrogating the Historical Basis for a Unitary Executive, 73 Stan. L. Rev. (forthcoming 2021). Second, many States at the time allowed limits on gubernatorial removal power even though their constitutions had similar vesting clauses. See Shane, The Originalist Myth of the Unitary Executive, 19 U. Pa. J. Const. L. 323, 334–344 (2016). Historical understandings thus belie the majority's "general rule."

Nor can the Take Care Clause come to the majority's rescue. That Clause cannot properly serve as a "placeholder for broad judicial judgments" about presidential control. Goldsmith & Manning, The Protean Take Care Clause, 164 U. Pa. L. Rev. 1835, 1867 (2016). To begin with, the provision—"he shall take Care that the Laws be faithfully executed"—speaks of duty, not power. Art. II, § 3. New scholarship suggests the language came from English and colonial oaths taken by, and placing fiduciary obligations on, all manner and rank of executive officers. See Kent, Leib, & Shugerman, Faithful Execution and Article II, 132 Harv. L. Rev. 2111, 2121–2178 (2019). To be sure, the imposition of a duty may imply a grant of power sufficient to carry it out. But again, the majority's view of that power ill comports with founding-era practice, in which removal limits were common. See, *e.g.,* Corwin, Tenure of Office and the Removal Power Under the

Constitution, 27 Colum. L. Rev. 353, 385 (1927) (noting that New York's Constitution of 1777 had nearly the same clause, though the State's executive had "very little voice" in removals). And yet more important, the text of the Take Care Clause requires only enough authority to make sure "the laws [are] faithfully executed"—meaning with fidelity to the law itself, not to every presidential policy preference. As this Court has held, a President can ensure " 'faithful execution' of the laws"—thereby satisfying his "take care" obligation—with a removal provision like the one here. *Morrison*. A for-cause standard gives him "ample authority to assure that [an official] is competently performing [his] statutory responsibilities in a manner that comports with the [relevant legislation's] provisions."

Finally, recall the Constitution's telltale silence: Nowhere does the text say anything about the President's power to remove subordinate officials at will. The majority professes unconcern. After all, it says, "neither is there a 'separation of powers clause' or a 'federalism clause.' " But those concepts are carved into the Constitution's text—the former in its first three articles separating powers, the latter in its enumeration of federal powers and its reservation of all else to the States. And anyway, at-will removal is hardly such a "foundational doctrine[ ]," *ibid.*: You won't find it on a civics class syllabus. That's because removal is a *tool*—one means among many, even if sometimes an important one, for a President to control executive officials. See generally *Free Enterprise Fund* (Breyer, J., dissenting). To find that authority hidden in the Constitution as a "general rule" is to discover what is nowhere there.

[In Part I.B, Justice Kagan offered a counter-history of congressional regulation of presidential removal authority. To begin, with virtually no reliable historians agree with Chief Justice Taft's inaccurate account of the Decision of 1789. Most believe that Congress left the matter of its authority to limit removal unresolved. See Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021, 1072 (2006). But however ambiguous was that decision, early legislation resolved the matter in favor of such authority.]

Take first Congress's decision in 1816 to create the Second Bank of the United States — "the first truly independent agency in the republic's history." Of the twenty-five directors who led the Bank, the President could appoint and remove only five. See Act of Apr. 10, 1816, § 8, 3 Stat. 269. Yet the Bank had a greater impact on the Nation than any but a few institutions, regulating the Nation's money supply in ways anticipating what the Federal Reserve does today. Of course, the Bank was controversial—in large part because of its freedom from presidential control. Andrew Jackson chafed at the Bank's independence and eventually fired his Treasury Secretary for keeping public moneys there (a dismissal that itself provoked a political storm). No matter. Innovations in governance always have opponents; administrative independence predictably (though by no means invariably) provokes presidential ire. The point is that by the early 19th century, Congress established a body wielding enormous financial power mostly outside the President's dominion.

The Civil War brought yet further encroachments on presidential control over financial regulators. In response to wartime economic pressures, President Lincoln (not known for his modest view of executive power) asked Congress to establish an office called the Comptroller of the Currency. The statute he signed made the Comptroller removable

only with the Senate's consent—a version of the old Hamiltonian idea, though this time required not by the Constitution itself but by Congress. See Act of Feb. 25, 1863, ch. 58, 12 Stat. 665. A year later, Congress amended the statute to permit removal by the President alone, but only upon "reasons to be communicated by him to the Senate." Act of June 3, 1864, § 1, 13 Stat. 100. The majority dismisses the original version of the statute as an "aberration." But in the wake of the independence given first to the Comptroller of the Treasury and then to the national Bank, it's hard to conceive of this newest Comptroller position as so great a departure. And even the second iteration of the statute preserved a constraint on the removal power, requiring a President in a firing mood to explain himself to Congress—a demand likely to make him sleep on the subject. In both versions of the law, Congress responded to new financial challenges with new regulatory institutions, alert to the perils in this area of political interference.

And then, nearly a century and a half ago, the floodgates opened. In 1887, the growing power of the railroads over the American economy led Congress to create the Interstate Commerce Commission. Under that legislation, the President could remove the five Commissioners only "for inefficiency, neglect of duty, or malfeasance in office"—the same standard Congress applied to the CFPB Director. Act of Feb. 4, 1887, § 11, 24 Stat. 383. More—many more—for-cause removal provisions followed. In 1913, Congress gave the Governors of the Federal Reserve Board for-cause protection to ensure the agency would resist political pressure and promote economic stability. See Act of Dec. 23, 1913, ch. 6, 38 Stat. 251. The next year, Congress provided similar protection to the FTC in the interest of House] incumbency." 51 Cong. Rec. 10376 (1914). The Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission. In the financial realm, "independent agencies have remained the bedrock of the institutional framework governing U. S. markets." Gadinis, From Independence to Politics in Financial Regulation, 101 Cal. L. Rev. 327, 331 (2013). By one count, across all subject matter areas, 48 agencies have heads (and below them hundreds more inferior officials) removable only for cause. See *Free Enterprise Fund* (Breyer, J., dissenting). So year by year by year, the broad sweep of history has spoken to the constitutional question before us: Independent agencies are everywhere.

[I.C] What is more, the Court's precedents before today have accepted the role of independent agencies in our governmental system. To be sure, the line of our decisions has not run altogether straight. But we have repeatedly upheld provisions that prevent the President from firing regulatory officials except for such matters as neglect or malfeasance. In those decisions, we sounded a caution, insisting that Congress could not impede through removal restrictions the President's performance of his own constitutional duties. (So, to take the clearest example, Congress could not curb the President's power to remove his close military or diplomatic advisers.) But within that broad limit, this Court held, Congress could protect from at-will removal the officials it deemed to need some independence from political pressures. Nowhere do those precedents suggest what the majority announces today: that the President has an "unrestricted removal power" subject to two bounded exceptions.

[Thus, Justice Kagan viewed *Humphrey's* and not *Myers* as the foundational precedent, and rejected the Court's apparent view that the Court's virtually unanimous decision in *Morrison* was an aberration.]

[I.D] The deferential approach this Court has taken gives Congress the flexibility it needs to craft administrative agencies. Diverse problems of government demand diverse solutions. They call for varied measures and mixtures of democratic accountability and technical expertise, energy and efficiency. Sometimes, the arguments push toward tight presidential control of agencies. The President's engagement, some people say, can disrupt bureaucratic stagnation, counter industry capture, and make agencies more responsive to public interests. See, well, Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2331–2346 (2001). At other times, the arguments favor greater independence from presidential involvement. Insulation from political pressure helps ensure impartial adjudications. It places technical issues in the hands of those most capable of addressing them. It promotes continuity, and prevents short-term electoral interests from distorting policy. (Consider, for example, how the Federal Reserve's independence stops a President trying to win a second term from manipulating interest rates.) Of course, the right balance between presidential control and independence is often uncertain, contested, and value-laden. No mathematical formula governs institutional design; trade-offs are endemic to the enterprise. But that is precisely why the issue is one for the political branches to debate—and then debate again as times change. And it's why courts should stay (mostly) out of the way. Rather than impose rigid rules like the majority's, they should let Congress and the President figure out what blend of independence and political control will best enable an agency to perform its intended functions.

Judicial intrusion into this field usually reveals only how little courts know about governance. Even everything I just said is an over-simplification. It suggests that agencies can easily be arranged on a spectrum, from the most to the least presidentially controlled. But that is not so. A given agency's independence (or lack of it) depends on a wealth of features, relating not just to removal standards, but also to appointments practices, procedural rules, internal organization, oversight regimes, historical traditions, cultural norms, and (inevitably) personal relationships. It is hard to pinpoint how those factors work individually, much less in concert, to influence the distance between an agency and a President. In that light, even the judicial opinions' perennial focus on removal standards is a bit of a puzzle. Removal is only the most obvious, not necessarily the most potent, means of control. See generally *Free Enterprise Fund* (Breyer, J., dissenting). That is because informal restraints can prevent Presidents from firing at-will officers—and because other devices can keep officers with for-cause protection under control. Of course no court, as *Free Enterprise Fund* noted, can accurately assess the "bureaucratic minutiae" affecting a President's influence over an agency. But that is yet more reason for courts to defer to the branches charged with fashioning administrative structures, and to hesitate before ruling out agency design specs like for-cause removal standards.

Our Constitution, as shown earlier, entrusts such decisions to more accountable and knowledgeable actors. The document—with great good sense—sets out almost no rules about the administrative sphere. As Chief Justice Marshall wrote when he upheld the first independent financial agency: "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument." *McCulloch*, 4 Wheat. at 415. That would have been, he continued, "an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly." *Ibid.* And if the Constitution, for those reasons, does not lay out immutable rules, then neither should judges. This Court has

usually respected that injunction. It has declined to second-guess the work of the political branches in creating independent agencies like the CFPB. In reversing course today—in spurning a "pragmatic, flexible approach to American governance" in favor of a dogmatic, inflexible one, the majority makes a serious error. * * *

NOTE ON THE ROBERTS COURT'S SEPARATION OF POWERS METHODOLOGY

The dissenting opinion lays out a strong assault on the legal reasoning of the Chief Justice's opinion for the Court in this case and in *Free Enterprise Fund*. As you read these criticisms, consider how Chief Justice Roberts would respond:

● *Constitutional Text: Gerrymandered.* The Court overreads the Vesting Clause of Article II, which never says "all" executive power, and ignores the Necessary and Proper Clause of Article I, which explicitly gives Congress authority to structure the executive branch. There is no "removal" authority granted the President in Article II. For any judge who reads the constitutional text, this is bizarre. Victoria Nourse and one of us have dubbed this "Textual Gerrymandering" (draft July 2020). What is Roberts' theory of Article II?

● *Law Office Pseudo-History.* Legal historians such as the conservative Saikrishna Prakash have demonstrated that the majority justices have misunderstood the Decision of 1789 and have turned it into a much bigger deal that it was at the time. For a general critique of the justices' inability to carry out genuinely "historicist" analysis, see Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation,* 84 Fordham L. Rev. 935 (2015). If Roberts were right about its import, how could the Second Bank have been adopted—and why would President Madison (the bulwark of the Roberts opinion) have signed it without objection? Is the Second Bank materially different from the CFPB? From independent agencies today?

● *Constitutional Structure and Plan: Where Is the Violation?* There can be no denying that the Constitution established checks and balances—which the Court in cases like *Chadha* and *Myers* (where Congress required Senate consent to discharge the postal official) has augmented with cautions against congressional power grabs. But the CFPB structure, like that of the Fed, seeks independence from the political process—both Congress and the President. Why is the CFPB in violation of the constitutional plan? The Chief Justice imagines the plan somewhat differently: Can you articulate his vision, which emphasizes separation of powers?

● *The Novelty Argument: Why Does This Carry Weight?* The majority and dissent argue about how "novel" the CFPB arrangement is, and students can form their own opinion about who "wins." But why does that carry any weight? As the Court said in *McCulloch*, the generally phrased Constitution has lasted a long time and constantly addresses new circumstances and innovations. Why is innovation a bad thing?

● *Practice and Precedent Cut Every Which Way.* The Roberts-Kagan debate is a classic example of how two lines of cases can be deployed to support almost any result—and hence create no rule of law, only a rule of which lawyers have a majority. Until *Free Enterprise Fund* and *Seila Law,* the dominant line of cases allowed a great deal of congressional latititude, so long as there was no self-aggrandizement (arguably the best way to reconcile *Myers, Humphrey's,* and *Morrison*). After *Free Enterprise Fund,* the reverse is the case. Does precedent really limit the Court—or is using precedent like looking out over the

crowd and picking out your friends?

● *Representation-Reinforcing Review: Bickel vs. Ely?* The dissent sounds Bickelian themes: Who do we think we are? Justices are not competent to micromanage the Congress-President competition. Many academics would read the majority as making moves that serve the interests of Corporate America: limit Congress's ability to impose regulations on corporations and rich people. We believe that at least some of the Justices were impressed by the President's ability to impose coherence in regulatory policies across the board—and be accountable for his/her policy regime at election time (the President either runs for reelection or supports her/his party's nominee). Does the Roberts opinion serve this purpose? (Compare it to the Chief's opinion in *Shelby County*.)

The elephant in the opinions is whether this line of cases, combined with a revived nondelegation doctrine, will result in a frontal challenge to the constitutionality of "independent" agencies—which the FTC, SEC, Fed, etc. still are.

Pages 1296: Insert the following Supreme Court decision and notes right before Part C:

DONALD J. TRUMP V. MAZARS USA, LLP
United States Supreme Court, 2020
140 S.Ct. , 2020 WL 3848061 (July 9, 2020)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

[In April 2019, three committees of the U. S. House of Representatives issued four subpoenas seeking information about the finances of President Donald Trump, his children, and affiliated businesses. The House Committee on Financial Services issued a subpoena to Deutsche Bank seeking any document related to account activity, due diligence, foreign transactions, business statements, debt schedules, statements of net worth, tax returns, and suspicious activity identified by Deutsche Bank. The Permanent Select Committee on Intelligence issued a similar subpoena to Deutsche Bank. And the House Committee on Oversight and Reform issued a subpoena to the President's personal accounting firm, Mazars, demanding information related to the President and several affiliated businesses. Although each of the committees sought overlapping sets of financial documents, each supplied different justifications for the requests, explaining that the information would help guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U. S. elections.

President Trump et al. contested the subpoena issued by the Oversight Committee in the District Court for the District of Columbia and the subpoenas issued by the Financial Services and Intelligence Committees in the Southern District of New York. The courts of appeals sustained the authority of the district courts to enforce the subpoenas under the regular rules for such enforcement. The Supreme Court reversed, on the ground that the courts of appeals should have applied a heightened standard, reflecting the separation of powers concerns raised by the subpoenas.]

[II.A] The question presented is whether the subpoenas exceed the authority of the House under the Constitution. Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out

in the "hurly-burly, the give-and-take of the political process between the legislative and the executive." Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel).

That practice began with George Washington and the early Congress. In 1792, a House committee requested Executive Branch documents pertaining to General St. Clair's campaign against the Indians in the Northwest Territory, which had concluded in an utter rout of federal forces when they were caught by surprise near the present-day border between Ohio and Indiana. See T. Taylor, Grand Inquest: The Story of Congressional Investigations 19–23 (1955). Since this was the first such request from Congress, President Washington called a Cabinet meeting, wishing to take care that his response "be rightly conducted" because it could "become a precedent." 1 Writings of Thomas Jefferson 189 (P. Ford ed. 1892).

The meeting, attended by the likes of Alexander Hamilton, Thomas Jefferson, Edmund Randolph, and Henry Knox, ended with the Cabinet of "one mind": The House had authority to "institute inquiries" and "call for papers" but the President could "exercise a discretion" over disclosures, "communicat[ing] such papers as the public good would permit" and "refus[ing]" the rest. President Washington then dispatched Jefferson to speak to individual congressmen and "bring them by persuasion into the right channel." The discussions were apparently fruitful, as the House later narrowed its request and the documents were supplied without recourse to the courts.

[The Chief Justice provided subsequent examples where the branches had worked out demands for executive department information through a negotiated settlement. This case is the first one where the Supreme Court was called upon to resolve the legality of a congressional subpoena against the President.]

[II.B] Congress has no enumerated constitutional power to conduct investigations or issue subpoenas, but we have held that each House has power "to secure needed information" in order to legislate. *McGrain* v. *Daugherty*, 273 U. S. 135, 161 (1927). This "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." Without information, Congress would be shooting in the dark, unable to legislate "wisely or effectively." The congressional power to obtain information is "broad" and "indispensable." *Watkins* v. *United States*, 354 U. S. 178, 187, 215 (1957). It encompasses inquiries into the administration of existing laws, studies of proposed laws, and "surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Id.*

Because this power is "justified solely as an adjunct to the legislative process," it is subject to several limitations. *Watkins*. Most importantly, a congressional subpoena is valid only if it is "related to, and in furtherance of, a legitimate task of the Congress." The subpoena must serve a "valid legislative purpose," *Quinn* v. *United States*, 349 U. S. 155, 161 (1955); it must "concern[ ] a subject on which legislation 'could be had,' " *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491, 506 (1975) (quoting *McGrain*).

Furthermore, Congress may not issue a subpoena for the purpose of "law

enforcement," because "those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn*. Thus Congress may not use subpoenas to "try" someone "before [a] committee for any crime or wrongdoing." *McGrain*. Congress has no " 'general' power to inquire into private affairs and compel disclosures," and "there is no congressional power to expose for the sake of exposure," *Watkins*. "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Id.*

Finally, recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation. See *id.* And recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege. See, *e.g.*, Congressional Research Service, *supra,* at 16–18 (attorney-client privilege); *Senate Select Committee*, 498 F. 2d, at 727, 730–731 (executive privilege).

[In Part II.C, the Chief Justice rejected the President's position, that the subpoena should have been governed by *Nixon*'s "demonstrated, specific need" for the financial information, just as the Watergate special prosecutor was required to do in order to obtain the tapes. See also *Senate Select Committee* (D.C. Circuit case refusing to enforce the Senate subpoena for the tapes).] Unlike the cases before us, *Nixon* and *Senate Select Committee* involved Oval Office communications over which the President asserted executive privilege. That privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is "fundamental to the operation of Government." *Nixon*. As a result, information subject to executive privilege deserves "the greatest protection consistent with the fair administration of justice." *Id.* We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations.

The standards proposed by the President and the Solicitor General—if applied outside the context of privileged information—would risk seriously impeding Congress in carrying out its responsibilities. The President and the Solicitor General would apply the same exacting standards to *all* subpoenas for the President's information, without recognizing distinctions between privileged and nonprivileged information, between official and personal information, or between various legislative objectives. Such a categorical approach would represent a significant departure from the longstanding way of doing business between the branches, giving short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively.
* * *

[In Part II.D, the Chief Justice rejected the House's position and that of the courts of appeals, that enforcement of the subpoenas should be governed by the rules generally applicable to subpoenas. Such a rule did not take account of the sensitive separation of powers concerns presented here but not in the ordinary subpoena case.]

[II.E. The Chief Justice considered the practicalities of this kind of dispute and balanced the interests of each branch to produce the following guidelines for the lower

courts on remand:]

First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. " '[O]ccasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 389–390 (2004) (quoting *Nixon*). Congress may not rely on the President's information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective. The President's unique constitutional position means that Congress may not look to him as a "case study" for general legislation.

Unlike in criminal proceedings, where "[t]he very integrity of the judicial system" would be undermined without "full disclosure of all the facts," *Nixon*, efforts to craft legislation involve predictive policy judgments that are "not hamper[ed] . . . in quite the same way" when every scrap of potentially relevant evidence is not available, *Cheney*. While we certainly recognize Congress's important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs.

Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective. The specificity of the subpoena's request "serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Cheney*.

Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress's legislative purpose, the better. See *Watkins* (preferring such evidence over "vague" and "loosely worded" evidence of Congress's purpose). That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency. In such cases, it is "impossible" to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation. *Id.*

Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena. We have held that burdens on the President's time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines. See *Vance*; *Clinton*. But burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.

Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list. * * *

[**JUSTICE THOMAS** dissented, on the ground that neither chamber of Congress has

subpoena power ancillary to its legislative powers under Article I. "At the time of the founding, the power to subpoena private, nonofficial documents was not included by necessary implication in any of Congress' legislative powers," a precept consistent with *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881), which refused to enforce a subpoena against private documents. Justice Thomas would have overruled *McGrain*, which did sustain such a power, because it was inconsistent with legislative powers as understood in 1789. The House has authority under its impeachment power to issue such subpoenas, an authority not invoked for these cases.]

[**JUSTICE ALITO** agreed with the remand but dissented from the formulation of the standard to be applied.] Specifically, the House should provide a description of the type of legislation being considered, and while great specificity is not necessary, the description should be sufficient to permit a court to assess whether the particular records sought are of any special importance. The House should also spell out its constitutional authority to enact the type of legislation that it is contemplating, and it should justify the scope of the subpoenas in relation to the articulated legislative needs. In addition, it should explain why the subpoenaed information, as opposed to information available from other sources, is needed. Unless the House is required to make a showing along these lines, I would hold that enforcement of the subpoenas cannot be ordered.

NOTE ON THE TRUMP TAX SUBPOENA CASES AND SEPARATION OF POWERS

The House Subpoena Case, read in conjunction with the State Grand Jury Subpoena Case and the cases in this Section 2, exploring separation of powers limits on Congress's authority, offer the student an opportunity to reflect on the Supreme Court's methodology in these cases, where Congress (or one chamber) is at loggerheads with the President. Consider some themes:

- *Justiciable but Still Political.* The Supreme Court declined to consider any of these cases "political questions" (not justiciable under Article III, as we explore in Casebook, pages 1360-80), and so the federal courts now stand as arbiters of clashes between Congress and the President. Although the Chief Justice emphasized the need for Congress and the President to resolve most of these information-generating disputes through interbranch bargaining, the Supreme Court and the judiciary assume power as 'neutral' arbiters. Notice that the Court gave the state grand jury proceedings a much easier path to the Trump tax records than it gave Congress.

- *Relevance of History.* Only Justice Thomas revealed interest in applying the original public meaning of Articles I and II to this controversy, or to the parallel controversy between the Manhattan District Attorney and President Trump over the grand jury subpoena. The other justices were interested in post-1789 history, carefully hewing to the Court's precedents (some of which Thomas questioned) and considering historic practice as they figured out what standard should be applied on remand. Recall the Jackson concurring opinion in the Steel Seizure Cases. It is by now a hallmark of Chief Justice Roberts' jurisprudence that he approaches constitutional "novelty" (issues of first impression) with extreme caution: he is reluctant to sanction novelty without reservation but is protective of the Court's political capital by refusing to make 'big moves'.

● *Balancing and the Critical Role of Process.* At bottom, both tax subpoena cases boiled down to judicial balancing—and process emerged as the big winner. Getting stuff from a President who does not want to give it up is going to require a lot of process—and this reinforces the already huge institutional advantages of the presidency: even a renegade president can slow down the processes of impeachment and congressional fact-finding so much that Congress shrinks further into irrelevance.

Are there other themes that strike you as important in the Trump Tax Subpoena Cases?

SECTION 3. SEPARATION OF POWERS, DUE PROCESS, RELIGION, AND THE WAR ON TERROR

Page 1342. Insert the following Note right before Problem 8-10:

NOTE ON THE UNAVAILABILITY OF HABEAS FOR IMMIGRANTS DENIED ASYLUM

In *Department of Homeland Security v. Thuraigassim,* 2020 WL 3454809, 140 S.Ct. (June 25, 2020), the Court ruled that the Suspension of Habeas Clause did not apply to federal detention of noncitizens who had entered the United States seeking asylum from persecution. (By treaty and by statute, the United States is supposed to grant asylum to persons fleeing from a "well-founded fear of persecution.") In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court had ruled that habeas was available to immigrants who had entered the country but were being detained as a prelude to deportation. But in *Thuraigassim,* the Court declined to require habeas review of a statutory bar to factual review of executive denial of asylum claims.

Justice Alito's opinion for the Court held that the Suspension Clause's protection for habeas as it existed when the Constitution was adopted in 1789 (the test the majority deduced from *Boumedienne*) did not apply to asylum petitioners, who were seeking a mandamus or an injunction rather than a traditional habeas remedy of release from detention. The United States was detaining the asylum-seeker here but was happy to release him to an "airplane cabin" taking him back to his home country. **Justices Breyer** and **Ginburg** concurred in the Court's judgment on narrow, fact-specific grounds.

Justice Sotomayor, joined by **Justice Kagan**, dissented. She charged the Court with a biased framing of the case: the immigrant was seeking review of executive detention resting upon a legally erroneous interpretation of the immigration laws—the classic function of habeas review. The dissenters also maintained that the statutory denial of judicial review violated the Due Process Clause of the Fifth Amendment.

CHAPTER 9

LIMITS ON THE JUDICIAL POWER

■ ■ ■

SECTION 1. THE POLITICAL QUESTION DOCTRINE

Page 1380. Insert before Section 2:

RUCHO V. COMMON CAUSE

-- U.S. -- , 139 S. Ct. 2484, 204 L. Ed.2d 931 (2019)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

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

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy's counsel in *Vieth* [*v. Jubelirer,* 541 U.S. 267 (2004)]: Any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral."). An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States. An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process."

As noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much.".). And it is vital in such circumstances that the Court act only in accord with especially clear standards: "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." If federal courts are to "inject [themselves] into the most heated partisan issues" by adjudicating partisan

gerrymandering claims, they must be armed with a standard that can reliably differentiate unconstitutional from "constitutional political gerrymandering."

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

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: "their party garnered 43 percent of the statewide vote, yet did not receive a single seat." When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects.

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

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

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

On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the

congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity "cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not."

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

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

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

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

*

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

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

The dissent proposes using a State's own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the "median" map would indicate whether a particular districting plan harms supporter of one party to an unconstitutional extent

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent's proposed constitutional test is indeterminate and arbitrary.

Even if we were to accept the dissent's proposed baseline, it would return us to "the original unanswerable question (How much political motivation and effect is too much?)." Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? (We appreciate that the dissent finds all the unanswerable questions annoying, but it seems a useful way to make the point.) The dissent's answer says it all: "This much is too much." That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. For example, the dissent cites the need to determine "substantial anticompetitive effect[s]" in antitrust law. That language, however, grew out of the Sherman Act, understood from the beginning to have its "origin in the common law" and to be "familiar in the law of this country prior to and at the time of the adoption of the [A]ct." Judges began with a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experience gives content to terms such as "substantial risk" or "substantial harm," but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or

some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, § 4, cl. 1.

The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. We are unconvinced by that novel approach.

Article I, § 2, provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." The Elections Clause 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 choosing Senators." Art. I, § 4, cl. 1.

The District Court concluded that the 2016 Plan exceeded the North Carolina General Assembly's Elections Clause authority because, among other reasons, "the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts." 318 F.Supp.3d at 937. The court further held that partisan gerrymandering infringes the right of "the People" to select their representatives. Before the District Court's decision, no court had reached a similar conclusion. In fact, the plurality in *Vieth* concluded—without objection from any other Justice—that neither § 2 nor § 4 of Article I "provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting."

The District Court nevertheless asserted that partisan gerrymanders violate "the core principle of [our] republican government" preserved in Art. I, § 2, "namely, that the voters should choose their representatives, not the other way around." That seems like an objection more properly grounded in the Guarantee Clause of Article IV, § 4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim.

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

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

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. According to the majority, "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." But the Constitution does not mandate proportional representation. So, the majority contends, resolving those claims "inevitably" would require courts to decide what is "fair" in the context of districting. They would have "to make their own political judgment about how much representation particular political parties *deserve*" and "to rearrange the challenged districts to achieve that end." And second, the majority argues that even after establishing a baseline, a court would have no way to answer "the determinative question: 'How much is too much?'" No "discernible and

manageable" standard is available, the majority claims—and so courts could willy-nilly become embroiled in fixing every districting plan.

I'll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels' intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can't be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State's *own* criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders. * * *

Start with the standard the lower courts used. * * * As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

Turn now to the test's application. First, did the North Carolina and Maryland districters have the predominant purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. To remind you of some highlights, North Carolina's redistricting committee used "Partisan Advantage" as an official criterion for drawing district lines. And from the first to the last, that committee's chair (along with his mapmaker) acted to ensure a 10–3 partisan split, whatever the statewide vote, because he thought that "electing Republicans is better than electing Democrats." For their part, Maryland's Democrats—the Governor, senior Congressman, and State Senate President alike—openly admitted to a single driving purpose: flip the Sixth District from Republican to Democratic. They did not blanch from moving some 700,000 voters into new districts (when one-person-one-vote rules required relocating just 10,000) for that reason and that reason alone.

The majority's response to the District Courts' purpose analysis is discomfiting. The majority does not contest the lower courts' findings; how could it? Instead, the majority says that state officials' intent to entrench their party in power is perfectly "permissible," even when it is the predominant factor in drawing district lines. But that is wrong. True enough, that the intent to inject "political considerations" into districting may not raise any constitutional concerns. * * * But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far. * * *

On to the second step of the analysis, where the plaintiffs must prove that the

districting plan substantially dilutes their votes. The majority fails to discuss most of the evidence the District Courts relied on to find that the plaintiffs had done so. But that evidence—particularly from North Carolina—is the key to understanding both the problem these cases present and the solution to it they offer. The evidence reveals just how bad the two gerrymanders were (in case you had any doubts). And it shows how the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes.

Consider the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan's effects mostly by relying on what might be called the "extreme outlier approach." (Here's a spoiler: the State's plan was one.) The approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, *except* for partisan gain. For each of those maps, the method then uses actual precinct-level votes from past elections to determine a partisan outcome (*i.e.,* the number of Democratic and Republican seats that map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other.[3] We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution.

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State's map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data (a composite of seven elections) that Hofeller had employed when devising the North Carolina plan in the first instance. The results were, shall we say, striking. Every single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. A second expert obtained essentially the same results with maps conforming to more generic districting criteria (*e.g.,* compactness and contiguity of districts). Over 99% of that expert's 24,518 simulations would have led to the election of at least one more Democrat, and over 70% would have led to two or three more. Based on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes.

* * * Contrary to the majority's suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State's actual map to an "ideally fair" one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn't been intent on partisan gain. * * * Under their approach, in other words, the State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians' effort to entrench themselves in office.

The North Carolina litigation well illustrates the point. The thousands of randomly generated maps I've mentioned formed the core of the plaintiffs' case that the North Carolina plan was an "extreme[ ] outlier." Those maps took the State's political landscape as a given. In North Carolina, for example, Democratic voters are highly concentrated in cities. That fact

was built into all the maps; it became part of the baseline. On top of that, the maps took the State's legal landscape as a given. * * * The point is that the assemblage of maps, reflecting the characteristics and judgments of the State itself, creates a neutral baseline from which to assess whether partisanship has run amok. Extreme outlier as to what? As to the other maps the State could have produced given its unique political geography and its chosen districting criteria. *Not* as to the maps a judge, with his own view of electoral fairness, could have dreamed up. * * *

The majority's sole response misses the point. According to the majority, "it does not make sense to use" a State's own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria "will vary from State to State and year to year." But that is a virtue, not a vice—a feature, not a bug. Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage—by these legislators at this moment—has distorted the State's districting decisions. Sure, different non-partisan criteria could result, as the majority notes, in different partisan distributions to serve as the baseline. But that in itself raises no issue: Everyone agrees that state officials using non-partisan criteria (*e.g.,* must counties be kept together? should districts be compact?) have wide latitude in districting. The problem arises only when legislators or mapmakers substantially deviate from the baseline distribution by manipulating district lines for partisan gain. So once again, the majority's analysis falters because it equates the demand to eliminate partisan gerrymandering with a demand for a single partisan distribution—the one reflecting proportional representation. But those two demands are different, and only the former is at issue here.

The majority's "how much is too much" critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much? By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. Even the majority acknowledges that "[t]hese cases involve blatant examples of partisanship driving districting decisions." If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these.

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

[G]errymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. In our government, "all political power flows from the people." And

that means, as Alexander Hamilton once said, "that the people should choose whom they please to govern them." 2 *Debates on the Constitution* 257 (J. Elliot ed. 1891). But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10 Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

NOTES ON RUCHO

1. *Judicially Unmanageable Standards*? Is the test suggested by the dissent truly vaguer or less rooted in the Constitution than tests the Court has used in other contexts? For instance, in the one-person, one-vote context, the Court has not required mathematical equality but instead has given legislatures reasonable leeway to consider traditional voting factors. Or consider the middle-tier scrutiny applied in some Equal Protection and First Amendment contexts, which also involve judgment calls by courts. Does the majority make a persuasive argument that the dissent's standard is qualitatively different than those standards? Or is the real thrust of the majority opinion that the need for clear, neutral standards is heightened in this context because of the inherently political nature of the issues? Does *Rucho* represent the triumph of Justice Frankfurter's desire to stay out of the "political thicket"?

2. *Congressional Remedies*. The majority suggests that as to federal elections, Congress may have the power to limit political gerrymandering. (Of course, the political difficulty is that the House is elected from districts that are shaped by state gerrymandering.) Imagine, for instance, a federal statute prohibiting state maps that are in the five ten percent of partisanship using the dissent's approach. Would such a federal statute be constitutional?

The two available sources of power seem to be the Guaranty Clause and section 5 of the Fourteenth Amendment. The extent of congressional power under the Guaranty Clause remains unclear, as is whether a court could review the exercise of that power. As to the Fourteenth Amendment, *Rucho* creates a bit of the puzzle. Assuming that extreme gerrymandering does violate the Fourteenth Amendment but that there is no judicially manageable standard, there must be "congruence and proportionality" between a statute and the underlying constitutional violation in order to satisfy section 5. But how can that test be applied unless the court is able to identify those underlying violations when it sees them? To put it another way, is the scope of congressional power to address political gerrymandering itself a nonjusticiable political question?

3. *The Future of Process Theory*. In *Rucho*, the Court seems to have abandoned or reached the limits of its role in ensuring the representativeness of the political process. How should its acceptance of limits to representative democracy process bear on constitutional doctrine more generally? Should the Court's willingness to overturn legislative decisions be affected by flaws in the representative nature of legislatures, as footnote four of *Carolene Products* and the work of John Hart Ely would suggest.?

Insert on p. 1435 before Section 4:

The Court limited the scope of *Boumedienne*'s ruling on the Suspension Clause in Department of Homeland Security v. Thuraissigiam, — U.S. — , — S.Ct. —, — L.Ed.2d —

(2020), which is discussed in somewhat more detail in Chapter 8. Thuraissigian crossed the U.S. Border and was immediately detained. He sought asylum, claiming that he had a credible fear of persecution. In an expedited removal proceeding, that claim was rejected by immigration officials. A statute prohibited review of that claim by habeas. The Court ruled that habeas only authorized immediate release during the Founding era, which was not the relief that he sought. (*Boumedienne*, in contrast, involved a challenge to detention.) The Court also held that he had no due process right to a hearing on his claim of credible fear of prosecution. The law is well-settled, the Court said, that aliens seeking admission into the United States have no due process rights. The fact that Thuraissigian made it twenty-five yards into U.S. territory before he was caught made no difference.