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LEGAL STRUCTURE OF THE POLITICAL PROCESS

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CHAPTER FIVE

Insert after page 710:

1. Allen v. Milligan, No. 21-1086 (June 8, 2023), involved a Section 2 VRA challenge to the 2021 Alabama congressional redistricting plan. In all the years since *Gingles,* the Court had only found one district in one case to have violated Section 2. When the Court decided to hear the case, many wondered whether the Court might restrict the scope of Section 2 or even hold it unconstitutional.

Plaintiffs had successfully argued to a three-judge district court that the *Gingles* factors were present and that the plan illegally diluted black votes. Blacks constituted 25.9 percent of Alabama's voting population but only one of the state's seven congressional districts was majority black. Plaintiffs' experts had demonstrated that a second majority-black district could be drawn. The District Court had also found extensive racially polarized voting, finding "on average, Black voters supported their candidates of choice with 92.3% of the vote" while "white voters supported Black-preferred candidates with 15.4% of the vote." The District Court preliminarily enjoined the implementation of the plan, but the Supreme Court stayed the decision, allowing the plan to be used in the 2022 elections.

Once the full Court reviewed the case, however, it issued a 5 to 4 decision affirming the District Court. Chief Justice Roberts wrote an opinion for the Court, joined in full by Justices Kagan, Sotomayor, and Jackson, and joined in substantial part by Justice Kavanaugh. The opinion reaffirmed the basics of the *Gingles* framework and the constitutionality of Section 2.

In defending the plan against the section 2 challenge, Alabama had argued that a second majority-black district was not required because drawing one would necessarily have been "racially predominant." The state argued that only if a majority-black district might be drawn through a racially neutral process could its creation be constitutionally required by the VRA and *Gingles*.

> The centerpiece of the State's effort is what it calls the "race-neutral benchmark." The theory behind it is this: Using modern computer technology, mapmakers can now generate millions of possible districting maps for a given State. The maps can be designed to comply with traditional districting criteria but to not consider race. The mapmaker can determine how many majority-minority districts exist in each map, and can then calculate the median or average number of majority-minority districts in the entire multi-million-map set. That number is called the race-neutral benchmark. Slip op at 15
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> [Under Alabama's interpretation of the VRA, prospective plaintiffs would need to prove three things in addition to the Gingles prongs.] First, the illustrative plan that plaintiffs adduce for the first *Gingles* precondition cannot have been "based" on race. Second, plaintiffs must show at the totality of circumstances stage that the State's enacted plan diverges from the average plan that would be drawn without taking race into account. And finally, plaintiffs must ultimately prove that any deviation between the State's plan and a race-neutral plan is explainable "only" by race—not, for example, by "the State's naturally occurring geography and demography." Slip op at 16.

The Court rejected Alabama's reinterpretation of *Gingles*. Alabama had argued that the absence of a second majority-black district in the two million computer simulations submitted by the plaintiffs proved that the creation of that second district was either not required by the VRA or would be unconstitutionally racially predominant were the statute to require it. The argument was reminiscent of those made by unsuccessful plaintiffs in partisan gerrymandering cases, such as *Rucho v. Common Cause*, in which a distribution of randomly generated computer-drawn plans was deployed as a benchmark to argue that partisanship played an extremely strong role in a gerrymander. As in *Rucho*, the *Milligan* Court rejected this methodology: "Section 2 cannot require courts to judge a contest of computers when there is no reliable way to determine who wins, or even where the finish line is." Slip Op. at 29.

Moreover, the Court noted, the history of section 2 litigation since *Gingles* belies the notion that a race-neutral benchmark should determine whether the VRA requires an additional majority-minority district. *Gingles requires* plaintiffs to consider race when they propose a demonstration district under *Gingles*'s first prong illustrating that the minority group is large and compact enough to form a single-member district. Similarly, a state seeking to avoid section 2 liability for its redistricting plan ordinarily must take race into account to prevent impermissible dilution. As the Court put it, "The contention that mapmakers must be entirely "blind" to race has no footing in our §2 case law. The line that we have long drawn is between consciousness and predominance. Plaintiffs adduced at least one illustrative map that comported with our precedents. They were required to do no more to satisfy the first step of *Gingles.*" Slip op. at 25.

Alabama's argument, the Court found, would reinject a "discriminatory intent" requirement into section 2 that was specifically rejected when the statute overturned such a requirement in *Mobile v. Bolden*. Slip op. at 29. The purpose of the *Gingles* prongs and the totality of the circumstances analysis was to highlight when a plan, given the size of the minority community and the extent of racial polarization in the jurisdiction, might have the effect of diluting minority votes. Regardless of whether a plan may have been generated without consideration of race or whether most such plans would have a similar racially discriminatory impact, section 2 exists to prevent plans with discriminatory effects even absent a discriminatory purpose.

Justice Kavanaugh provided the critical fifth vote to affirm the District Court. He wrote separately to emphasize several points. First, he placed great weight on stare decisis and the line of cases beginning with *Gingles* that provided the framework for the court's opinion. Second, he emphasized that proportionality was not the touchstone for section 2 – that majority minority districts still must be "reasonably configured" and respect traditional districting principles. Third, the Section 2 effects test requires that courts "account for the race of voters to prevent the cracking and packing—whether intentional or not—of large and geographically compact minority populations." Slip op. at 4 (Kavanaugh, J., concurring). Finally, he echoed a point made in Justice Thomas's dissent, that while Section 2 might have constitutionally required race-based redistricting when it was enacted in 1982, it could not do so indefinitely. Justice Kavanaugh declined to consider the argument because Alabama had not raised it.

Justice Thomas's dissent, joined in different parts by Justices Gorsuch, Barrett, and Alito, reiterated arguments he had made in several earlier section 2 cases, such as *Holder v. Hall*. He agreed with Alabama that, despite the history of Section 2 and the caselaw succeeding it, the provision did not apply to redistricting. Justice Thomas also agreed with Alabama

that *Gingles*, as it had evolved and was interpreted by the Court here, had pushed inexorably toward requiring proportional representation. "The only benchmark that can justify [the creation of a second majority-black district] is the decidedly nonneutral benchmark of proportional allocation of political power based on race." Slip op. at 6-7 (Thomas, J., dissenting). Such a requirement was inconsistent with the Constitution and the concerns that undergird the *Shaw*-line of cases, according to Justice Thomas (and according to Justice Alito, whose separate dissent joined by Justice Gorsuch, emphasized that forcing the creation of a second majority minority district would be unconstitutionally racially predominant). Moreover, if the statute contained such a requirement, then section 2 exceeded Congress's powers under the enforcement clauses of the Fourteenth and Fifteenth Amendments.

2. An important background factor to the *Allen v. Milligan* litigation was recognition of the fact that minority-preferred candidates can win election without the need for super-majority black voting age populations. When district 7 was first created in the 1990s, it was designed with a 64% black population; at the time, a level that high was thought necessary due to lower rates of black voter registration and turnout. In the plan Alabama enacted in 2021, the black voting-age population (BVAP) had been reduced to 56%. In several of the alternative maps the plaintiffs submitted, the BVAP in district 7 was reduced to around 51-52% BVAP; that enabled a second, partially adjoining district to be drawn with a 50-52% BVAP. The plaintiffs argued that both districts provided an equal opportunity for the minority community to elect a candidate of its choice.

Thus, *Milligan* bears a close relationship to the line of cases from the 2010 round of redistricting, in which the Court struck down Republican drawn plans from Alabama, Virginia, and North Carolina. These plans concentrated black voters at higher rates than necessary to provide the ability to elect that the VRA requires in the face of racially polarized voting. [Because of his involvement in the case, these notes should not be read as reflecting the views of Professor Persily.]

CHAPTER SEVEN

Insert at page 947:

Note on Missouri v. Biden

1. How should the First Amendment treat government attempts to convince or coerce platforms to take action against constitutionally protected speech? The community standards and terms of service of each of the major platforms prohibit certain types of speech (such as bullying, graphic depictions of violence, or hate speech) that the First Amendment protects from government regulation. With respect to election-related speech, the platforms have developed extensive rules related to vote suppression, disinformation related to voting processes, and false election denial (i.e., rejecting the outcome of a election). Depending on the content, speech that falls into these categories might be removed, labeled, or demoted in a newsfeed or it might lead to platforms placing counter-speech, such as a factcheck, next to the particular post in question.

As a result of revelations in the so-called "Twitter Files," which included emails between certain government officials and Twitter, greater attention has been paid to government attempts to identify speech that violates platform policies and government officials' attempts to notify, make aware, cajole, or threaten platforms that refuse to take action against such content. Lawsuits have now been filed to declare that these government efforts leading to platform enforcement actions are unconstitutional under the First Amendment. In one such case, Missouri v. Biden, No. 3:22-CV-01213, (M.D. La. 7/4/23), a federal district judge issued a preliminary injunction, based on his findings that various officials in the Executive Branch had colluded with internet platforms to demote, label, or remove speech related to COVID and election processes. The judge enjoined a number of officials in the White House and the executive branch from having contact with representatives from social media platforms, unless it was necessary to prevent certain categories of illegal behavior. The order was stayed by the Fifth Circuit as this supplement went to publication.

2. What constitutional rules should apply to government officials' efforts to encourage or threaten platforms to regulate user speech? When does using the "bully pulpit" trespass into unconstitutional state action? The plaintiffs in Missouri v. Biden allege that government officials indirectly threatened platforms with antitrust action or pushing for legislation to remove their immunity under Section 230 of the Communications Decency Act. Even if such official action is not threatened, might platforms still feel compelled to ingratiate themselves to representatives from the government? Platforms routinely interact with government officials to deal with criminal investigations, anti-terrorism enforcement, foreign election interference, financial scams, as well as any number of other policy areas, such as civil rights and public health, in which both the government and the platforms seek to understand public opinion and the information ecosystem. Might the internet companies, just like other regulated industries, be overly willing to accede to government requests?

At the same time, any person is allowed to notify a platform of content that violates its

policies. Should government officials be prohibited from speaking to platforms about violative content that might cause societal harm? Even if the First Amendment might be indeterminate on this question, what rules or norms should apply to government interactions with modern internet platforms, which can hold great power to control the reach of certain speech and speakers?

CHAPTER NINE

Insert on page 1095 (before note on Safe Harbors):

Moore v. Harper

600 U.S. __ (June 27, 2023)

■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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

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

I

The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Ibid*. The Clause "imposes" on state legislatures the "duty" to prescribe rules governing federal elections. It also guards "against the possibility that a State would refuse to provide for the election of representatives" by authorizing Congress to prescribe its own rules. *Ibid.*

A

The 2020 decennial census showed that North Carolina's population had increased by nearly one million people, entitling the State to an additional seat in its federal congressional delegation. U. S. Census Bureau, 2020 Census Apportionment Results (2021) (Table A). … In November 2021, the Assembly enacted three new maps, each passed along party lines. *N. C. Gen. Stat. Ann. §120-1* (2021) (State Senate); *§120-2* (State House); *§163-201* (U. S. House of Representatives).

Shortly after the new maps became law, several groups of plaintiffs—including the North Carolina League of Conservation Voters, Common Cause, and individual voters—sued in state court. The plaintiffs asserted that each map constituted an impermissible partisan gerrymander in violation of the North Carolina Constitution.… The trial court agreed, finding that the General Assembly's 2021 congressional districting map was "a partisan

outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." But the court denied relief, reasoning that the partisan gerrymandering claims "amounted to political questions that are nonjusticiable under the North Carolina Constitution."

The North Carolina Supreme Court reversed, …reject[ing] the trial court's conclusion that partisan gerrymandering claims present a nonjusticiable political question. The Court acknowledged our decision in *Rucho* v. *Common Cause*, which held "that partisan gerrymandering claims present political questions beyond the reach of the federal courts." *139 S. Ct. 2484, 250, (2019)*. But "simply because the Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts," the court explained, "it does not follow that they are nonjusticiable in North Carolina courts." The State Supreme Court also rejected the argument that the Elections Clause in the Federal Constitution vests exclusive and independent authority in state legislatures to draw congressional maps....

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

IV

We hold that…[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.

A

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

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

Smiley v. *Holm*, decided 16 years after *Hildebrant*, considered the effect of a Governor's veto of a state redistricting plan. *285 U. S. 355, 361 (1932)*. Following the 15th decennial census in 1930, Minnesota lost one seat in its federal congressional delegation. The State's legislature divided Minnesota's then nine congressional districts in 1931 and sent its Act to the Governor for his approval. The Governor vetoed the plan pursuant to his authority under the State's Constitution. But the Minnesota Secretary of State nevertheless began to implement the legislature's map for upcoming elections. A citizen sued, contending that the legislature's map "was a nullity in that, after the Governor's veto, it was not repassed by the legislature as required by law." The Minnesota Supreme Court disagreed. In its view, "the authority so given by" the Elections Clause "is unrestricted, unlimited, and absolute."

The Elections Clause, it held, conferred upon the legislature "the exclusive right to redistrict" such that its actions were "beyond the reach of the judiciary."

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

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

The significant point for present purposes is that the Court in *Arizona State Legislature* recognized that whatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution. The Court embraced the core principle espoused in *Hildebrant* and *Smiley* "that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto."…

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

B

The legislative defendants and the dissent both contend that because the Federal Constitution gives state legislatures the power to regulate congressional elections, only *that* Constitution can restrain the exercise of that power. Brief for Petitioners 22; *post*, at 17 (opinion of Thomas, J.). …

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

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

legislatures." We rejected that position, holding that when state legislatures ratify amendments to the Constitution, they carry out "a federal function derived from the Federal Constitution," which "transcends any limitations sought to be imposed by the people of a State." *Ibid.*

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

Hawke and *Smiley* delineated the various roles that the Constitution assigns to state legislatures. Legislatures act as "Consent[ing]" bodies when the Nation purchases land, *Art. I, §8, cl. 17*; as "Ratif[ying]" bodies when they agree to proposed Constitutional amendments, *Art. V*; and—prior to the passage of the *Seventeenth Amendment*—as "electoral" bodies when they choose United States Senators, *Smiley, 285 U. S., at 365, 52 S. Ct. 397*; see also Art. I, §3, cl. 1; *Amdt. 17* (providing for the direct election of Senators).

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

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

* * *

D

Were there any doubt, historical practice confirms that state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause. We have long looked to "settled and established practice" to interpret the Constitution. And we have found historical practice particularly pertinent when it comes to the Elections and Electors Clauses. *Smiley, 285 U. S., at 369* (Elections Clause); *Chiafalo v. Washington, 140 S. Ct. 2316 (2020)* (Electors Clause).

Two state constitutional provisions adopted shortly after the founding offer the strongest

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

Besides the two specific provisions in Maryland and Delaware, multiple state constitutions at the time of the founding regulated federal elections by requiring that "[a]ll elections shall be by ballot."…

* * *

V

A

Although we conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein. … As in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law.

State law, for example, "is one important source" for defining property rights. At the same time, the Federal Constitution provides that "private property" shall not "be taken for public use, without just compensation." Amdt. 5. As a result, States "may not sidestep the *Takings Clause* by disavowing traditional property interests."

A similar principle applies with respect to the *Contracts Clause*, which provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." *Art. I, §10, cl. 1*. In that context "we accord respectful consideration and great weight to the views of the State's highest court." Still, "in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made."

Cases raising the question whether adequate and independent grounds exist to support a state court judgment involve a similar inquiry. We have in those cases considered whether a state court opinion below adopted novel reasoning to stifle the "vindication in state courts of . . . federal constitutional rights." *NAACP v. Alabama ex rel. Patterson, 357 U. S. 449, 457-458 (1958)*.

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

by the Federal Constitution.

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

We do not adopt these or any other test by which we can measure state court interpretations of state law in cases implicating the Elections Clause. The questions presented in this area are complex and context specific. We hold only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.

B

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

It is so ordered.

■ JUSTICE KAVANAUGH, concurring.

I join the Court's opinion in full. The Court today correctly concludes that state laws governing federal elections are subject to ordinary state court review, including for compliance with the relevant state constitution. But because the *Elections Clause* assigns authority respecting federal elections to state legislatures, the Court also correctly concludes that "state courts do not have free rein" in conducting that review. Therefore, a state court's interpretation of state law in a case implicating the Elections Clause is subject to federal court review. Federal court review of a state court's interpretation of state law in a federal election case "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*."

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

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

As I see it, all three standards convey essentially the same point: Federal court review of a state court's interpretation of state law in a federal election case should be deferential, but

deference is not abdication. I would adopt Chief Justice Rehnquist's straightforward standard. As able counsel for North Carolina stated at oral argument, the Rehnquist standard "best sums it up." Chief Justice Rehnquist's standard should apply not only to state court interpretations of state statutes, but also to state court interpretations of state constitutions. And in reviewing state court interpretations of state law, "we necessarily must examine the law of the State as it existed prior to the action of the [state] court."….

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

…

II

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

The first premise is that "the people of a single State" lack any ability to limit powers "given by the people of the United States" as a whole. This idea should be uncontroversial, as it is "the unavoidable consequence of th[e] supremacy" of the Federal Constitution and laws. As the Court once put it (in a case about the *Article V* ratifying power of state legislatures), "a federal function derived from the Federal Constitution . . . transcends any limitations sought to be imposed by the people of a State."

The second premise is that regulating the times, places, and manner of congressional elections "'is no original prerogative of state power,'" so that "such power 'had to be delegated to, rather than reserved by, the States.'" This premise is firmly supported by this Court's precedents, which have also held that the Elections Clause is "the exclusive delegation of " such power, as "[n]o other constitutional provision gives the States authority over congressional elections."

The third premise is that "the Legislature thereof " does not mean the people of the State or the State as an undifferentiated body politic, but, rather, the lawmaking power as it exists under the State Constitution. This premise comports with the usual constitutional meanings of the words "State" and "Legislature," as well as this Court's precedents. "A state, and the legislature of a state, are quite different political beings." "A state, in the ordinary sense of the Constitution, is a political community of free citizens . . . organized under a government sanctioned and limited by a written constitution." "'Legislature,'" on the other hand, generally means "'the representative body which ma[kes] the laws of the people.'"

To be sure, the precise constitutional significance of the word "Legislature" depends on "the function to be performed" under the provision in question. Because "the function contemplated by" the Elections Clause "is that of making laws," this Court's Elections Clause cases have consistently looked to a State's written constitution to determine the constitutional actors in whom lawmaking power is vested. The definitions that most precisely explain this Court's holdings were given in a state-court case that anticipated *Hildebrant* and *Smiley* by several years: "[T]he word 'Legislature,' as used in [the Elections Clause] means the lawmaking body or power of the state, as established by the state Constitution," or, put differently, "that body of persons within a state clothed with

authority to make the laws."

If these premises hold, then petitioners' conclusion follows: In prescribing the times, places, and manner of congressional elections, "the lawmaking body or power of the state, as established by the state Constitution," performs "a federal function derived from the Federal Constitution," which thus "transcends any limitations sought to be imposed by the people of a State." As shown, each premise is easily supported and consistent with this Court's precedents. Petitioners' conclusion also mirrors the Court's interpretation of parallel language in the Electors Clause in *McPherson v. Blacker, 146 U. S. 1 (1892)*: "[T]he words, 'in such manner as the legislature thereof may direct,'" "operat[e] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Id.*, at 25.

The majority rejects petitioners' conclusion, but seemingly without rejecting any of the premises from which that conclusion follows. Its apparent rationale—that *Hildebrant*, *Smiley*, and *Arizona State Legislature* have already foreclosed petitioners' argument—is untenable, as it requires disregarding a principled distinction between the issues in those cases and the question presented here. …those cases addressed how to identify "the Legislature" of each State. But, nothing in their holdings speaks at all to whether the people of a State can impose substantive limits on the times, places, and manners that a procedurally complete exercise of the lawmaking power may validly prescribe. These are simply different questions: "There is a difference between *how* and *what*."

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

III

…The majority uses the separate writings in *Bush v. Gore, 531 U. S. 98 (2000)* (*per curiam*), as a loose touchstone for the kind of judicial review that it apparently expects federal courts to conduct in future cases like this one. …[U]nder the majority's framework, it seems clear that the statutory interpretation review forecast in *Bush* (or some version of it) is to be extended to state *constitutional* law.

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

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

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

I would hesitate long before committing the Federal Judiciary to this uncertain path. And I certainly would not do so in an advisory opinion, in a moot case, where "the only function remaining to the court is that of announcing the fact and dismissing the cause."

I respectfully dissent.

Notes and Questions

1. Prior to the Court's decision, there was a lot of uncertainty as whether the case had become moot. After entering the judgment and issuing the mandate that invalidated the 2021 plans, a newly reconstituted version of the North Carolina Supreme Court reheard arguments regarding the constitutionality of the plans under state law. Overruling its prior decision, the court found that the North Carolina constitution imposed no judicially enforceable limits on the practice of partisan gerrymandering. Despite the fact that the North Carolina Supreme Court dismissed the case with prejudice (*Harper I*) and withdrew its opinion ordering remedial maps (*Harper II*), the U.S. Supreme Court nonetheless determined that *Harper I* constituted a final judgment barring the use of the 2021 maps and, as such, the Court retained jurisdiction to resolve the case on the merits. According to the Court, "Were we to reverse the judgment in *Harper I*—a step not taken by the North Carolina Supreme Court—the 2021 plans enacted by the legislative defendants would again take effect. The parties accordingly continue to have a 'personal stake in the ultimate disposition of the lawsuit.'"

In contrast, the dissenters argued that, because the case had been dismissed with prejudice and there was no longer a North Carolina Supreme Court decision barring the use of the 2021 maps, the legislative defendants had received complete relief, thereby mooting the case. Who has the better of the argument? Why might the Court want to decide *Harper* on the merits despite the dissenter's concerns that the case is moot?

2. Although the Court rejected the strongest version of a potential independent state legislature doctrine, it did endorse a weaker version. Is the majority's proposed framework for determining whether state courts are operating within the "bounds of ordinary judicial review" a recipe for continuing uncertainty? Justice Kavanaugh, in a concurrence, notes that there are three possible standards on the table, all of which speak to the degree of deference that federal courts owe to state court interpretations in this context. But the Court does not choose between these standards or offer any guidance as to how this weaker version of the doctrine should be applied.

The dissenters argued the weaker version of the doctrine would spawn a great deal of uncertainty:

> [T]he majority's framework appears to demand that federal courts develop some generalized concept of "the bounds of ordinary judicial review,"; apply it to the task of constitutional interpretation within each State; and make that concept their rule of decision in some of the most politically acrimonious and fast-moving cases that come before them. In many cases, it is difficult to imagine what this inquiry could mean in theory, let alone practice. For example, suppose that we were reviewing *Harper I* under this framework. Perhaps we could have determined that reading justiciable prohibitions against partisan gerrymandering into the North Carolina Constitution exceeded the bounds of ordinary judicial review in North Carolina; perhaps not.… We have held, however, that federal courts are not equipped to judge partisan-gerrymandering questions *at all*. It would seem to follow, *a fortiori*, that they are not equipped to judge whether a state court's partisan-gerrymandering determination surpassed "the bounds of ordinary judicial review."
>
> Even in cases that do not involve a justiciability mismatch, the majority's advice invites questions of the most far-reaching scope. What *are* "the bounds of ordinary judicial review"? What methods of constitutional interpretation do they allow? Do those methods vary from State to State? And what about *stare decisis* —are federal courts to review state courts' treatment of their own precedents for some sort of abuse of discretion? The majority's framework would seem to require answers to all of these questions and more.

Are the dissenters correct that the majority's framework creates legal uncertainty at the worst possible time, i.e. during high stakes and fast moving election litigation? *See* Richard Pildes, *The Supreme Court Rejected a Dangerous Elections Theory. But It's Not All Good News,* N.Y. TIMES, June 28, 2023.

CHAPTER TEN

After page 1146, insert:

PART IV: THE SHADOW DOCKET AND ELECTION LITIGATION

1. An influential 2015 law review article by Professor William Baude introduced the concept of the "shadow docket," a series of important orders by the Supreme Court that altered the outcome of significant disputes or areas of law, even where certiorari was delayed or denied. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015). As broadly expanded by Stephen Vladeck in his well-received book, *The Shadow Docket*, a body of jurisprudence has developed outside the formal law of extensive inputs and careful examination usually associated with cases that emerge from the Supreme Court. Further, a significant set of the shadow docket orders come from the domain of election cases, often in cases seemingly in tension with the *Purcell* caution of judicial restraint on the eve of elections. *See* Steve Vladeck, *How the Shadow Docket Came Full Circle in the 2022 Redistricting Case*s, ELECTION LAW BLOG, May 17, 2023, available at https://electionlawblog.org/?cat=155; Ellis Champion, *With Redistricting, the U.S. Supreme Court Is Leaving Voters in the Shadows*, DEMOCRACY DOCKET, May 3, 2022, available at https://www.democracydocket.com/analysis/with-redistricting-the-u-s-supreme-court-is-leaving-voters-in-the-shadows/; Adam Liptak, *Missing From Supreme Court's Election Cases: Reasons for Its Rulings*, N.Y. TIMES, October 26, 2020, available at https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html.

Among the most far-reaching of such shadow docket activity was the Court's decision in *Merrill v. Milligan*, a predecessor to this term's VRA case *Allen v. Milligan*. In January 2022, a district court panel ordered the Alabama Legislature to redraw its congressional map to include a second majority-Black district. The Supreme Court paused the lower court's order in February 2022 via its shadow docket, only to agree with the lower on the merits in its June 2023 decision.
Merrill v. Milligan, 595 U. S. ____ (2022); *Allen v. Milligan*, 599 U. S. ____ (2023). The pause meant that the unlawful congressional map was used in the 2022 midterms. The impact was the subject of Justice Kagan's dissent from the initial stay, calling the decision "one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument." *Merrill v. Milligan*, 595 U. S. ____ (2022) (Kagan, J., dissenting). In his concurrence, Justice Kavanaugh cited the *Purcell* principle as reason for re-instating Alabama's maps, apparently finding that the four months until the primary election was too narrow a window for a remedial order. *Id*. (Kavanaugh, J., concurring).

The month after *Merrill*, the Court delivered an unsigned order directing the Wisconsin Supreme Court to re-draw its statehouse maps approximately six months before the state's primary election, holding that the state supreme court's original maps were unconstitutional racial gerrymanders. *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 95 U. S. ____ (2022). Dissenting, Justice Sotomayor called the Court's decision "not only extraordinary but also unnecessary," noting none of the traditional processes for filing a racial gerrymander claim were followed. *Id*. (Sotomayor, J., dissenting). Wisconsin had also been at the center of one of the Court's shadow docket rulings in 2020, when an

unsigned order cited the *Purcell* principle in overturning the lower court's extension of the absentee ballot postmark date. *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam). The effect was to create confusion as election officials had already begun changing the date on election materials to accord with the lower court's order, leaving the Supreme Court's order arguably as disruptive of the election proceedings. *See* Caroline Fredrickson, *Will American Democracy Last in Light of the Shadow Docket?*, 23 NEV. L.J. 727, 743 (2023).