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THE LAW OF DEMOCRACY

LEGAL STRUCTURE OF THE POLITICAL PROCESS

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CHAPTER FIVE

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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.]

3. The Court decided another important case that struggled with defining the line between racial gerrymandering, which can be justified only through satisfying the demands of strict scrutiny, and partisan gerrymandering, which is not justiciable in the federal courts. The case, *Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. ___ (2024), involved a single congressional district in South Carolina. After the 2020 Census, the Republican legislature sought to shore up Republican support in Congressional District 1, which had been a 50-50 district in the prior two elections (with a Democrat winning in 2018 and a Republican winning in 2020). The issue was whether race or partisan considerations had predominated in the pursuit of that aim.

The new map raised the projected Republican vote share to 54.39%, a 1.36 point increase from the prior plan. The new plan also kept the BVAP in the district close to what it had been in the prior plan; the BVAP went from 16.6% to 16.7%. The three-judge district court found that race had predominated in the way the new district was constructed; the court found that the redistricters had set a target of maintaining a 17% BVAP in the district, as part of ensuring the district would be a likely Republican one. In a 6-3 decision, the Supreme Court reversed.

Cases in which courts must sort out whether voters were moved in and out of districts primarily for racial or partisan reasons are often factually complex and highly detailed. For the factual issues, we refer readers to the opinion itself. But *Alexander* emphasized or established two legal principles relevant for cases going forward. First, courts must presume that state legislatures have acted in good faith. This would seem to mean that

where the factual issues are close, legislatures must be given the benefit of the doubt.

Second, the Court revisited the role of alternative maps in these type of cases. In *Cooper v. Harris*, the Court had rejected the argument that plaintiffs in racial gerrymandering cases had to offer an alternative map, which would show that the state could have achieved any partisan aims without relying on racial considerations. The Court held that such circumstantial evidence could be helpful, but was not required, because racial gerrymandering could be proven in other ways. In *Alexander*, the Court held that, even if an alternative map is not required, courts must nonetheless draw an adverse inference against plaintiffs if they do not submit such a map. Dissenting in *Alexander*, Justice Kagan (the author of *Cooper v. Harris*) argued that the Court was essentially overruling *Cooper* on this point.

Alexander will make it more difficult for plaintiffs to prevail in racial gerrymandering cases. But even before the decision, it was unclear how many such cases would arise in this decade, given the Court's *Rucho v. Common Cause* decision. *Rucho*, recall, was decided in 2019, toward the end of the prior decade of redistricting. Until then, redistricters were concerned that, if they were explicit about engaging in partisan gerrymandering, the courts might strike down their maps. Thus, they sometimes argued that the Voting Rights Act required the maps they drew, which in turn drew charges of racial gerrymandering, where the VRA did not in fact provide a strong basis in evidence for any such requirement. After *Rucho*, legislatures can be overt about moving people for partisan purposes and, thus, do not need to hide behind the claim that they moved people by race to comply with the VRA. Even before *Alexander*, that would reduce the likelihood of racial gerrymandering claims. Keep in mind that racial gerrymandering claims are distinct from racial vote-dilution claims; the latter reflect not just moving voters by race, but the denial of equal opportunity to elect candidates of choice, in the face of racially-polarized voting.

CHAPTER SEVEN

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Note on *Murthy v. Missouri* and *Moody v. Netchoice*:

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 concerning voting processes, and false election denial (i.e., rejecting the outcome of an 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. Users of Twitter, Facebook and other platforms, along with members of Congress in oversight hearings, have complained that the government and platforms have together violated the First Amendment by acting against constitutionally protected speech.

In Murthy v. Missouri, 603 U.S. __ (2024), the Supreme Court had its first opportunity to engage with these issues. The District Court had issued a preliminary injunction, concluding that Executive Branch had colluded with internet platforms to demote, label, or remove speech related to COVID and election processes. It 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 Fifth Circuit affirmed much of the District Court's decision.

The Supreme Court, in an majority opinion written by Justice Barrett, overturned the Fifth Circuit's decision, largely on standing grounds. The Court concluded that the plaintiffs could not prove that the actions of the social media platforms were "fairly traceable" to government "coercion" or "significant encouragement." Many of the applicable policies of the platforms preexisted any communications with the government. Their actions against the plaintiffs' posts could have come from the platforms' own enforcement of their policies. Because they could not demonstrate that the platforms acted on the plaintiffs' speech as a result of some implied or explicit threat or significant encouragement from the government, they did not have standing to demand a prospective injunction against the platforms, which might continue to enforce their own policies with the same effects.

Justice Alito filed a dissent, joined by Justices Thomas and Gorsuch, arguing that

if the facts were correct, "this is one of the most important free speech cases to reach the Court in years." He noted the powerful incentives internet platforms have to please the government, which could punish them by removing statutory immunities critical to their business, threatening antitrust action, or choosing not to protect them in negotiations with foreign governments. The dissent focused on government communications with the platforms concerning the COVID pandemic and vaccines and concluded that the pattern of government communications and platform actions was enough to demonstrate that "censorship" of at least one of the plaintiffs likely resulted from government pressure.

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 *Murthy v. Missouri* alleged 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?

3. In the same term that it decided *Murthy v. Missouri*, the Court issued an opinion in another internet case, *Moody v. Netchoice*, 603 U.S. __ (2024). In that case, the Court considered the constitutionality of laws from Florida and Texas that required internet platforms to carry certain speech that might otherwise be taken down or demoted due to violations of their community standards and content policies. Florida's law prevented platform action against speech by "journalistic enterprises" or political candidates. Texas's law prohibited "viewpoint discrimination" on the part of the platforms, which, for example, could prohibit takedowns for hate speech or certain categories of disinformation. The platforms and an industry association (Netchoice) brought facial challenges to the laws. At the preliminary injunction stage, the lower courts upheld much of the Texas law and struck down much of the Florida law.

In an opinion authored by Justice Kagan, the Court reversed and remanded these decisions, maintaining that the lower courts had not developed the record sufficiently to satisfy the high standard for a facial challenge. Nevertheless, the Court provided direction to the district courts in its opinion suggesting that the laws infringed on the platforms' First Amendment rights. Analogizing internet platforms to newspapers, the Court suggested the laws infringed on the rights of platforms-as-speakers to "compile and curate" other persons' speech. *See Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974). The "government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas." Slip op. at 18. In other words, the state cannot force platforms to carry certain speech they wish to demote or takedown simply because the state

considers the platforms' content moderation standards or algorithms to be politically biased or otherwise distorting of the marketplace of ideas. "However imperfect the private marketplace of ideas, here was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others." Slip op. at 19. Given the state's impermissible purpose, the Court maintained that the law would not pass even intermediate scrutiny because the law did not "further a substantial governmental interest . . . unrelated to the suppression of free expression." Slip op. at 26. Citing *Buckley v. Valeo*, the Court reiterated that the government "cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana. That is why we have said in so many contexts that the government may not 'restrict the speech of some elements of our society in order to enhance the relative voice of others.' *Buckley*."

Nevertheless, the Court was unwilling to hold that the law was unconstitutional on its face. The laws included various provisions related to transparency and user appeals that might be less infringing of the platforms' First Amendment rights. Moreover, the Court suggested that the mandates of viewpoint neutrality might have some constitutional applications. The antidiscrimination and "must carry" provisions might raise different questions for messaging apps or email, than they would for newsfeeds or the YouTube homepage. The lower courts would need to define the scope of the laws with greater specificity and consider whether each type of platform (or product within a platform) exercised the same type of First Amendment rights of curation of user content.

4. How should we reconcile the *Murthy* and *Netchoice* cases? Although the Court decided *Murthy* on standing grounds and *Netchoice* on the high bar necessary to bring a facial challenge, the cases seem to provide some direction going forward as to the constitutional boundaries between government action and a platform's First Amendment rights. Both cases arose from concerns that the platforms' content moderation policies, either in purpose or effect, were politically biased. The plaintiffs in *Murthy* alleged the bias arose, in some settings, from coercion from the government. The states in the *Netchoice* cases tried to address alleged platform bias through the most explicit form of government coercion: state laws regulating the content policies of the platforms. Note that the plaintiffs in *Murthy* were individual users of the platforms. If the platforms themselves had sued to prevent the kind of "jawboning" alleged by the users, might the case have come out differently?

Undergirding many of the concerns expressed in these cases is a recognition that large internet platforms, like Meta and Google, have unique power to shape the marketplace of ideas through their content policies. If they decided to place a thumb on the scale for different parties or candidates, is there anything the state could do about it? Or should the platforms' content-related decisions be viewed, as they were in *Netchoice*, like those of the editorial page of a newspaper, which is free under the First Amendment to endorse candidates? Justice Kagan in *Netchoice* suggests that antitrust law may be the appropriate setting in which the government might act to address the outsized power of some of these platforms to shape political debate. Is there anything to be learned from the *White Primary Cases*, the "politics-as-markets" theory, or other topics in the law of democracy that might be helpful in thinking through the line-drawing problems related to government power and the rights of internet platforms?

A NOTE ON ARTIFICIAL INTELLIGENCE AND DEMOCRACY

Following the release of ChatGPT in November 2022, innovation and interest in artificial intelligence has exploded. So have concerns about how AI might affect elections and democracy. Americans continue to harbor fears that technology, such as social media, undermines democracy in fundamental ways. The experience of 2016 has cast a long shadow over opinions related to the impact of technology on elections. In a series of surveys taken in 2024, a majority of Americans expressed concerns that AI would determine the outcome of the 2024 election. *See* Owen Covington, *New Survey Finds Most Americans Expect AI Abuses Will Affect 2024 Election*, Today at Elon, May 15, 2024, available at https://www.elon.edu/u/news/2024/05/15/ai-and-politics-survey/; Morning Consult, *National Tracking Poll Topline Report* (Project 2308055, August 10–13, 2023). In particular, Americans are concerned that AI-generated synthetic imagery, such as "deep fakes" that realistically depict candidates in a negative light, may manipulate voter opinion or mislead people about the voting process.

In some respects, AI is both worse and better than social media. The key danger most people perceive relates to the interaction of AI and social media – the creation of a new brand of disinformation that can be optimized to go viral or to microtarget specific populations or even be tailor made for individuals. But AI is a more ubiquitous and powerful technology than social media. It will amplify the abilities of all actors in the electoral system to achieve all the same goals they had in the pre-AI world. This is true for good and bad actors, foreign and domestic organizations, candidates and campaigns, election officials and outside groups. All digital services, in short order, will include some form of AI technology.

Since the ChatGPT bombshell, most attention has focused on generative AI. Various generative AI tools allow users to create text, images, voice, or video from prompts entered into a search-like query box. These tools are different than search engines, like Google, however. At its core, the technology makes predictions from the information the user provides based off of enormous amounts of training data, sometimes as large as the internet itself. The tools do not search the internet for answers, per se, but they "learn" from training data what the likely best responses to a user query might be.

As such, these tools are susceptible to intentional disinformation and unintentional misinformation. Users can create persuasive text or images to try to convince voters to vote a particular way or not to vote at all. They can mimic candidate voices to misrepresent a candidate's positions or to generate robocalls that put the candidate in a bad light. Of greatest concern, the video tools might create truly "fake news" videos that mislead viewers into thinking something happened when it did not. Even if voters do not believe in any given deep fake, the ubiquity of AI imagery and videos may increasingly lead people to doubt the veracity of true news. It also allows candidates more credibly to claim that bad news about them is actually fake – what scholars' call the "Liar's Dividend." Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 Cal. L. Rev. 1753, (2019).

The risk of misinformation is of equal concern. People now turn to ChatGPT and similar tools for information related to elections and otherwise. However, the answers these tools provide are based off data that can be quite old, and in any event, they represent predictions rather than Google-like search responses. As a result, if a

person asks these tools "where is my polling place?" They might generate an outdated or totally inaccurate response. The same would be true for candidate positions or facts. These tools are prone to "hallucinations" – the often-confident expression of answers that are disconnected from any factual basis. For example, when one user asked Google's Gemini tool how many rocks should be included in a person's daily diet, it responded that "eating the right rocks can be good for you because they contain minerals that are important for your body's health." When asked what the best way would be to stick cheese on a pizza, it recommended using non-toxic glue. *See* Dan Ladden-Hall, *Google Explains Why Its AI Tool Told Users to Eat Rocks*, Daily Beast, May 31, 2024, available at https://www.thedailybeast.com/google-explains-why-its-ai-overviews-told-users-to-eat-rocks-and-glue-pizzas . These are some of the most egregious examples, but they illustrate how the tools might be unreliable to provide useful information in high stakes instances, such as election information.

Recognizing these problems, leading AI companies, such as OpenAI and Anthropic, have taken several measures to try to avoid having their tools lead voters astray with misinformation related to the voting process. Open AI has partnered with the National Association of Secretaries of State, and Anthropic has partnered with Democracy Works, to supply accurate and up-to-date voting information. For queries related to the election process, tools like ChatGPT and Claude, now point to websites and tools from those organizations, instead of generating responses on their own. Unfortunately, the number of possible queries related to elections is so vast that some who have tested these tools have still found high rates of errors and hallucinations. *See* Julia Angwin, Alondra Nelson & Rina Palta, *Seeking Reliable Election Information? Don't Trust AI*, AI Democracy Projects, February 27, 2024, available at https://www.ias.edu/sites/default/files/AIDP_SeekingReliableElectionInformation-DontTrustAI_2024.pdf.

Even when the information provided by generative AI tools might not be inaccurate, it still might be biased. Sometimes that bias might emerge from the model's training data (e.g., if a model is primarily trained on left-leaning sources, the answers it gives to queries might express that bias). Other times, bias may emerge in fine-tuning the model or building in guardrails that restrict the kinds of answers that products like chatbots will supply, as when it reverts to search for certain election administration queries or refuses to answer queries attempting to evoke an illegal or offensive response.

Whatever the origin, though, bias in AI tools can be of particular concern in the election context when the tools are used by voters or other actors in the system to seek out information or develop advocacy materials. Early in its release, ChatGPT would write favorable poems about Joe Biden but not Donald Trump, for example. Most infamously, Google's Gemini image generation tool would recreate historical images so that they were more diverse along gender or racial lines, which led it to depict Nazis of different races and female popes. *See* Megan McArdle, *Female Popes? Google's Amusing AI Bias Underscores a Serious Problem*, Wash. Post, February 27, 2024, available at https://www.washingtonpost.com/opinions/2024/02/27/google-gemini-bias-race-politics/. These patterns led to concerns about so-called "woke AI," similar to the concerns related to social media content policies that gave rise to the laws in Florida and Texas at issue in *Netchoice*. *See* Rob Waugh, *The Nine Shocking Replies That Highlight 'Woke' ChatGPT's Inherent Bias*, Daily Mail, February 11, 2024, available at https://www.dailymail.co.uk/sciencetech/article-11736433/Nine-shocking-replies-highlight-woke-ChatGPTs-inherent-bias.html.

How should the law of democracy deal with the advent of AI? Does it present a qualitatively different set of issues than social media or communication policies from the pre-internet era? States have passed a series of laws to try to come to grips with the political implications of these tools. Several have required disclosure of the use of AI in campaign advertisements or even banned the use of "deep fakes" to "influence an election." *See* Minn. Stat. Ann. § 609.771 (West 2024), Tex. Elec. Code. Ann. § 255.004 (West 2019). The AI platforms, themselves, have similar terms of use or hard-wire their models so that, for example, images of public figures cannot be manipulated. Some, like OpenAI, also prohibit the use of some of their tools for "campaigning" and "lobbying" purposes. *See* OpenAI, *Usage Policies*, Jan. 10, 2024, available at https://openai.com/policies/usage-policies/ (prohibiting facilitation of activities, such as "engaging in political campaigning or lobbying, including generating campaign materials personalized to or targeted at specific demographics" or "deterring people from participation in democratic processes, including misrepresenting voting processes or qualifications and discouraging voting"). These new companies, like the social media platforms that came before them and campaign finance reformers throughout history, are the most recent actors to try to develop definitions over what constitutes impermissible electioneering activities.

One factor that might distinguish AI from social media is the availability of open-source tools. In addition to the closed models of companies, like OpenAI, Anthropic, and Google, some firms, such as Meta with its Llama model, have decided to make their models publicly available. This allows users to fine tune the model for their own purposes. Once the company releases the model they no longer have control over how it might be adapted or transformed. As a result, guardrails related to politics or campaigning (let alone pornography, disinformation, or other harmful uses) can be easily removed in a different version of the model, which in turn could be downloaded by any political actor. Therefore, even if regulations might affect deployment of the initial version of the model, the technology could still be used for otherwise prohibited purposes.

Not only will it be difficult to regulate the AI models and companies because of the dynamics of open source, it will be increasingly difficult to identify the actors, themselves, who are deploying AI for political ends. Anonymity has always been a distinctive feature of new forms of digital political communication. As revealed by the foreign intervention in the 2016 election, it can be difficult to identify who is behind certain types of online political communication. With the emergence of AI "agents," however, some political activities will not be performed by humans at all. Agents are autonomous software programs with the ability to plan and perform certain actions online. Those agents will be able to generate online political content and even interact with users in political conversations. How should First Amendment law adapt to the dynamics of autonomous machine-generated speech? Recall that in the cases relating to corporations and campaign finance, such as *Bellotti* and *Citizens United*, several opinions focus on the rights of listeners to hear certain speech rather than the rights of the speakers, whatever their identity. Should regulations of AI-generated speech turn on the nature of the speaker (in this case, a machine) or do listeners have a right to hear such speech, whatever its source.

Although much of the discussion relating to AI and democracy has an apocalyptic tone, this new family of technologies is, in the end, a group of tools that can be used for good or ill. Just as bad actors may try to generate content to suppress the vote or misrepresent

political reality, candidates, NGOs, and campaigns can use them to engage in advocacy to mobilize or to communicate with voters. Similarly, election officials can use AI to allocate their resources efficiently, generate all forms of voting materials, and to detect anomalies in election returns or polling place practices. It is difficult, at this early stage, to predict the impact of AI technologies on democracy, just as it is for the economy, society, and geopolitics, which may be transformed in profound ways. For a more extensive treatment of these issues, see Nathaniel Persily, *Misunderstanding AI's Democracy Problem*, *in* The Digitalist Papers: Artificial Intelligence, Digital Society, and Democracy in America (Erik Brynjofsson, et al., eds., 2024).

CHAPTER NINE

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

Moore v. Harper

600 U.S. 1 (2023)

■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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

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

I

The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *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.

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).

PART V: AN EMERGING LAW OF PRESIDENTIAL SELECTION AND PRESIDENTIAL ACCOUNTABILITY?

Truly unprecedented in American history has been the potential criminal charges brought against former President Trump in connection with his candidacy for office and then his efforts to retain office and the use of presidential powers, even after leaving office. These cases raise difficult issues of the scope of presidential authority, separation of powers, federalism, and immunities for the discharge of official functions. An entire course could no doubt be devoted to these questions and would reach into complicated questions of constitutional law and even criminal law. Our focus will be on the most direct engagement with presidential election, and we begin with the question of disqualification of a candidate for that office.

Trump v. Anderson
600 U.S. 100 (2024)

■ PER CURIAM.

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

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

I

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

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

> "No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

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

II

A

Proposed by Congress in 1866 and ratified by the States in 1868, the Fourteenth Amendment "expand[ed] federal power at the expense of state autonomy" and thus "fundamentally altered the balance of state and federal power struck by the Constitution." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59; see also *Ex parte Virginia*, 100 U.S. 339 (1880). Section 1 of the Amendment, for instance, bars the States from "depriv[ing] any person of life, liberty, or property, without due process of law" or "deny[ing] to any person ... the equal protection of the laws." And Section 5 confers on Congress "power to enforce" those prohibitions, along with the other provisions of the Amendment, "by appropriate legislation."

Section 3 of the Amendment likewise restricts state autonomy, but through different means. It was designed to help ensure an enduring Union by preventing former Confederates from returning to power in the aftermath of the Civil War. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., 2544 (1866) (statement of Rep. Stevens, warning that without appropriate constitutional reforms "yelling secessionists and hissing copperheads" would take seats in the House); *id.*, at 2768 (statement of Sen. Howard, lamenting prospect of a "State Legislature ... made up entirely of disloyal elements" absent a disqualification provision). Section 3 aimed to prevent such a resurgence by barring from office "those who, having once taken an oath to support the Constitution of the United States, afterward went into rebellion against the Government of the United States." Cong. Globe, 41st Cong., 1st Sess., 626 (1869) (statement of Sen. Trumbull)….

Congress's Section 5 power is critical when it comes to Section 3. Indeed, during a debate on enforcement legislation less than a year after ratification, Sen. Trumbull noted that "notwithstanding [Section 3] ... hundreds of men [were] holding office" in violation of its terms. Cong. Globe, 41st Cong., 1st Sess., at 626. The Constitution, Trumbull noted, "provide[d] no means for enforcing" the disqualification, necessitating a "bill to give effect to the fundamental law embraced in the Constitution." *Ibid.* The enforcement mechanism Trumbull championed was later enacted as part of the Enforcement Act of 1870, "pursuant to the power conferred by § 5 of the [Fourteenth] Amendment." *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375 (1982); see 16 Stat. 143–144.

B

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

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

Such power over governance, however, does not extend to *federal* officeholders and candidates. Because federal officers " 'owe their existence and functions to the united voice

of the whole, not of a portion, of the people,'" powers over their election and qualifications must be specifically "delegated to, rather than reserved by, the States." *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803–804 (1995) (quoting 1 J. Story, Commentaries on the Constitution of the United States § 627, p. 435 (3d ed. 1858)). But nothing in the Constitution delegates to the States any power to enforce Section 3 against federal officeholders and candidates….

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

The text of Section 3 reinforces these conclusions. Its final sentence empowers Congress to "remove" any Section 3 "disability" by a two-thirds vote of each house. The text imposes no limits on that power, and Congress may exercise it any time …. In fact, historically, Congress sometimes exercised this amnesty power postelection to ensure that some of the people's chosen candidates could take office. But if States were free to enforce Section 3 by barring candidates from running in the first place, Congress would be forced to exercise its disability removal power before voting begins if it wished for its decision to have any effect on the current election cycle….

Nor have the respondents identified any tradition of state enforcement of Section 3 against federal officeholders or candidates in the years following ratification of the Fourteenth Amendment.[3] Such a lack of historical precedent is generally a " 'telling indication' " of a " 'severe constitutional problem' " with the asserted power. *United States v. Texas*, 599 U.S. 670, 677 (2023) (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)). And it is an especially telling sign here, because as noted, States *did* disqualify persons from holding state offices following ratification of the Fourteenth Amendment. That pattern of disqualification with respect to state, but not federal offices provides "persuasive evidence of a general understanding" that the States lacked enforcement power with respect to the latter. *U. S. Term Limits*, 514 U.S. at 826.

Instead, it is Congress that has long given effect to Section 3 with respect to would-be or existing federal officeholders. Shortly after ratification of the Amendment, Congress enacted the Enforcement Act of 1870. That Act authorized federal district attorneys to bring civil actions in federal court to remove anyone holding nonlegislative office—federal or state—in violation of Section 3, and made holding or attempting to hold office in violation of Section 3 a federal crime. §§ 14, 15, 16 Stat. 143–144 (repealed, 35 Stat. 1153–1154, 62 Stat. 992–993). In the years following ratification, the House and Senate exercised their unique powers under Article I to adjudicate challenges contending that certain prospective or sitting Members could not take or retain their seats due to Section 3. See Art. I, § 5, cls. 1, 2; 1 A. Hinds, Precedents of the House of Representatives §§ 459–463, pp. 470–486 (1907). And the Confiscation Act of 1862, which predated Section 3, effectively provided an additional procedure for enforcing disqualification. That law made engaging in insurrection or rebellion, among other acts, a federal crime punishable by disqualification from holding office under the United States. See §§ 2, 3, 12 Stat. 590. A successor to those provisions remains on the books today. See 18 U.S.C. § 2383.

[10] [11]Moreover, permitting state enforcement of Section 3 against federal officeholders and candidates would raise serious questions about the scope of that power. Section 5 limits *congressional* legislation enforcing Section 3, because Section 5 is strictly "remedial." *City of Boerne*, 521 U.S. at 520. To comply with that limitation, Congress "must tailor its legislative scheme to remedying or preventing" the specific conduct the relevant provision prohibits. *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639 (1999)....

Finally, state enforcement of Section 3 with respect to the Presidency would raise heightened concerns. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest." *Anderson v. Celebrezze*, 460 U.S. 780 (1983). But state-by-state resolution of the question whether Section 3 bars a particular candidate for President from serving would be quite unlikely to yield a uniform answer consistent with the basic principle that "the President ... represent[s] *all* the voters in the Nation." *Id.*, at 795 (emphasis added)…. The result could well be that a single candidate would be declared ineligible in some States, but not others, based on the same conduct (and perhaps even the same factual record).

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

* * *

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

All nine Members of the Court agree with that result. Our colleagues writing separately further agree with many of the reasons this opinion provides for reaching it. See *post*, Part I (joint opinion of SOTOMAYOR, KAGAN, and JACKSON, JJ.); see also *post*, pp. 671 – 672 (opinion of BARRETT, J.). So far as we can tell, they object only to our taking into account the distinctive way Section 3 works and the fact that Section 5 vests *in Congress* the power to enforce it. These are not the only reasons the States lack power to enforce this particular constitutional provision with respect to federal offices. But they are important ones, and it is the combination of all the reasons set forth in this opinion—not, as some of our colleagues would have it, just one particular rationale—that resolves this case. In our view, each of these reasons is necessary to provide a complete explanation for the judgment the Court unanimously reaches.

The judgment of the Colorado Supreme Court is reversed.

It is so ordered.

■ JUSTICE BARRETT, concurring in part and concurring in the judgment.
I join Parts I and II–B of the Court's opinion. I agree that States lack the power to enforce Section 3 against Presidential candidates. That principle is sufficient to resolve this case, and I would decide no more than that. This suit was brought by Colorado voters under state law in state court. It does not require us to address the complicated question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced…..

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

"If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 348 (2022) (ROBERTS, C. J., concurring in judgment). That fundamental principle of judicial restraint is practically as old as our Republic. This Court is authorized "to say what the law is" only because "[t]hose who apply [a] rule to particular cases ... must of *necessity* expound and interpret that rule." *Marbury v. Madison*, 5 U.S. 1 Cranch 137, 2 L.Ed. 60 (1803) (emphasis added).

Today, the Court departs from that vital principle, deciding not just this case, but challenges that might arise in the future. In this case, the Court must decide whether Colorado may keep a Presidential candidate off the ballot on the ground that he is an oathbreaking insurrectionist and thus disqualified from holding federal office under Section 3 of the Fourteenth Amendment. Allowing Colorado to do so would, we agree, create a chaotic state-by-state patchwork, at odds with our Nation's federalism principles. That is enough to resolve this case. Yet the majority goes further. Even though "[a]ll nine Members of the Court" agree that this independent and sufficient rationale resolves this case, five Justices go on. They decideCAL novel constitutional questions to insulate this Court and petitioner from future controversy. Although only an individual State's action is at issue here, the majority opines on which federal actors can enforce Section 3, and how they must do so….

Notes and Questions

1. The Court's methodology is strikingly at odds with the originalist cast to recent constitutional jurisprudence. The Per Curiam opinion is most troubled by two facts. First, after the enactment of Section 3, actions taken by Congress indicated a move away from the kind of enforcement favored by Colorado, certainly at the state level. This reliance on history is of the sort that focuses on what Justice Frankfurter once termed the historical gloss. It is not so much the contemporaneous history at the time of the adoption of the Fourteenth Amendment, but how it came to be applied by the political branches after that fact. *See* Samuel Issacharoff and Trevor Morrison, *Constitution by Convention,* 108 CAL. L.REV. 1913 (2020).

Second, the opinion takes a highly functionalist account of the disruption to the national presidential election process. At the time of the opinion, not only had Colorado disqualified former President Trump through a judicial proceeding, but the Maine Secretary of State had done so as well under state administrative authority. In respond, Missouri officials were considering disqualifying President Biden in that state. There is no direct constitutional recognition of a federal interest in national presidential elections. Indeed the Constitution assigns to the state legislators the ability to designate how their Electors would be selected. And, in the early history of the U.S., most states selected their

Electors through state legislative designation rather than election. Here too, the Court is looking to modern U.S. political developments to protect citizen reliance on the ability to vote for or against national presidential candidates.

Is the Court inviting a new constitutional approach to the national interest in presidential elections?

2. *Trump v. Anderson* addresses the question of candidate eligibility and the federal interest in national uniformity. By contrast, there are four pending sets of prosecutions that involve the person of the president and the question of potential criminal liability of that individual while president, while a candidate for office, and in later acts as a civilian. In New York, former President Trump was convicted in state court of fraud based in part on covering up the campaign implications of having paid hush money to a former porn star paramour. In Georgia, state criminal charges await on charges of having attempted to tamper with election results while still president. Similar charges were brought against Trump in federal court in D.C. by Special Prosecutor Jack Smith concerning efforts to alter election results in various states in the aftermath of the 2020 presidential election. Finally, federal charges were also pending in Florida on charges that Trump improperly retained classified documents after he left office. This last case was dismissed by the court on the grounds that the appointment of a special prosecutor was an unconstitutional act.

Most significant thus far has been the D.C. prosecution which went to the Supreme Court as *Trump v. United States*, 144 S.Ct. 2312 (2024). As summarized by the Court, the indictment at issue charged that,

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

The stakes for any democracy could not be higher: "This case is the first criminal

prosecution in our Nation's history of a former President for actions taken during his Presidency. We are called upon to consider whether and under what circumstances such a prosecution may proceed. Doing so requires careful assessment of the scope of Presidential power under the Constitution. We undertake that responsibility conscious that we must not confuse "the issue of a power's validity with the cause it is invoked to promote," but must instead focus on the "enduring consequences upon the balanced power structure of our Republic." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)." 144 S.Ct. at 2346. The crux of the opinion, and the point of departure from the dissents, was the efforts to define the "conclusive and preclusive" boundaries of executive authority, relying on Justice Jackson's *Youngstown* framework. The holding defined those powers broadly and then granted complete immunity from criminal prosecution to presidential conduct within the ambit of that power.

Most central to the discussion in this Chapter is the Court's recognition that the certification of a presidential election remains a legislative function. Accordingly, the interplay between the President and his Vice President as to that function may fall outside any immunity for executive conduct:

> The question then becomes whether that presumption of immunity is rebutted under the circumstances. When the Vice President presides over the January 6 certification proceeding, he does so in his capacity as President of the Senate. Despite the Vice President's expansive role of advising and assisting the President within the Executive Branch, the Vice President's Article I responsibility of "presiding over the Senate" is "not an 'executive branch' function." Memorandum from L. Silberman, Deputy Atty. Gen., to R. Burress, Office of the President, Re: Conflict of Interest Problems Arising Out of the President's Nomination of Nelson A. Rockefeller To Be Vice President Under the Twenty-Fifth Amendment to the Constitution 2 (Aug. 28, 1974). With respect to the certification proceeding in particular, Congress has legislated extensively to define the Vice President's role in the counting of the electoral votes, see, *e.g.*, 3 U.S.C. § 15, and the President plays no direct constitutional or statutory role in that process. So the Government may argue that consideration of the President's communications with the Vice President concerning the certification proceeding does not pose "dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U.S., at 754. *Id.* at 2337.

Also outside the bounds of executive immunity would be campaign related efforts to tamper with state electoral results: "At oral argument, Trump appeared to concede that at least some of these acts—those involving 'private actors' who 'helped implement a plan to submit fraudulent slates of presidential electors to obstruct the certification proceeding' at the direction of Trump and a co-conspirator—entail 'private' conduct. *Id.* at 2338. Ultimately, this was left to remand to sort out:

> Determining whose characterization may be correct, and with respect to which conduct, requires a close analysis of the indictment's extensive and interrelated allegations. Unlike Trump's alleged interactions with the Justice Department, this alleged conduct cannot be neatly categorized as falling within a particular Presidential function. The necessary analysis is instead fact specific, requiring assessment of numerous alleged interactions with a wide variety of state officials and private persons. And the parties' brief comments at oral argument indicate that they

> starkly disagree on the characterization of these allegations. The concerns we noted at the outset—the expedition of this case, the lack of factual analysis by the lower courts, and the absence of pertinent briefing by the parties—thus become more prominent. We accordingly remand to the District Court to determine in the first instance—with the benefit of briefing we lack—whether Trump's conduct in this area qualifies as official or unofficial. *Id.* at 2339.

Also remanded were the most explosive charges relating to instigation of the January 6 assault on the Capitol:

> As the sole person charged by the Constitution with executing the laws of the United States, the President oversees—and thus will frequently speak publicly about—a vast array of activities that touch on nearly every aspect of American life. Indeed, a long-recognized aspect of Presidential power is using the office's "bully pulpit" to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest. He is even expected to comment on those matters of public concern that may not directly implicate the activities of the Federal Government—for instance, to comfort the Nation in the wake of an emergency or tragedy. For these reasons, most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities.
>
> There may, however, be contexts in which the President, notwithstanding the prominence of his position, speaks in an unofficial capacity—perhaps as a candidate for office or party leader. To the extent that may be the case, objective analysis of "content, form, and context" will necessarily inform the inquiry. *Snyder v. Phelps*, 562 U.S. 443, 453. *Id.* at 2339-2340.