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Cases and Materials

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Chapter 4. Partisan Gerrymandering and Political Competition

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

In the 2020 redistricting cycle, state courts took a more active role than ever before in adjudicating partisan gerrymandering claims. Some of these suits were brought under specific state constitutional prohibitions of gerrymandering, while others relied on more general state constitutional provisions. Gerrymandering claims succeeded in Maryland, North Carolina, New York, and Ohio. See *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct., Mar. 25, 2022); *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022); *Harkenrider v. Hochul*, 197 N.E.3d 437 (N.Y. Apr. 27, 2022); *Adams v. DeWine*, 195 N.E.3d 74 (Ohio Jan. 14, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Commission*, 192 N.E.3d 379 (Ohio 2022). They failed in Florida, Kansas, Michigan, and Oregon. See *In re: Senate Joint Resolution of Legislative Apportionment 100*, 334 So. 3d 1282 (Fla. 2022); *Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022); *League of Women Voters of Michigan v. Independent Citizens Redistricting Commission*, 971 N.W.2d 595 (Mich. 2022); *Clarno v. Fagan*, 2021 WL 5632371 (Or. Cir. Ct. Nov. 24, 2021). Note the small number and unrepresentativeness of the states in which these suits were brought. At the congressional level, these features create the possibility that the bias of the House of Representatives might be *worsened* by state court rulings striking down gerrymanders. For example, when New York's Democratic gerrymander was invalidated and replaced by a more neutral map, this exacerbated the existing pro-Republican skew of the House. See Aaron Goldzimer & Nicholas Stephanopoulos, *The Novel Strategy Blue States Can Use to Solve Partisan Gerrymandering by 2024*, Slate, May 6, 2022, https://perma.cc/9BTU-WRLY.

Note also the fierce pushback to several of these state court decisions. In North Carolina, after the state supreme court became more conservative in the wake of the 2022 election, the newly constituted court overruled *Harper*, declared partisan gerrymandering nonjusticiable under the North Carolina Constitution, and authorized the state legislature to enact new plans without any state constitutional constraints. *See Harper v. Hall*, 886 S.E.2d 393 (N.C. 2023). In New York, Democrats are arguing that the court-drawn plans should not be used for any further elections, but rather should be replaced by new maps designed by the state's commission or the state legislature. *See* Bill Mahoney, *New York Court Hears Arguments to Redraw the State's Congressional Maps in 2024*, Politico, June 8, 2023. In Ohio, similarly, Republicans are likely to redraw the plans used in the 2022 election. *See* Andrew J. Tobias, *Ohio Republicans Consider Next Steps for Redistricting Following Landmark U.S. Supreme Court Ruling*, Cleveland.com, June 28, 2023. (The Supreme Court remanded to the Ohio Supreme Court a case on the constitutionality of Ohio's congressional redistricting, in light of the Supreme Court's decision in *Moore v. Harper*, *infra* this Supplement to Chapter 6. *Huffman v. Neiman*, 2023 WL 4278436 (U.S. June 30, 2023).) In light of these developments, how viable is state court litigation as a check on partisan gerrymandering? Are state courts consistently able to block gerrymanders desired by dominant political actors from ultimately going into effect?

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

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

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

A subsequent bill that was passed by the House but failed to overcome a Senate filibuster, the Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. (2021), would have taken a different approach to curbing partisan gerrymandering. It would have allowed state legislatures to continue enacting congressional plans, but it would have imposed a presumptive ceiling on how biased these plans could be. Any plan with an efficiency gap above seven percent or one seat (whichever is greater) in two or more of the last four elections for President and U.S. Senator would have been presumptively unlawful. *Id.* § 5003(c)(3). Separate from this presumption, the bill would also have prohibited any plan "drawn with the intent or . . . the effect of materially favoring or disfavoring any political party." *Id.* § 5003(c)(1).

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

In the 2020 redistricting cycle, both parties' mapmakers aggressively gerrymandered where they had the chance, but these efforts essentially maintained the status quo of the latter half of the 2010 redistricting cycle—namely, a modest Republican advantage. According to various statistical measures of partisan fairness, the House of Representatives was almost exactly as biased after congressional plans were redrawn as before. See Christopher T. Kenny et al., *Widespread Partisan Gerrymandering Mostly Cancels Nationally, but Reduces Electoral Competition*, Proc. Nat'l Acad. Sci., June 13, 2023, at 1, 3; Christopher Warshaw et al., *Districts for a New Decade—Partisan Outcomes and Racial Representation in the 2021-22 Redistricting Cycle*, Publius: J. Federalism, June 17, 2022, at 1, 14. As might also be expected, nonpartisan mapmakers in the 2020 cycle (divided state governments, courts, and commissions) designed plans with small or no partisan skews relative to maps generated randomly by computers. See Warshaw et al., *supra*, at 17.

Chapter 5. Race and Redistricting

ADD THE FOLLOWING AFTER NOTE 6 ON PAGE 265:

In fact, in the 2020 redistricting cycle, there was little retrogression in the areas previously subject to Section 5. At the congressional level, the total number of minority ability districts in states formerly covered in full or in part *increased* by one. At the state senate level, this figure dipped by just two ability districts. And at the state house level, the total volume of ability districts in formerly covered states again *rose* by three. See Nicholas O. Stephanopoulos et al., *Non-Retrogression Without Law*, 2023 University of Chicago Legal Forum (forthcoming 2023) (manuscript at 3). Why was there little retrogression given the substantial number of minority ability districts that *could* have been eliminated? The authors mention two potential explanations. "One is the status quo bias of many mapmakers. If line-drawers are frequently reluctant to disrupt existing district configurations, the number of minority ability districts should stay the same before and after redistricting in many states." *Id.* "The other factor illuminated by our analyses is the general absence of a strong partisan incentive to eliminate minority ability districts. If either party thought it could reap substantial electoral rewards from retrogression, we should see unified Democratic or unified Republican governments consistently reducing minority representation. However, this pattern doesn't materialize." *Id.* (manuscript at 4).

DELETE NOTE 5 BEGINNING ON PAGE 297.

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

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

ADD THE FOLLOWING NOTE AFTER NOTE 10 ON PAGE 301:

As discussed above, some conservatives are critical of the *Gingles* framework because they believe it is too aggressive, too favorable for plaintiffs alleging racial vote dilution, or too race-conscious. In *Allen v. Milligan*, 143 S. Ct. 1487 (2023), Alabama echoed these views and launched a frontal attack on *Gingles*. Alabama had been ordered to draw a second congressional African American opportunity district by the district court, which had unanimously found liability under *Gingles*. Before the Supreme Court, Alabama argued that *Gingles*'s first prong should be rendered race-blind. That is, the question should be whether a map drawn *without considering race* includes more reasonably compact majority-minority districts than a jurisdiction's enacted plan. Alabama further argued that Section 2 does not apply to redistricting. Still more sweepingly, Alabama maintained that, if Section 2 does apply to redistricting, and if liability under the provision is not based on comparison with a race-blind baseline, then Section 2 is unconstitutional.

In *Milligan*, the Court surprisingly rejected all these claims and affirmed the continued viability of the *Gingles* framework. With respect to the race-blind baseline urged by Alabama, the Court pointed out that it "runs headlong into our precedent." *Id.* at 1507. "[O]ur cases have consistently focused, for purposes of litigation, on the specific illustrative maps that a plaintiff

adduces. Deviation from [those maps] shows it is *possible* that the State's map has a disparate effect on account of race." *Id.* Plaintiffs' illustrative maps in Section 2 cases, however, have always been drawn with consciousness of race. "[A]ll those maps were created with an express target in mind—they were created to show, as our cases require, that an additional majority-minority district could be drawn. That is the whole point of the enterprise." *Id.* at 1512.

The Court also denied that the *Gingles* framework is too easy to satisfy or leads inexorably to proportional representation by race. There was thus no need to revisit *Gingles*, in the Court's view. As to ease of satisfaction: "Since 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits. And the *only* state legislative or congressional districts that were redrawn because of successful Section 2 challenges were a handful of state house districts near Milwaukee and Houston." *Id.* at 1509 (internal citations and quotation marks omitted). As to racial proportionality: "At the congressional level, the fraction of districts in which black-preferred candidates are likely to win is currently below the Black share of the eligible voter population in every state but three. . . . Only one State in the country, meanwhile, has attained a proportional share of districts in which Hispanic-preferred candidates are likely to prevail." *Id.* (internal quotation marks omitted).

The Court further expressed skepticism about the method advocated by Alabama for identifying the race-blind baseline: the generation of large numbers of maps by a computer algorithm that incorporates non-racial criteria but ignores race. "The test is flawed in its fundamentals. Districting involves myriad considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, communities of interest, and population equality." *Id.* at 1513. But these many factors cannot all be programmed into an algorithm. And even when they can be coded: "Which one of these metrics should be used? What happens when the maps they produce yield different benchmark results? How are courts to decide?" *Id.*; *see also id.* at 1514 ("What would the next million maps show? The next billion? The first trillion of the trillion trillions? Answerless questions all.").

While the Court considered at length Alabama's proposal of a race-blind baseline, it more quickly dismissed the state's other arguments. The Court's precedents, the statutory text, and the legislative history of Section 2 made it obvious that the provision applies to redistricting. "[W]e have applied § 2 to States' districting maps in an unbroken line of decisions stretching four decades." *Id.* at 1515. "The statutory text in any event supports the conclusion that § 2 applies to single-member districts." *Id.* "Congress adopted the amended § 2 in response to the 1980 decision *City of Mobile*, a case about *districting*. . . . This was not lost on anyone when § 2 was amended. Indeed, it was the precise reason that the contentious debates over proportionality raged—debates that would have made little sense if § 2 covered only poll taxes and the like, as the dissent contends." *Id.* at 1516.

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

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

Justice Kavanaugh wrote a short concurrence indicating his potential openness to a claim (like that in *Shelby County*) that "even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future." *Id.* at 1519 (opinion of Kavanaugh, J.). Justice Thomas and Justice Alito each wrote dissents. Justice Thomas largely reiterated views he previously expressed in his opinion in *Holder v. Hall*, 512 U.S. 874 (1994), which we excerpt later in this chapter. Justice Alito argued that the first *Gingles* prong forbids plaintiffs' illustrative maps from being predominantly shaped by race. "Because non-predominance is a longstanding and vital feature of districting law, it must be honored in a *Gingles* plaintiff's illustrative district." *Id.* at 1550 (Alito, J., dissenting). He further maintained that, here, "race played a predominant role in the production of the plaintiffs' illustrative maps and that it is most unlikely that a map with more than one majority-black district could be created without giving race such a role." *Id.* at 1555.

In the wake of *Milligan*, it appears certain that a second congressional African American opportunity district will be drawn in Alabama. It is also likely that a very similar Section 2 suit against Louisiana's congressional districts will succeed. More generally, Nicholas Stephanopoulos writes, "*Milligan* should change the gestalt around racial vote dilution claims, especially for conservative judges. In recent cases, some conservative judges have seemed to believe that they can (even should) always rule for defendants, including by inventing new doctrines (like Section 2 not containing a private right of action), requiring a racial explanation for racially polarized voting, and intimating that Section 2 is unconstitutional. *Milligan* should bring an end to this behavior. Conservative judges must now live with a controlling precedent authored by a conservative Chief Justice clearly finding liability under many of the same circumstances where they previously ruled for defendants." Nicholas Stephanopoulos, *Early Thoughts on Milligan*, Election Law Blog, June 8, 2023, https://perma.cc/SPR8-S459. Do you agree that *Milligan* will have these implications?

ADD THE FOLLOWING NOTES ON PAGE 389:

7. In *Wisconsin Legislature v. Wisconsin Elections Commission*, 142 S. Ct. 1245 (2022), the Supreme Court reversed a Wisconsin Supreme Court ruling adopting a state house plan with seven majority-Black districts. The state court endorsed this plan after the elected branches deadlocked. The Supreme Court held that the plan's seven majority-Black districts (most of whose Black majorities barely exceeded fifty percent) were designed for predominantly racial reasons. The Court further held that the state court had not properly justified the need under Section 2 for seven Black opportunity districts. "[T]he court's analysis of *Gingles*' preconditions fell short of our standards," because "the court improperly relied on generalizations to reach the conclusion that the preconditions were satisfied." *Id.* at 1250. Additionally, "the court improperly reduced *Gingles*' totality-of-circumstances analysis to a single factor," "focus[ing] exclusively on proportionality." *Id.* The Supreme Court thus remanded for either a more thorough Section 2 analysis or (as actually transpired) the adoption of a plan with fewer Black opportunity districts.

8. The Supreme Court recently agreed to review the district court's decision in *South Carolina State Conference of the NAACP v. Alexander*, ___ F. Supp. 3d ___, 2023 WL 118775 (D.S.C. Jan. 6, 2023), striking down South Carolina's First Congressional District as an unconstitutional racial gerrymander. This case is unusual in two respects. First, the First District is a "stripped" rather than a "packed" district—a district whose African American population is allegedly artificially *low* because of the race-based *removal* of Black voters. The Supreme Court has never previously considered a racial gerrymandering challenge to a stripped district. Second, the plaintiffs relied in part on sets of randomly generated race-blind district maps. These maps demonstrated that, without race as a factor, the First District essentially never had as low of a Black population as it did in the enacted plan. These sorts of computer simulations have featured prominently in *partisan* gerrymandering cases. But until now, computer-created comparator maps haven't appeared in any *racial* gerrymandering case before the Supreme Court. *See also Jacksonville Branch of NAACP v. City of Jacksonville*, ___ F. Supp. 3d ___, 2022 WL 7089087 (M.D. Fla. Oct. 12, 2022) (also holding unconstitutional districts artificially "stripped" of Black residents, partly based on randomly generated sets of comparator maps).

Chapter 6. Election Administration and Remedies

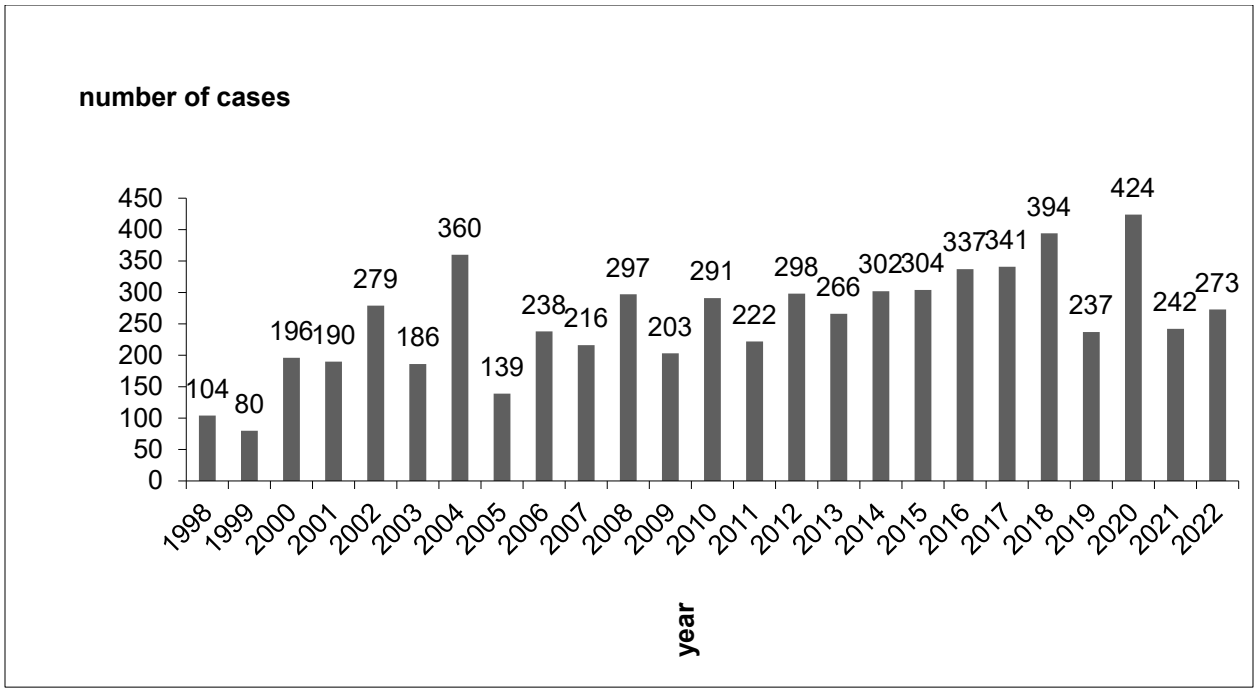
ADD THE FOLLOWING AT THE END OF NOTE 9 ON PAGE 412:

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

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

Derek T. Muller, *Reducing Election Litigation*, 90 Fordham Law Review 561, 565-66 (2021); see also Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, Election Law Journal, https://www.liebertpub.com/doi/epdf/10.1089/elj.2021.0050 (2022) (disagreeing with Muller on whether reducing election litigation is necessarily a worthy goal).

The latest data compiled by Professor Hasen shows a steep drop in the rate of election litigation in the most recent midterm election season, with litigation averaging 257.5 cases per year in the 2021-22 midterm election period, down almost 25 percent compared to a 339-per-year case average during the last midterm period of 2017-18. In the meantime, Professor Muller reports a 30 percent increase in the amount raised by the political parties for election litigation. Derek Muller, *Democratic, Republican fundraising for election litigation tops $154 Million in 2021-22 cycle, 30 percent increase over 2020 Presidential Cycle*, Election Law Blog, Apr. 3, 2023, https://perma.cc/44R9-283R. It seems unlikely that the drop will continue into the 2024 presidential election season.



Source: Richard L. Hasen, Election Challenge Litigation, 1996-2022, https://perma.cc/C5AH-GYHS.

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

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

Moore v. Harper

600 U.S. __, 2023 WL 4187750 (2023)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Several groups of plaintiffs challenged North Carolina's congressional districting map as an impermissible partisan gerrymander. The plaintiffs brought claims under North Carolina's Constitution, which provides that "[a]ll elections shall be free." Art. I, § 10. Relying on that

provision, as well as the State Constitution's equal protection, free speech, and free assembly clauses, the North Carolina Supreme Court found in favor of the plaintiffs and struck down the legislature's map. The Court concluded that North Carolina's Legislature deliberately drew the State's congressional map to favor Republican candidates.

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

I

The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." The Clause "imposes" on state legislatures the "duty" to prescribe rules governing federal elections. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). It also guards "against the possibility that a State would refuse to provide for the election of representatives" by authorizing Congress to prescribe its own rules. *Ibid.*

A

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

Shortly after the new maps became law, several groups of plaintiffs—including the North Carolina League of Conservation Voters, Common Cause, and individual voters—sued in state court. The plaintiffs asserted that each map constituted an impermissible partisan gerrymander in violation of the North Carolina Constitution. [After trial, a three-judge state court found that the congressional plan was "a partisan outlier intentionally and carefully designed to maximize Republican advantage," but denied relief on the ground that the partisan gerrymandering claims are political questions under the state constitution.]

The North Carolina Supreme Court reversed, holding that the legislative defendants violated state law "beyond a reasonable doubt" by enacting maps that constituted partisan gerrymanders. It also rejected the trial court's conclusion that partisan gerrymandering claims present a nonjusticiable political question. The Court acknowledged our decision in *Rucho* v. *Common Cause*, which held "that partisan gerrymandering claims present political questions beyond the

reach of the federal courts." 139 S. Ct. 2484, 2506-2507 (2019). But "simply because the Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts," the court explained, "it does not follow that they are nonjusticiable in North Carolina courts." The State Supreme Court also rejected the argument that the Elections Clause in the Federal Constitution vests exclusive and independent authority in state legislatures to draw congressional maps.

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

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

B

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

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

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

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

III

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

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

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

The Framers recognized state decisions exercising judicial review at the Constitutional Convention of 1787. On July 17, James Madison spoke in favor of a federal council of revision that could negate laws passed by the States. He lauded the Rhode Island judges "who refused to execute an unconstitutional law," lamenting that the State's legislature then "displaced" them to substitute others "who would be willing instruments of the wicked & arbitrary plans of their masters." 2 Records of the Federal Convention of 1787, p. 28 (M. Farrand ed. 1911). A week later, Madison extolled as one of the key virtues of a constitutional system that "[a] law violating a constitution established by the people themselves, would be considered by the Judges as null & void." *Id.*, at 93. Elbridge Gerry, a delegate from Massachusetts, also spoke in favor of judicial review. (Known for drawing a contorted legislative district that looked like a salamander, Gerry later became the namesake for the "gerrymander.") At the Convention, he noted that "[i]n some States the Judges had [actually] set aside laws as being agst. the Constitution." 1 *id*., at 97 (alteration in original by James Madison). Such judicial review, he noted, was met "with general approbation." *Ibid.* . . .

State cases, debates at the Convention, and writings defending the Constitution all advanced the concept of judicial review. And in the years immediately following ratification, courts grew assured of their power to void laws incompatible with constitutional provisions. The idea that

courts may review legislative action was so "long and well established" by the time we decided *Marbury* in 1803 that Chief Justice Marshall referred to judicial review as "one of the fundamental principles of our society."

IV

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

A

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

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

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

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

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

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

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

B

The legislative defendants and the dissent both contend that, because the Federal Constitution gives state legislatures the power to regulate congressional elections, only *that* Constitution can restrain the exercise of that power. The legislative defendants cite for support Federalist No. 78, which explains that the wielding of legislative power is constrained by "the tenor of the commission under which it is exercised."

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

The argument advanced by the defendants and the dissent also does not account for the Framers' understanding that when legislatures make laws, they are bound by the provisions of the

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

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

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

The legislative defendants and Justice Thomas rely as well on our decision in *Leser v. Garnett*, 258 U.S. 130 (1922), but it too offers little support. *Leser* addressed an argument that the Nineteenth Amendment—providing women the right to vote—was invalid because state constitutional provisions "render[ed] inoperative the alleged ratifications by their legislatures." We rejected that position, holding that when state legislatures ratify amendments to the Constitution, they carry out "a federal function derived from the Federal Constitution," which "transcends any limitations sought to be imposed by the people of a State."

But the legislature in *Leser* performed a ratifying function rather than engaging in traditional lawmaking. The provisions at issue in today's case—like the provisions examined in *Hildebrant* and *Smiley*—concern a state legislature's exercise of lawmaking power. And as we held in *Smiley*, when state legislatures act pursuant to their Elections Clause authority, they engage in lawmaking subject to the typical constraints on the exercise of such power. We have already distinguished *Leser* on those grounds. *Smiley*. In addition, *Leser* cited for support our decision in *Hawke* v. *Smith*,

which sharply separated ratification "from legislative action" under the Elections Clause. Lawmaking under the Elections Clause, *Hawke* explained, "is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution."

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

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

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

C

Addressing our decisions in *Smiley* and *Hildebrant*, both the legislative defendants and Justice Thomas concede that at least some state constitutional provisions can restrain a state legislature's exercise of authority under the Elections Clause. But they read those cases to differentiate between procedural and substantive constraints. *Smiley*, in their view, stands for the proposition that state constitutions may impose only procedural hoops through which legislatures must jump in crafting rules governing federal elections. This concededly "formalistic" approach views the Governor's veto at issue in *Smiley* as one such procedural restraint. But when it comes to substantive provisions, their argument goes, our precedents have nothing to say.

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

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

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

D

Were there any doubt, historical practice confirms that state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause. We have long looked to "settled and established practice" to interpret the Constitution. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929). And we have found historical practice particularly pertinent when it comes to the Elections and Electors Clauses. *Smiley* (Elections Clause); *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2325-2327 (2020) (Electors Clause). [The Court offered historical examples of state constitutional provisions regulating federal elections.]

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

V

A

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

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

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

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

B

We decline to address whether the North Carolina Supreme Court strayed beyond the limits derived from the Elections Clause. The legislative defendants did not meaningfully present the issue in their petition for certiorari or in their briefing, nor did they press the matter at oral argument. Counsel for the defendants expressly disclaimed the argument that this Court should reassess the North Carolina Supreme Court's reading of state law. Tr. of Oral Arg. 7 ("We're not asking this Court to second-guess or reassess. We say take the North Carolina Supreme Court's decision on face value and as fairly reflecting North Carolina law. . . . "). When pressed whether North Carolina's Supreme Court did not fairly interpret its State Constitution, counsel reiterated that such an argument was "not our position in this Court." Although counsel attempted to expand the scope of the argument in rebuttal, such belated efforts do not overcome prior failures to preserve the issue for review. See this Court's Rule 28 ("[C]ounsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal.").

* * *

State courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause. But federal courts must not abandon their own duty to exercise judicial review. In interpreting state law in this area, state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution.

Because we need not decide whether that occurred in today's case, the judgment of the North Carolina Supreme Court is affirmed.

It is so ordered.

Justice KAVANAUGH, concurring.

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

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

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

As I see it, all three standards convey essentially the same point: Federal court review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication. I would adopt Chief Justice Rehnquist's straightforward standard. As able counsel for North Carolina stated at oral argument, the Rehnquist standard "best sums it up." Chief Justice Rehnquist's standard should apply not only to state court interpretations of state statutes, but also to state court interpretations of state constitutions. And in reviewing state court interpretations of state law, "we necessarily must examine the law of the State as it existed prior to the action of the [state] court." *Bush* (Rehnquist, C. J., concurring).

Petitioners here, however, have disclaimed any argument that the North Carolina Supreme Court misinterpreted the North Carolina Constitution or other state law. For now, therefore, this Court need not, and ultimately does not, adopt any specific standard for our review of a state court's interpretation of state law in a case implicating the Elections Clause. In other words, the Court has recognized and articulated a general principle for federal court review of state court decisions in federal election cases. In the future, the Court should and presumably will distill that general principle into a more specific standard such as the one advanced by Chief Justice Rehnquist.

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

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

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

II

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

The Elections Clause of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Art. I, § 4, cl. 1. The question presented was whether the people of a State can place state-constitutional limits on the times, places, and manners of holding congressional elections that "the Legislature" of the State has the power to prescribe. Petitioners said no. Their position rests on three premises, from which the conclusion follows.

The first premise is that "the people of a single State" lack any ability to limit powers "given by the people of the United States" as a whole. *McCulloch v. Maryland*, 4 Wheat. 316, 429, 17 U.S. 316 (1819). This idea should be uncontroversial, as it is "the unavoidable consequence of th[e] supremacy" of the Federal Constitution and laws. *Id.* As the Court once put it (in a case about the Article V ratifying power of state legislatures), "a federal function derived from the Federal Constitution ... transcends any limitations sought to be imposed by the people of a State." *Leser v. Garnett*.

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

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

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

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

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

The majority rejects petitioners' conclusion, but seemingly without rejecting any of the premises from which that conclusion follows. Its apparent rationale—that *Hildebrant*, *Smiley*, and *Arizona State Legislature* have already foreclosed petitioners' argument—is untenable, as it requires disregarding a principled distinction between the issues in those cases and the question presented here. In those cases, the relevant state-constitutional provisions addressed the allocation of lawmaking power within each State; they defined what acts, performed by which constitutional actors, constituted an "exercise of the lawmaking power." *Smiley*; cf. U. S. Const., Art. I, § 7, cl. 2 (describing the processes upon completion of which a bill "become[s] a Law"). In other words, those cases addressed how to identify "the Legislature" of each State. But, nothing in their holdings speaks at all to whether the people of a State can impose substantive limits on the times, places, and manners that a procedurally complete exercise of the lawmaking power may validly prescribe. These are simply different questions: "There is a difference between *how* and *what*." J. Kirby, Limitations on the Power of State Legislatures Over Presidential Elections, 27 Law & Contemp. Prob. 495, 503 (1962).

This is not an arbitrary distinction, but one rooted in the logic of petitioners' argument. No one here contends that the Elections Clause *creates* state legislatures or defines "the legislative process" in any State. *Smiley*. Thus, while the Elections Clause confers a lawmaking power, "the exercise of th[at] authority must" follow "the method which the State has prescribed for legislative

enactments." *Id*. But, if the power in question is not original to the people of each State and is conferred upon the constituted legislature of the State, then it follows that the people of the State may not dictate what laws can be enacted under that power—precisely as they may not dictate what constitutional amendments their legislatures can ratify under Article V. Accordingly, if petitioners' premises hold, then state constitutions may specify *who* constitute "the Legislature" and prescribe *how* legislative power is exercised, but they cannot control *what* substantive laws can be made for federal elections.

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

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

Instead, the majority focuses on the power of state courts to exercise "judicial review" of Elections Clause legislation. But that power sheds no light on the question presented. In every case properly before it, any court—state or federal—must ascertain and apply the substantive law that properly governs that case. Thus, the court naturally must apply the Federal Constitution rather than any statute in conflict with it. The court must also apply the state constitution over any conflicting statute enacted under a power limited by that constitution. Petitioners' argument, however, is that legislation about the times, places, and manner of congressional elections is *not* limited by state constitutions—because the power to regulate those subjects comes from the Federal Constitution, not the people of the State. Right or wrong, this question has nothing to do with whether state courts have the power to conduct judicial review in the first place. To say that "state judicial review" authorizes applying state constitutions over conflicting Elections Clause legislation, is simply to assume away petitioners' argument.

III

The majority opinion ends with some general advice to state and lower federal courts on how to exercise "judicial review" "in cases implicating the Elections Clause." As the majority offers no clear rationale for its interpretation of the Clause, it is impossible to be sure what the

consequences of that interpretation will be. However, judging from the majority's brief sketch of the regime it envisions, I worry that today's opinion portends serious troubles ahead for the Judiciary.

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

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

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

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

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

In the end, I fear that this framework will have the effect of investing potentially large swaths of state constitutional law with the character of a federal question not amenable to meaningful or principled adjudication by federal courts. In most cases, it seems likely that the "the bounds of ordinary judicial review" will be a forgiving standard in practice, and this federalization of state constitutions will serve mainly to swell federal-court dockets with state-constitutional questions to be quickly resolved with generic statements of deference to the state courts. On the other hand, there are bound to be exceptions. They will arise haphazardly, in the midst of quickly evolving, politically charged controversies, and the winners of federal elections may be decided by a federal court's expedited judgment that a state court exceeded "the bounds of ordinary judicial review" in construing the state constitution.

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

I respectfully dissent.

Notes and Questions

1. The stakes in the debate over the independent state legislature theory are extraordinarily high, especially given the many state legislators who have pressed the discredited claim that the 2020 presidential election was stolen. The chief concern is that state legislatures – if freed from state constitutional constraints – could wreak havoc on federal elections, including presidential elections. One study found that at least 357 Republican legislators in battleground states – 44% of those in the nine closest states – tried to discredit or overturn the 2020 presidential election. Nick Corasaniti, Karen Yourish & Keith Collins, *How Trump's 2020 Election Lies Have Gripped State Legislatures*, N.Y. Times, May 22, 2022, https://perma.cc/MGE6-YNVM. According to Judge Michael Luttig, a prominent conservative who served on the Fourth Circuit for 15 years and advised former Vice President Mike Pence on his responsibilities in connection with the 2020 electoral count: "Trump and the Republicans can only be stopped from stealing the 2024 election at this point if the Supreme Court rejects the independent state legislature doctrine (thus allowing state court enforcement of state constitutional limitations on legislatively enacted election rules and elector appointments) . . . ." J. Michael Luttig, *The Republican Blueprint to Steal the 2024 Election*, CNN, April 27, 2022, https://perma.cc/MLQ2-LBSR.

The Court did reject the most robust version of the independent state legislature theory in *Moore v. Harper*, while leaving some big questions still to be determined.

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

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

3. While the Court rejected the most robust version of the independent state legislature theory in *Moore v. Harper*, its specter remains present over future federal election controversies. In Part V of its opinion, the majority emphasizes that state courts "do not have free rein" in applying their state constitutions in this context, and that they must not "transgress the ordinary bounds of judicial review." That suggests that the Elections Clause imposes some constraints on state courts' application of state constitutions to federal elections. But those boundaries remain quite uncertain. The Court declines to adopt a standard for determining whether state courts have transgressed them and does not even decide whether the North Carolina Supreme Court went too far in its interpretation of its state constitution. Should the Court have given clearer guidance? Is Justice Thomas right to suggest that this "portends serious troubles ahead for the Judiciary," given the uncertainty of the limits applicable to state courts? Will the Court's failure to articulate a clear standard invite more litigation – including cases in the U.S. Supreme Court – over federal elections? For arguments to that effect, see Richard L. Hasen, *There's a Time Bomb in Progressives' Big Supreme Court Voting Case Win*, Slate (June 27, 2023), https://perma.cc/4JC8-7DTK, and Richard H. Pildes, *The Supreme Court Rejected a Dangerous Elections Theory. But It's Not All Good News*, N.Y. Times (June 28, 2023), https://perma.cc/B7S4-WJUZ.

Note that Justice Kavanaugh, while joining the majority opinion in full, did offer some additional guidance on the limits that the Elections Clause imposes on state courts in his solo concurrence. He would adopt the standard set forth by Chief Justice Rehnquist in his concurring opinion in *Bush v. Gore*, asking whether a state court "impermissibly distorted" state law "beyond what a fair reading required" Further quoting Chief Justice Rehnquist, Justice Kavanaugh goes on

to say that, in reviewing state court interpretations of state constitutions, the Court should consider "the law of the State as it existed prior to the action of the [state] court?" Is this an administrable standard, as Justice Kavanaugh argues? Does this suggest that the Court will reject novel interpretations of state constitutions, in the context of federal elections – for example, interpreting a state constitution to expand voting rights? For worries that it does, see Leah Litman, *Anti-Novelty, the Independent State Legislature Theory in* Moore v. Harper*, and Protecting State Voting Rights*, Election Law Blog (July 3, 2023), https://perma.cc/89WC-UM3D. In previous scholarship, Professor Litman has criticized the idea that novelty connotes unconstitutionality in other contexts. Leah H. Litman, *Debunking Antinovelty*, 66 Duke Law Journal 1407 (2017). What are the downsides of construing the Elections Clause to limit novel state court interpretations of state constitutional law?

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

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

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

It remains unclear whether Donald Trump or any of his allies will be criminally charged either in Georgia or by the federal government for attempting to interfere with the confirmation of his opponent as the winner of the 2020 presidential election. See Tamar Hallerman, *Fulton Prosecutors to Begin Jury Selection for Trump Probe*, Atlanta Journal-Constitution, May 2, 2022, https://perma.cc/H74F-8T2D; Glenn Thrush & Luke Broadwater, *Justice Department is Said to Request Transcripts from Jan. 6 Committee*, N.Y. Times, May 17, 2022, https://perma.cc/78KY-T35E.

In addition, a special Select Committee at the House of Representatives continues to investigate the events of January 6, and potential wrongdoing by Trump and others. In the context of a civil discovery dispute with one of Trump's lawyers, John Eastman, on whether the crime-fraud exception to attorney-client privilege applies, a federal district court found it more likely than not that Trump and Eastman corruptly attempted to disrupt the official proceeding when Congress was set to count Electoral College votes. It also found it more likely than not that they conspired to commit two other crimes. *Eastman v. Thompson*, 594 F.Supp.3d 1156, 1193-1197 (C.D. Cal. 2022). Any criminal prosecution, of course, would require proof beyond a reasonable doubt. Eastman has filed a cert petition, No. 22-1138, seeking to have the Supreme Court wipe out this case as precedent on grounds that his case became moot when the documents at issue were publicly released. Below are some of the court's findings on potential criminal activity:

Eastman v. Thompson

594 F. Supp.3d 1156 (C.D. Cal. 2022)

. . .

The Select Committee alleges that President Trump violated 18 U.S.C. § 1512(c)(2), which criminalizes obstruction or attempted obstruction of an official proceeding. It requires three elements: (1) the person obstructed, influenced or impeded, or attempted to obstruct, influence or impede (2) an official proceeding of the United States, and (3) did so corruptly. . . .

Section 1512(c)(2) requires that the obstructive conduct have a "nexus ... to a specific official proceeding" that was "either pending or was reasonably foreseeable to [the person] when he engaged in the conduct." President Trump attempted to obstruct an official proceeding by launching a pressure campaign to convince Vice President Pence to disrupt the Joint Session on January 6.

President Trump facilitated two meetings in the days before January 6 that were explicitly tied to persuading Vice President Pence to disrupt the Joint Session of Congress. On January 4, President Trump and Dr. Eastman hosted a meeting in the Oval Office with Vice President Pence, the Vice President's counsel Greg Jacob, and the Vice President's Chief of Staff Marc Short. At that meeting, Dr. Eastman presented his plan to Vice President Pence, focusing on either rejecting electors or delaying the count. When Vice President Pence was unpersuaded, President Trump sent Dr. Eastman to review the plan in depth with the Vice President's counsel on January 5. Vice President Pence's counsel interpreted Dr. Eastman's presentation as being on behalf of the President.

On the morning of January 6, President Trump made several last-minute "revised appeal[s] to the Vice President" to pressure him into carrying out the plan. At 1:00 am, President Trump tweeted: "If Vice President @Mike_Pence comes through for us, we will win the Presidency . . . Mike can send it back!" At 8:17 am, President Trump tweeted: "All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!" Shortly after, President Trump rang Vice President Pence and once again urged him "to make the call" and enact the plan. Just before the Joint Session of Congress began, President Trump gave a speech to

a large crowd on the Ellipse in which he warned, "[a]nd Mike Pence, I hope you're going to stand up for the good of our Constitution and for the good of our country. And if you're not, I'm going to be very disappointed in you. I will tell you right now." President Trump ended his speech by galvanizing the crowd to join him in enacting the plan: "[L]et's walk down Pennsylvania Avenue" to give Vice President Pence and Congress "the kind of pride and boldness that they need to take back our country."

Together, these actions more likely than not constitute attempts to obstruct an official proceeding. . . .

The Court next analyzes whether the Joint Session of Congress to count electoral votes on January 6, 2021, constituted an "official proceeding" under the obstruction statute. The United States Code defines "official proceeding" to include "a proceeding before the Congress." The Twelfth Amendment outlines the steps to elect the President, culminating in the President of the Senate opening state votes "in the presence of the Senate and House of Representatives." Dr. Eastman does not dispute that the Joint Session is an "official proceeding." While there is no binding authority interpreting "proceeding before the Congress," ten colleagues from the District of Columbia have concluded that the 2021 electoral count was an "official proceeding" within the meaning of section 1512(c)(2), and the Court joins those well-reasoned opinions. . . .

A person violates § 1512(c) when they obstruct an official proceeding with a corrupt mindset. The Ninth Circuit has not defined "corruptly" for purposes of this statute. However, the court has made clear that the threshold for acting "corruptly" is lower than "consciousness of wrongdoing," meaning a person does not need to know their actions are wrong to break the law. Because President Trump likely knew that the plan to disrupt the electoral count was wrongful, his mindset exceeds the threshold for acting "corruptly" under § 1512(c).

President Trump and Dr. Eastman justified the plan with allegations of election fraud—but President Trump likely knew the justification was baseless, and therefore that the entire plan was unlawful. Although Dr. Eastman argues that President Trump was advised several state elections were fraudulent, the Select Committee points to numerous executive branch officials who publicly stated and privately stressed to President Trump that there was no evidence of fraud. By early January, more than sixty courts dismissed cases alleging fraud due to lack of standing or lack of evidence, noting that they made "strained legal arguments without merit and speculative accusations" and that "there is no evidence to support accusations of voter fraud." President Trump's repeated pleas for Georgia Secretary of State Raffensperger clearly demonstrate that his justification was not to investigate fraud, but to win the election: "So what are we going to do here, folks? I only need 11,000 votes. Fellas, I need 11,000 votes. Give me a break." Taken together, this evidence demonstrates that President Trump likely knew the electoral count plan had no factual justification.

The plan not only lacked factual basis but also legal justification. Dr. Eastman's memo noted that the plan was "BOLD, Certainly." The memo declared Dr. Eastman's intent to step outside the bounds of normal legal practice: "we're no longer playing by Queensbury Rules." In addition, Vice President Pence "very consistent[ly]" made clear to President Trump that the plan was unlawful, refusing "many times" to unilaterally reject electors or return them to the states. In the

meeting in the Oval Office two days before January 6, Vice President Pence stressed his "immediate instinct [ ] that there is no way that one person could be entrusted by the Framers to exercise that authority."

Dr. Eastman argues that the plan was legally justified as it "was grounded on a good faith interpretation of the Constitution." But "ignorance of the law is no excuse," and believing the Electoral Count Act was unconstitutional did not give President Trump license to violate it. Disagreeing with the law entitled President Trump to seek a remedy in court, not to disrupt a constitutionally-mandated process. And President Trump knew how to pursue election claims in court—after filing and losing more than sixty suits, this plan was a last-ditch attempt to secure the Presidency by any means.

The illegality of the plan was obvious. Our nation was founded on the peaceful transition of power, epitomized by George Washington laying down his sword to make way for democratic elections. Ignoring this history, President Trump vigorously campaigned for the Vice President to single-handedly determine the results of the 2020 election. As Vice President Pence stated, "no Vice President in American history has ever asserted such authority." Every American—and certainly the President of the United States—knows that in a democracy, leaders are elected, not installed. With a plan this "BOLD," President Trump knowingly tried to subvert this fundamental principle.

Based on the evidence, the Court finds it more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021. . . .

[T]he evidence demonstrates that President Trump likely attempted to obstruct the Joint Session of Congress on January 6, 2021. While the Court earlier analyzed those actions as attempts to obstruct an "official proceeding," Congress convening to count electoral votes is also a "lawful function of government" within the meaning of 18 U.S.C. § 371, which Dr. Eastman does not dispute.

An "agreement" between co-conspirators need not be express and can be inferred from the conspirators' conduct. There is strong circumstantial evidence to show that there was likely an agreement between President Trump and Dr. Eastman to enact the plan articulated in Dr. Eastman's memo. In the days leading up to January 6, Dr. Eastman and President Trump had two meetings with high-ranking officials to advance the plan. On January 4, President Trump and Dr. Eastman hosted a meeting in the Oval Office to persuade Vice President Pence to carry out the plan. The next day, President Trump sent Dr. Eastman to continue discussions with the Vice President's staff, in which Vice President Pence's counsel perceived Dr. Eastman as the President's representative. Leading small meetings in the heart of the White House implies an agreement between the President and Dr. Eastman and a shared goal of advancing the electoral count plan. The strength of this agreement was evident from President Trump's praise for Dr. Eastman and his plan in his January 6 speech on the Ellipse: "John is one of the most brilliant lawyers in the country, and he looked at this and he said, 'What an absolute disgrace that this can be happening to our Constitution.'"

Based on these repeated meetings and statements, the evidence shows that an agreement to enact the electoral count plan likely existed between President Trump and Dr. Eastman. . . .

Obstruction of a lawful government function violates § 371 when it is carried out "by deceit, craft or trickery, or at least by means that are dishonest." While acting on a "good faith misunderstanding" of the law is not dishonest, "merely disagreeing with the law does not constitute a good faith misunderstanding . . . because all persons have a duty to obey the law whether or not they agree with it."

The Court discussed above how the evidence shows that President Trump likely knew that the electoral count plan was illegal. President Trump continuing to push that plan despite being aware of its illegality constituted obstruction by "dishonest" means under § 371.

The evidence also demonstrates that Dr. Eastman likely knew that the plan was unlawful. Dr. Eastman heard from numerous mentors and like-minded colleagues that his plan had no basis in history or precedent. Fourth Circuit Judge Luttig, for whom Dr. Eastman clerked, publicly stated that the plan's analysis was "incorrect at every turn." Vice President Pence's legal counsel spent hours refuting each part of the plan to Dr. Eastman, including noting there had never been a departure from the Electoral Count Act and that not "a single one of [the] Framers would agree with [his] position."

Dr. Eastman himself repeatedly recognized that his plan had no legal support. In his discussion with the Vice President's counsel, Dr. Eastman "acknowledged" the "100 percent consistent historical practice since the time of the Founding" that the Vice President did not have the authority to act as the memo proposed. More importantly, Dr. Eastman admitted more than once that "his proposal violate[d] several provisions of statutory law," including explicitly characterizing the plan as "one more relatively minor violation" of the Electoral Count Act. In addition, on January 5, Dr. Eastman conceded that the Supreme Court would unanimously reject his plan for the Vice President to reject electoral votes. Later that day, Dr. Eastman admitted that his "more palatable" idea to have the Vice President delay, rather than reject counting electors, rested on "the same basic legal theory" that he knew would not survive judicial scrutiny.

Dr. Eastman's views on the Electoral Count Act are not, as he argues, a "good faith interpretation" of the law; they are a partisan distortion of the democratic process. His plan was driven not by preserving the Constitution, but by winning the 2020 election:

[Dr. Eastman] acknowledged that he didn't think Kamala Harris should have that authority in 2024; he didn't think Al Gore should have had it in 2000; and he acknowledged that no small government conservative should think that that was the case.

Dr. Eastman also understood the gravity of his plan for democracy—he acknowledged "[y]ou would just have the same party win continuously if [the] Vice President had the authority to just declare the winner of every State."

The evidence shows that Dr. Eastman was aware that his plan violated the Electoral Count Act. Dr. Eastman likely acted deceitfully and dishonestly each time he pushed an outcome-driven plan that he knew was unsupported by the law. . . .

President Trump and Dr. Eastman participated in numerous overt acts in furtherance of their shared plan. As detailed at length above, President Trump's acts to strong-arm Vice President Pence into following the plan included meeting with and calling the Vice President and berating him in a speech to thousands outside the Capitol. Dr. Eastman joined for one of those meetings, spent hours attempting to convince the Vice President's counsel to support the plan, and gave his own speech at the Ellipse "demanding" the Vice President "stand up" and enact his plan.

Based on the evidence, the Court finds that it is more likely than not that President Trump and Dr. Eastman dishonestly conspired to obstruct the Joint Session of Congress on January 6, 2021.

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

Is *Anderson-Burdick* balancing standard better suited for state courts than federal courts? Consider this perspective:

> Federal doctrine has embraced a balancing framework in the *Anderson-Burdick* test—an example of federal courts sometimes quietly using proportionality principles—but that test is widely criticized. States can do better. Whereas *Anderson-Burdick* today codes as an anything-goes approach that marks a retreat from more vigorous federal protection of voting rights, states have taken their versions of the test seriously.

Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 Columbia Law Review __ (forthcoming 2023). Should we be more comfortable with balancing standards in the hands of state courts as opposed to federal courts?

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

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

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

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

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

Michael Barber & John B. Holbein, *400 Million Voting Records Show Profound Racial and Geographic Disparities in Voter Turnout in the United States*, 17 PLoS ONE 6 at 1 (June 8, 2022) https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0268134.

ADD THE FOLLOWING AT THE END OF PAGE 502:

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

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

Id. at 881.

Justice Kagan for the three liberal Justices dissented, pointing out that the Court in the past had rejected *Purcell* arguments in cases on similar timeframes. She further noted that plaintiffs were diligent in suing within hours or days of the enactment of the redistricting plan. "Alabama is not entitled to keep violating Black Alabamians' voting rights just because the court's order came down in the first month of an election year." *Id*. at 888-89 (Kagan, J., dissenting).

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

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

On the merits in *Milligan*, the Supreme Court affirmed the lower court in *Allen v. Milligan*, 143 S. Ct. 1487 (2023). See this Supplement to Chapter 5. The upshot is that under *Purcell*, plaintiffs were denied their remedy for the 2022 election season but will get a remedy beginning with the 2024 election season. The Court affirmed on the merits in *Moore* as well, rejecting the

claim that the state court had exceeded its powers. *Moore v. Harper*, 600 U.S. __, 2023 WL 4187750 (U.S. June 27, 2023) (excerpted above, this Chapter of the Supplement).

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

Chapter 8. Major Political Parties

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

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

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

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

Chapter 9. Third Parties and Independent Candidates

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

A recent paper argues that the United States should pursue major structural reforms – including fusion voting – that would dismantle the "two-party doom loop" and strengthen other political parties. Lee Drutman, *New Parties, Better Parties: The Case for Pro-Parties Democracy Reform*, New America (July 3, 2023), https://perma.cc/Q4X6-E4SS. Here is an excerpt from the executive summary:

> Political parties are the central institutions of modern representative democracy. They must also be the center of reform efforts. To redirect and realign the downward trajectory of American politics, we must focus on political parties. We need them to do better. And in order for them to do better, we need more than two of them.
>
> It may seem obvious that system-level problems cannot be solved by incremental changes. Yet, for years, existential threats to American democracy have been met with small, candidate-related tweaks that have largely failed to alter the trajectory. Rather than continue to focus on bad actors or extremist individuals, then, we must understand the way in which the entire system empowers and elevates the worst instincts in political leaders, who in turn stoke the most irrational fears among citizens. We must understand how this extremism follows from the toxic combination of an anxious uncertainty and a confrontational us-against-them binary fight for total power. . . .
>
> Many proposals focus primarily on candidates and, in particular, elevating independent and moderate candidates in the immediate term. These "candidate-centric" reforms include open primaries, top-two primaries, ranked-choice voting, and blanket primaries that send the top four or five finishers regardless of party to a ranked-choice general election. This category of "candidate-centric" reforms views political parties as obstacles to good governance and see the task of reform as finding a clever way around the perceived destructiveness of parties and especially partisanship. Though these candidate-centric reforms can sometimes work in targeted circumstances, this paper argues that such productive circumstances are limited. More broadly, this paper argues that in addition to having mixed and uncertain immediate-term effects, these candidate-centric reforms are unlikely to have sustainable long-term positive effects, because they do not address the core questions of the political party system.
>
> Instead, this paper makes the case for pro-parties reforms both generally, and specifically for two powerful pro-parties reforms: fusion voting and proportional representation. Fusion voting allows for multiple parties to endorse the same candidate, encouraging new party formation. Proportional representation ends the single-member district, and makes it possible for multiple parties to win a proportional share of representation in larger, multi-member districts. The goal of these reforms—fusion in the short and medium terms, and proportional representation in the longer term—is to move us toward a thriving multiparty democracy in which healthy political parties perform the crucial functions essential to

> modern representative democracy, with less of the us-against-them, all-or-nothing, high-stakes uncertainty that sabotages self-governance.

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

Chapter 10. Campaigns

ADD THE FOLLOWING AFTER NOTE 1 ON PAGE 782:

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

ADD THE FOLLOWING AFTER NOTE 5 ON PAGE 784:

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

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

This judicial race was so expensive and contested because ideological control of the court was at stake, and issues such as abortion rights and redistricting loomed large over the race. Protasiewicz made clear in campaign speech her views on these issues, providing voters with a clear choice between the candidates. She defended her candor as reflecting her values. "'And the reason that I have been so clear about what my values are is that I believe the voters deserve to know what the candidate seeking office believes . . . I also value a woman's freedom to make her own health care decisions with her doctor, family and faith.' Protasiewicz said she would not step

aside in cases involving abortion, telling reporters that she had never promised to rule one way or another. 'Every single time I talk about what my personal values are, I make sure everybody understands that I will only be making decisions based on what the law is and based on what the Constitution is,' Protasiewicz said." *Id*.

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

Chapter 11. Bribery

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

For an examination of the meaning of corrupt intent in a different context see *Eastman v. Thompson*, 594 F. Supp. 3d 1156 (C.D. Cal. 2022), excerpted in Chapter 6 of this Supplement. *Eastman* involved a federal statute, 18 U.S.C. § 1512(c)(2), that criminalizes the corrupt obstruction of an official proceeding. Presented with evidence that former President Donald Trump and his lawyer John Eastman acted deceitfully and with knowledge that their actions were wrongful, in planning to disrupt the electoral count on January 6, 2021, the district court found it more likely than not that they acted "corruptly" under § 1512.

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

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

In *Percoco v. United States*, 143 S. Ct. 1130 (2023), the Court rejected as overly vague a jury instruction on whether a top aide to Cuomo had conspired to commit honest services fraud under these statutes. During the period in question, Percoco had resigned from his position in the Governor's office to manage Cuomo's reelection campaign, only to resume his role as Executive Deputy Secretary later that year. Significantly, the Court rejected Percoco's argument that a private citizen can *never* be convicted of honest services fraud, while also concluding that this duty does not extend to all private citizens. The trial judge had instructed the jury that Percoco owed a duty if he "dominated and controlled any government business" and "people working in the government actually relied on him because of a special relationship he had with the government." The Court found these instructions overly vague, without providing much clarity on what a permissible instruction would look like.

The other case, *Ciminelli v. United States*, 143 S. Ct. 1121 (2023), addressed whether potentially valuable economic information can be considered "property" under the wire fraud statute. The defendant in that case was convicted for an alleged scheme to rig the bidding process for a state-funded development project. The Court held that the statute includes only "traditional property interests," *id.* at 1128, and reversed the conviction on that ground.

Chapter 14. Contribution Limits

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

After the Ninth Circuit struck down Alaska's individual campaign finance limits, Alaska legislators considered but were unable to reach a deal imposing new limits. Alaska has now gone from a state with one of the lowest individual contribution limits to one in which a donor may give directly to a candidate for office any size donation. Some supporters of lower limits are considering a ballot measure. Nathaniel Herz, *A Last-Minute Deal to Restore Alaska's Campaign Finance Limits Fell Through. Here's How*, Anchorage Daily News, May 19, 2022, https://perma.cc/FKR2-NRNR. Since then, campaign spending in Alaska unsurprisingly has surged. Zachariah Hughes, *Conservatives Close Fundraising Gap in Assembly Races with Help of Big Donors and Independent Expenditure Group*, Anchorage Daily News, April 4, 2023, https://perma.cc/Q2EA-9CVA.

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

Campaign committees run by candidates and supportive Super PACs have found new creative ways to coordinate their messages and themes without running afoul of technical Federal Election Commission coordination rules. "To work around the prohibition on directly coordinating with super PACs, candidates are posting their instructions to them inside the red boxes on public pages that super PACs continuously monitor. [¶] The boxes highlight the aspects of candidates' biographies that they want amplified and the skeletons in their opponents' closets that they want exposed. Then, they add instructions that can be extremely detailed: Steering advertising spending to particular cities or counties, asking for different types of advertising and even slicing who should be targeted by age, gender and ethnicity." Shane Goldmacher, *The Little Red Boxes Making a Mockery of Campaign Finance Laws*, N.Y. Times, May 16, 2022, https://perma.cc/V8BT-FHEW.

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

With no noted dissents, the Supreme Court once again turned down a case raising the constitutionality of the federal ban on direct corporate contributions to candidates. *Lundergan v. United States*, 142 S. Ct. 2676 (2022).

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

In *Federal Election Commission v. Cruz for Senate*, 142 S. Ct. 1638 (2022), the Supreme Court struck down another part of the McCain-Feingold law as violating the First Amendment. The opinion confirmed the consistent conservative-liberal split on the constitutionality of campaign finance limits, but it appeared to break little new doctrinal ground.

The contested provision essentially made it illegal for a campaign to pay back a candidate for loans the candidate made to the campaign in excess of $250,000 with funds raised after the election. "The Government argues that the contributions at issue raise a heightened risk of corruption because of the use to which they are put: repaying a candidate's personal loans. It also maintains that post-election contributions are particularly troubling because the contributor will

know—not merely hope—that the recipient, having prevailed, will be in a position to do him some good." *Id.* at 1652.

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

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

Id. at 1652-53.

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

> A candidate for public office extends a $500,000 loan to his campaign organization, hoping to recoup the amount from benefactors' post-election contributions. Once elected, he devotes himself assiduously to recovering the money; his personal bank account, after all, now has a gaping half-million-dollar hole. The politician solicits donations from wealthy individuals and corporate lobbyists, making clear that the money they give will go

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

Id. at 1657-58 (Kagan, J., dissenting).

Chapter 16. Disclosure

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

Relying in part upon *Bonta*, a federal district court struck down some broad campaign finance disclosure rules in Wyoming as violating the First Amendment. *Wyoming Gun Owners v. Buchanon*, 592 F. Supp. 3d 1014 (D. Wyo. 2022). The rules appeared to require disclosure of funding for some non-election-related political activities. The court recognized the government interests served by disclosure, and it suggested ways that Wyoming could narrow its disclosure rules so that they would be more likely to satisfy exacting scrutiny and not violate plaintiff's rights. The case is currently on appeal to the Tenth Circuit.

Professor Hasen argues that nonprofit entities, especially religious entities, are attractive plaintiffs for opponents of campaign finance disclosure and other regulation seeking to use courts to push further deregulation. Richard L. Hasen, *Nonprofit Law as the Tool to Kill What Remains of Campaign Finance Law: Reluctant Lessons from Ellen Aprill*, 56 Loyola of Los Angeles Law Review (forthcoming 2024), draft available, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4353037.

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

The en banc court in the *CREW* case, over the dissent of two judges, affirmed FEC Commissioners' use of prosecutorial discretion to insulate those decisions from judicial review. 55 F.4th 918 (D.C. Cir. 2022) (en banc).