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Ostracism and Democracy

Alex Zhang

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OSTRACISM AND DEMOCRACY

ALEX ZHANG*

The 2020 Presidential Election featured an unprecedented attempt to undermine our democratic institutions: allegations of voter fraud and litigation about mail-in ballots culminated in a mob storming of the Capitol as Congress certified President Biden's victory. Former President Trump now faces social-media bans and potential disqualification from future federal office, but his allies have criticized those efforts as the witch-hunt of a cancel culture that is symptomatic of the unique ills of contemporary liberal politics.

This Article defends recent efforts to remove Trump from the public eye, with reference to an ancient Greek electoral mechanism: ostracism. In the world's first democracy, Athenians assembled once a year to write down on pottery shards, ostraka, names of prominent figures they wished to exile from their political community. I argue that this desire to banish powerful figures from political participation is, in fact, sign of a well-functioning, legitimate democracy. In particular, ostracism emerges as an effective procedure during an erosion of the perceived legitimacy of one's political adversaries, and it is grounded in a hope to restore a once-shared commitment to the foundational norms of democratic contest.

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INTRODUCTION

The 2020 Presidential Election was unlike any other. Held during a global pandemic with record voter turnout and sharp polarization,¹ it featured—alarmingly to our democracy—an incumbent President who would go to any length to hold onto political power. After a resounding defeat in both popular votes and the Electoral College, former President Trump advanced false claims of victory in the media,² maintained legally untenable positions in the courts,³ and exerted pressure on the Republican Party to ensure his continuation in office.⁴ On January 6, 2021, an angry mob, spurred by unsubstantiated claims that the liberals had stolen the election, stormed the U.S. Capitol in hope of stopping Congress from confirming President Biden’s victory.⁵ In the face of this unprecedented attack, the confirmation vote revealed the extent of Trump’s control over the nation’s political process: Over one hundred House of Representative members objected to the results of what experts have called “one of the most secure elections in [U.S.] history.”⁶

The backlash was swift. Within a few days of the Capital mob, social media permanently suspended Trump’s accounts;⁷ the House impeached

¹ See James M. Lindsay, *The 2020 Election by the Numbers*, COUNCIL ON FOREIGN RELS. (Dec. 15, 2020), <https://www.cfr.org/blog/2020-election-numbers> (showing that the 2020 turnout, measured as a percentage of eligible voters, was the highest in 120 years); David French, *It’s Clear That America Is Deeply Polarized. No Election Can Overcome That*, TIME (Nov. 4, 2020), <https://time.com/5907318/polarization-2020-election> (discussing the 2020 U.S. Presidential election and its effects on the country’s deep political polarization).

² Alexander Burns & Jonathan Martin, *As America Awaits a Winner, Trump Falsely Claims He Prevalled*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/us/politics/election-trump-biden-recap.html>.

³ E.g., Donald J. Trump for President, Inc. v. Boockvar, No. 4:20-CV-02078, 2020 WL 6821992, at *4 (M.D. Pa. Nov. 21, 2020) (comparing claims of voter fraud to “Frankenstein’s Monster”), *aff’d*, 830 F. App’x 377 (3d Cir. 2020) (holding that the Trump campaign’s arguments “have no merit”).

⁴ Morgan Chalfant & Brett Samuels, *Trump Puts Pressure on Republicans, Says He Will ‘Never Concede’*, HILL (Jan. 6, 2021) <https://thehill.com/homenews/administration/532920-trump-puts-pressure-on-republicans-says-he-will-never-concede>.

⁵ Nicholas Fandos & Emily Cochrane, *After a Day of Chaos, Congress Certifies Joe Biden’s Election Victory*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/live/2021/01/06/us/electoral-vote/after-a-day-of-chaos-congress-certifies-joe-bidens-election-victory>.

⁶ *It’s Official: The Election Was Secure*, BRENNAN CTR. FOR JUST. (Dec. 11, 2020), <https://www.brennancenter.org/our-work/research-reports/its-official-election-was-secure>; 167 CONG. REC. H93 (daily ed. Jan. 6, 2021) (recording 121 yeas to the objection to the Arizona electoral college vote count).

⁷ See, e.g., *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.html (announcing the permanent

Trump a second time;⁸ even then-Majority Leader Mitch McConnell declared on the Senate floor that Trump “fed lies” to his supporters.⁹ But progressives asked for more serious punishment—proportionate to Trump’s “threat to national security, democracy, and the Constitution”¹⁰: In particular, the constitutional language of the Impeachment Clauses provoked calls for the Senate to disqualify Trump from future federal office.¹¹ In response, Trump and his vocal defenders decried both the impeachment and prior efforts to “vote him out” of office—in particular after the death of Justice Ruth Bader Ginsburg¹²—as the witch-hunt of a cancel culture that is symptomatic of the unique ills of contemporary liberal politics.¹³ This accusation threatened to derail Trump’s conviction by the Senate early on, when forty-five Republican Senators—well above the acquittal threshold—signaled their position that impeachment of an out-of-office President violated the Constitution.¹⁴

Although the Senate ultimately acquitted Trump in the conviction proceedings,¹⁵ the public’s desire to exclude him and other extremist politicians from power has manifested in contexts beyond impeachment. Somewhat unusually, given its historical relationship with the Republican Party, large corporations have spearheaded efforts to diminish the influence of Trumpian voices in the public sphere: In addition to social-media bans, cloud services

suspension of former President Trump’s Twitter account “due to the risk of further incitement of violence”).

⁸ H.R. 24, 117th Cong. (2021).

⁹ 167 CONG. REC. S49 (daily ed. Jan. 19, 2021) (statement of Sen. McConnell).

¹⁰ H.R. 24, 117th Cong., at 4 (2021).

¹¹ See U.S. CONST. art. I, § 2, cl. 5 (authorizing the House to impeach); *id.* § 3, cl. 6 (authorizing the Senate to convict); *id.* § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . .”); see, e.g., Deepak Gupta & Brian Beutler, *Impeachment Isn’t the Only Option Against Trump*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/opinion/Trump-impeachment-disqualification.html> (urging Congress to “invoke its constitutional power to bar the president from holding office again”).

¹² Calls to vote Trump out of office intensified after he announced his intention to nominate Justice Ginsburg’s replacement to the Supreme Court, despite Republican efforts to block the confirmation of then-Judge Merrick Garland in 2016 due to that nomination’s proximity to an upcoming presidential election. See Michael Crowley, ‘Vote Him Out,’ Protesters Chant as Trump Visits Justice Ginsburg’s Coffin, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/09/24/us/politics/vote-him-out-protesters-chant-as-trump-visits-justice-ginsburgs-coffin.html> (describing protestors’ expressions of dissatisfaction—including “vote him out” and “honor her wish,” the latter of which refers to Justice Ginsburg’s request for the next President to nominate her successor—as then-President Trump paid his respects).

¹³ See, e.g., 167 CONG. REC. H166 (daily ed. Jan. 13, 2021) (statement of Rep. Jordan) (accusing the Democrats of “want[ing] to cancel the President”).

¹⁴ 167 CONG. REC. S142-43 (daily ed. Jan. 26, 2021).

¹⁵ *Roll Call Vote 117th Congress—1st Session*, U.S. SENATE (Feb. 13, 2021), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00059.

have suspended hosting Parler, the conservative microblogging interface; payment-processing companies have ended support for the Trump campaign website; and video hosting platforms have removed content and hashtags that question election outcomes or incite further violence.¹⁶ These corporate efforts of banishment have provoked both scholarly debate and, more recently, a lawsuit by Trump decrying unconstitutional censorship and prior restraint (despite an unclear legal basis, since private entities are not subject to the First Amendment).¹⁷ As for political actors, the House stripped Representative Marjorie Taylor Greene of her committee assignments for espousing numerous outlandish conspiracy theories and proposals, such as executing Democratic politicians and suggesting that school shootings were staged and conducted by the government.¹⁸ Even in the case of Trump, legal scholars have suggested an alternative avenue of disqualification from future federal office, through section 3 of the Fourteenth Amendment.¹⁹

This Article examines recent efforts to remove Trump and other politicians from the public eye, defending those efforts against criticisms that they manifest the unprecedented extremism of cancel culture with reference to an ancient Greek electoral mechanism: ostracism.²⁰ In the world's first

¹⁶ Derek Thompson, *The Meaning of Trump's Mass Cancellation*, ATLANTIC (Jan. 12, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/how-big-tech-impeached-donald-trump/617643> (observing that despite Trump being spared by the "deep state," he was nonetheless cancelled by the free market).

¹⁷ Complaint at 2-3, *Trump v. Twitter, Inc.*, No. 1:21-cv-22441 (S.D. Fla. July 7, 2021) (alleging that Twitter "mounted an aggressive campaign of prior restraint . . . through censorship (flagging, shadow banning, etc.) resulting from legislative coercion and collusion with federal actors"). For an example of scholarly debate, see European University Institute, *Trump, Facebook and the Oversight Board: What Future for Platform Adjudication?*, YOUTUBE (July 9, 2021), <https://www.youtube.com/watch?v=tQSFbNz92Yo>.

¹⁸ Catie Edmondson, *House Exiles Marjorie Taylor Greene From Panels, as Republicans Rally Around Her*, N.Y. TIMES (May 25, 2021), <https://www.nytimes.com/2021/02/04/us/politics/marjorie-taylor-greene.html>.

¹⁹ Section 3 of the Fourteenth Amendment denies eligibility for state and federal office to any public official who has previously sworn an oath to defend the Constitution and subsequently either (1) engages in insurrection or rebellion against the United States or (2) gives aid or comfort to its enemies. U.S. CONST. amend. XIV, § 3; e.g., Bruce Ackerman & Gerard Magliocca, *Impeachment Won't Keep Trump from Running Again. Here's a Better Way.*, WASH. POST (Jan. 11, 2021), <https://www.washingtonpost.com/opinions/2021/01/11/impeachment-wont-keep-trump-running-again-heres-better-way> (arguing that the Fourteenth Amendment represents a "constitutional provision that can achieve precisely [the goal of disqualification] without distorting the Constitution's meaning"); Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-To Guide*, LAWFARE (Jan. 19, 2021), <https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide> (applying Section 3 to the storming of the Capitol).

²⁰ Some commentators have turned to another classical political device—*damnatio memoriae*, or condemnation of memory—in envisioning the post-Trump world of American politics and democracy. E.g., Robyn Faith Walsh, *The Ancient Romans Had a Strange Way of Dealing With Figures Like Donald Trump*, SLATE (Feb. 8, 2021, 5:45 AM), <https://slate.com/news-and-politics/2021/02/erasing-donald-trump-impeachment-romans.html> (drawing an analogy between the

democracy, Athenians assembled once a year to write down on pottery shards, *ostraka*, names of prominent figures they wished to exile from their political community.²¹ I argue that this desire to banish public figures from political participation and power is, in fact, sign of a well-functioning, legitimate democracy. This Article also critically assesses contemporary practices of ostracism, offering both structural and targeted recommendations to make them better fulfill the direct-democracy functions of political banishment. Importantly, ostracism is a *trans-ideological* device: it targets any public figure who poses a threat to our democratic institutions or whose demagoguery threatens the fundamental norms that constitute our polity, without regard to the substantive content of the policies those politicians advocate.

The remainder of this Article proceeds as follows. Part I introduces the Athenian practice of ostracism, contending that it fulfills three core functions. First, ostracism combats the tensions of intra-elite competition, as well as the resulting hydraulic pressure in a democracy to degenerate into tyranny or oligarchy. Second, it diffuses polarization, especially with respect to policies associated with a particular office or citizen. Third, it facilitates contestatory democracy with both cathartic and discursive benefits. These functional and institutional features highlight ostracism's effectiveness as an instrument of democratic politics when particular personalities have eroded longstanding commitments to democratic norms and the perceived legitimacy of one's political opponents. Part II maps this framework onto the state of modern American democracy, focusing in particular on the events that unfolded around the election of 2020 and the purposes served by ostracism in that context. Part III offers a critical assessment of the modern practices (and potential routes) of political banishment, identifying two features that

current state of American politics and Rome but ultimately rejecting *damnatio* as an effective mechanism to erase the memory of disgraced public figures); Mike Lofgren, Opinion, *Damnatio Memoriae: The First Step to Recovery in a Post-Trump America*, COMMON DREAMS (Oct. 21, 2020), <https://www.commondreams.org/views/2020/10/21/damnatio-memoriae-first-step-recovery-post-trump-america> (proposing that the new administration “wipe the slate in much the same manner that the Romans used *damnatio memoriae* (the condemnation of memory) to literally erase the record of a traitor or a usurper by removing any trace or mention of the evil doer”). *Damnatio memoriae* involved the removal of once-powerful politicians from the public memory, usually by mutilating and negating their presence in monuments and government records. As I have argued in a previous article, memory erasure has the central purpose of rehabilitating the public space so that the symbols of political power not only memorialize a shared past but also communicate the right normative messages. Cf. Alex Zhang, *Damnatio Memoriae and Black Lives Matter*, 73 STAN. L. REV. ONLINE 77, 87-88 (2020) (examining BLM's scrutiny of civic symbols through the lens of *damnatio memoriae*). The efforts to remove former President Trump from the public sphere focus on the damage that he has done to our democratic institutions rather than his commemoration in public monuments, so ostracism provides a much better historical precedent than *damnatio memoriae*.

²¹ See D. M. MacDowell, *Ostracism*, in OXFORD CLASSICAL DICTIONARY (Simon Hornblower, Antony Spawforth & Esther Eidinow eds., 4th ed. 2012) (describing the political practices of ostracism).

distinguish them from the classical Greek electoral procedure: (1) delegation of the decisionmaking process to elected representatives rather than direct action by the citizenry; and (2) the outsized influence of corporations that control platforms of public political and deliberative engagement. These characteristics should challenge us to rethink the functions and forms of modern ostracism to preserve its role as a mechanism of direct democracy. Despite the Senate's failure to reach a judgment of conviction in Trump's particular case, then, this Article makes a unique contribution by providing a normative and historical foundation to re-imagining the law of democracy.

I.

OSTRACISM AND ITS DEMOCRATIC FUNCTIONS

A. *The Electoral Procedure*

Athens during the classical period (fifth and fourth centuries BCE) featured the world's first democracy, the radical nature of which was manifest in its egalitarianism.²² All citizens shared in legislative deliberation regardless of qualifications;²³ jurors without legal expertise served as judges in the same trials;²⁴ membership in the magistracy and legislative council was determined primarily by lottery.²⁵

In this direct democracy, although election was not used as the primary mechanism of filling public offices, voters did congregate once a year to

²² By egalitarianism, I refer not to the broad political-philosophical view that all human beings—regardless of their gender, ethnic origin, or social status—are to be treated equally with respect to a morally relevant metric (e.g., resources, political rights, or capabilities). See Richard Arneson, *Egalitarianism*, STAN. ENCYCLOPEDIA PHIL. (Apr. 24, 2013), <https://plato.stanford.edu/entries/egalitarianism> (describing the contemporary strands of egalitarianism). Instead, I refer to the limited notion that within the category of those recognized as citizens—even if defined on exclusionist terms—political power is distributed on a relatively equal basis. Classical Athens certainly did not fit the description of the former—many were excluded from citizenship by virtue of their sex and parentage—but belonged more to the latter: Many offices were assigned by lot, and the polity encouraged political participation of the poor by monetary incentives. See, e.g., JOSIAH OBER, *MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY, AND THE POWER OF THE PEOPLE* 4–9 (1991) (discussing Athenian citizenship and the nature of political participation by Athenian citizens).

²³ See OBER, *supra* note 22, at 7; see also MOGENS HERMAN HANSEN, *THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES: STRUCTURE, PRINCIPLES, AND IDEOLOGY* 3 (J.A. Crook trans., 1991) (examining Athenian democracy both as a political system and as an ideology).

²⁴ See Adriaan Lanni, “*Verdict Most Just*”: *The Modes of Classical Athenian Justice*, 16 *YALE J.L. & HUMAN.* 277, 286 (2004) (analyzing the complex and unique system of Athenian law).

²⁵ See PAUL CARTLEDGE, *DEMOCRACY: A LIFE* 108, 170, 310 (2016) (“Greek democrats believed that the lottery was the proper way to select citizens for key public functions . . .”); see also Claire Taylor, *From the Whole Citizen Body? The Sociology of Election and Lot in the Athenian Democracy*, 76 *HESPERIA* 323 (2007) (offering a sociological overview of election/lottery as mechanisms of selecting public officers in Athens).

expel from their polity a controversial figure in politics.²⁶ A twofold procedure effectuated this form of political banishment. First, the legislative assembly (*ekklēsia*) considered the question of whether an ostracism would be held during that year.²⁷ Second, if the assembly answered in the affirmative, eligible voters would assemble in the public forum and write on a pottery fragment (*ostrakon*—hence the term ostracism) the name of their chosen politician.²⁸ If total votes cast exceeded six thousand, then the person receiving the highest number of votes would be exiled from the Athenian political community for ten years, but without loss of citizenship or forfeiture of property.²⁹ After the expiration of the ten-year term (and presumably a cooling of political emotions), the banished person could then return to Athens with his rights and privileges fully restored.³⁰ In more abstract terms, then, ostracism required (1) institutional support in the form of approval from the legislative assembly to hold the election, (2) sufficient popular participation to reach the six thousand-vote quorum, and (3) concentration of both institutional and democratic anger against the one person who would be exiled.³¹

B. *The Democratic Functions of Ostracism*

1. *Elite Competition and Tyranny*

Why would democracy ostracize? I argue that this peculiar electoral procedure serves three core functions, the most visible of which is the enhancement of political equality. Aristotle shared this view:

Democratic states have instituted ostracism for this reason: they are considered to promote equality as the most important goal. As a result, they would ostracize and banish from their government, for a fixed duration, those perceived to possess excessive power due to their wealth,

²⁶ See, e.g., OBER, *supra* note 22, at 7–8 (noting that Athens had “no entrenched governing elite and . . . no elected representatives” since “elections were considered potentially undemocratic,” and that the membership in the Athenian Council was “chosen, like other magistrates, annually by lottery”); MacDowell, *supra* note 21, at 1053.

²⁷ MacDowell, *supra* note 21, at 1053.

²⁸ *Id.*

²⁹ There is some debate about whether the six thousand-vote threshold functioned as a quorum or whether the ostracized politician himself must receive at least six-thousand votes. Scholarly discourse has generally settled on the former view. See, e.g., SARA FORSDYKE, EXILE, OSTRACISM, AND DEMOCRACY 149 n.20 (2009) (discussing the ambiguity of sources that address the six-thousand-vote threshold).

³⁰ MacDowell, *supra* note 21, at 1053.

³¹ In this way, ostracism functions as the opposite of dictatorship: Just as Romans would institute their leader as a dictator with emergency powers to combat an external threat, Athenians removed their most prominent politician when internal pressures and political dynamics threatened their democracy. For a general overview of constitutional dictatorship, see, for example, Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789 (2010).

popularity, or other forms of political strength.³²

The Aristotelian justification is intuitive. A well-functioning democracy allows—and encourages, for the sake of facilitating pluralism and legitimacy—elite competition for power.³³ Healthy intra-elite competition ensures a balanced distribution of political authority across different interest groups, as well as a fair opportunity for any desirable policy outcome to gain support regardless of its ideological salience.³⁴ Occasionally, however, one person or group so effectively aggrandizes itself as to achieve near-complete dominance in the political landscape. In that scenario, existing democratic mechanisms break down, and minority groups that hold views dissonant with those of the majority become at risk of persecution.³⁵ Further concentration of power could then lead to constitutional change: democracy degenerates into oligarchy or authoritarian tyranny.³⁶ Ostracism, then, performs the critical function of expelling that person—or the leader of that group—who poses a threat to democracy.

Equality enhancement was the original purpose of ostracism in Athens, as revealed by the first few applications of the procedure, all of which involved banishing politicians with monarchical ambitions. While it is hard to demarcate a precise origin, Athenian democracy crystalized with the reforms of Solon, a prominent Athenian lawgiver who rose to power during a time of

³² Translations from the Greek are mine, unless otherwise noted, but I cite to the original and a modern scholarly edition for reference. ARISTOTELIS POLITICA 1284 (W.D. Ross ed., 1957), translated in ARISTOTLE POLITICS 89 (C.D.C. Reeve trans., Hackett Publ'g Co. 1998) (1284a17-18).

³³ Competition for political power within the governing elite might manifest in different forms (e.g., conflicts between branches of government or between parties). See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2316–30 (2006) (describing the historical development in which elite political competition shifted from an interbranch to an inter-party focus).

³⁴ In any representative democracy that features variation in political and policy preferences, the absence of elite competition implies political unresponsiveness to segments of the population. See, e.g., Sara Binzer Hobolt & Robert Klemmensen, *Government Responsiveness and Political Competition in Comparative Perspective*, 41 COMPAR. POL. STUD. 309 (2007) (showing that political contestation drives policy responsiveness).

³⁵ This Section provides an example from classical Athens, see *infra* notes 41–46 and accompanying text, but it is notable that such failures also take place in modern democracies. See generally ETHAN SCHEINER, *DEMOCRACY WITHOUT COMPETITION IN JAPAN: OPPOSITION FAILURE IN A ONE-PARTY DOMINANT STATE* 7–8 (2006) (outlining party competition failure in contemporary Japan); M. STEVEN FISH, *DEMOCRACY DERAILED IN RUSSIA: THE FAILURE OF OPEN POLITICS* (2005) (detailing symptoms of democracy failures in post-Soviet Russia).

³⁶ The *locus classicus* for a theory of constitutional degeneration can be found in Polybius's notion of *anacyclōsis*, which posits that democracy would degenerate into ochlocracy (rule of the mobs—a deviant form of democracy), which in turn would be transformed into monarchy, then tyranny (the deviant form of singular rule), then aristocracy, then oligarchy (the deviant form of pluralist rule), then democracy, at which point the process repeats itself in a constant course of political change. POLYBIUS, *THE HISTORIES* 6.4–9 (Robin Waterfield trans., Oxford Univ. Press 2010).

intense political opposition between rich creditors and poor debtors, when concentration of wealth, in the form of land ownership, among the few reached such a level that a large portion of the population became enslaved in debt bondage.³⁷ The political terms under which Solon became a mediator between the two groups are noteworthy for the purposes of conceptualizing ostracism: His constitutional reforms were subject to a unique condition, as the Athenians agreed not to change his laws for a fixed period of time so that they could see the new constitutional scheme in operation and effect before hasty political action.³⁸ This particular mechanism of entrenchment functioned, in a way, as the opposite of ostracism to disenfranchise those opposed to the new political order. But, at the same time, Solon (along with other ancient Greek lawgivers whose legislation was protected from popular overrides for a pre-defined duration) voluntarily exiled himself from the political community to avoid any pressure to change his own laws or to interpret them in a particular way.³⁹ In any event, Solon's reforms produced the democratic principle of one person, one vote in the legislative assembly.⁴⁰

A few decades later, however, Pisistratus managed to institute himself as the sole ruler of the state. At the time, Athenian politics was characterized by an aristocratic struggle between the faction of the plain (*pediakoi*) and the faction of the coast (*paralioi*).⁴¹ Having risen to prominence at first through military victory, Pisistratus became “an extreme advocate of the people,” that is, a populist leader, heading the “hillmen” population of Athens (*hyperakrioi*—not dissimilar to Trump's support among the so-called hillbillies).⁴² Pisistratus then crushed the two other factions and eliminated his political opponents in a paradigmatic example of a failure in elite competition.⁴³ The procedure of ostracism was introduced after Pisistratus's tyranny, and the earliest victims were all associated with his reign (by blood or by political alliance).⁴⁴ The Athenian citizenry banished them from participation in the

³⁷ Adriaan Lanni & Adrian Vermeule, *Constitutional Design in the Ancient World*, 64 STAN. L. REV. 907, 914 (2012) (identifying distinctive features of ancient constitutional design and evaluating their repercussions).

³⁸ *Id.* at 917–18, 918 n.45.

³⁹ *Id.*

⁴⁰ See CARTLEDGE, *supra* note 25, at 53 (discussing the significance of Solonian political innovation, which implied “one citizen = one vote, whether the citizen was rich or poor, noble or commoner”).

⁴¹ See Valerij Gouschin, *Pisistratus' Leadership in A.P. 13.4 and the Establishment of the Tyranny of 561/60 B.C.*, 49 CLASSICAL Q. 14, 14, 18 (1999) (“[Pisistratus'] fame strengthened during the feud that began between the *Pediakoi* and the *Paralioi*.”).

⁴² *Id.* at 14.

⁴³ See Rosalind Thomas, *Pisistratus*, in OXFORD CLASSICAL DICTIONARY, *supra* note 21.

⁴⁴ See Mara Kutter, *The Peisistratid Tyranny at Athens: Conflicting Sources and Revisionist History at Work*, ALEPH J. (July 17, 2015) <http://aleph.humanities.ucla.edu/2015/07/17/the-peisistratid-tyranny-at-athens-conflicting-sources-and-revisionist-history-at-work> (noting that

political community, due to their power—as well as desire—to subvert the state’s democratic institutions and to resurrect tyranny from its smoldering ashes.⁴⁵ Ostracism, therefore, could function as an electoral mechanism to preserve political equality and to prevent the failures of elite competition from being exacerbated to erode democracy itself.⁴⁶

2. Polarization

Ostracism could also depolarize, by decisively rejecting a set of policy outcomes in a polity where public opinions are scattered on the two extremes of an ideological spectrum. This aspect of ostracism resembles but is not fully equivalent to a general election, in which voters select policy bundles to empower.⁴⁷ The depolarizing potential of political banishment is conspicuous during a national crisis, the occurrence of which tends to divide the electorate.⁴⁸

Two victims of ostracism from classical Athens illustrate the procedure’s depolarizing function. In 461 and 443 BCE, the citizenry voted to exile Cimon and Thucydides, respectively, both of whom were fierce conservative opponents to Pericles.⁴⁹ Cimon harbored favorable views toward the oligarchy that ruled Sparta and persuaded the Athenian government to send him, along with an army, to aid Sparta against an internal revolt by the

Peisistratus died around 527, and tyranny lasted into the 510’s, followed by the first ostracisms, which were conducted in the 480’s); B.M. Lavelle, *A Note on the First Three Victims of Ostracism*, in 83 CLASSICAL PHILOLOGY 131, 132 (1988) (“There is further evidence that the first three men ostracized were kinsmen of Pisistratus.”).

⁴⁵ See MacDowell, *supra* note 21, at 1053 (attributing the unpopularity of the first victims of ostracism at Athens to the contemporaneous perception that “they favoured the Persian invaders and the restoration of the tyranny”); FORSDYKE, *supra* note 29, at 153–54 (describing the view that “tyrannical inclinations were among the justifications for ostracism,” given historical as well as archaeological evidence, but ultimately criticizing this view because Athenians had other, potentially harsher, penalties for tyrants).

⁴⁶ See Alexander S. Kirshner, *Legitimate Opposition, Ostracism, and the Law of Democracy in Ancient Athens*, 78 J. POL. 1094, 1094 (2016) (arguing that Athenian institutions were “antimonopolistic, blocking individuals from wielding excessive power”).

⁴⁷ Scholars have recognized this affinity between election and ostracism. See MacDowell, *supra* note 21, at 1054.

⁴⁸ The de-polarizing power of ostracism derives from the need of certain political positions and policy preferences—often occupying the fringe of the ideological spectrum but not necessarily lacking in popular support—to channel their voices through charismatic (even if morally problematic) figures. The removal of those spokespersons and provocateurs from political participation and the public forum then facilitates the movement of those citizens toward the center of the ideological spectrum.

⁴⁹ See Arnold Wycombe Gomme, Theodore John Cadoux & Simon Hornblower, *Cimon* [hereinafter Gomme et al., *Cimon*], in OXFORD CLASSICAL DICTIONARY, *supra* note 21 (discussing the life of Cimon); Arnold Wycombe Gomme, Tim J. Cornell & P.J. Rhodes, *Thucydides (1)* [hereinafter Gomme et al., *Thucydides*], in OXFORD CLASSICAL DICTIONARY, *supra* note 21 (discussing the life of Thucydides).

serfs—an expedition that ended in failure.⁵⁰ Thucydides, on the other hand, clashed with Pericles on his domestic policies and building program (which produced well-known architectural structures like the Parthenon).⁵¹ By banishing both from political participation, Athenian voters ended the intense disagreement between the Periclean and the conservative factions, allowing for political stability and decisive policymaking during a turbulent time.⁵²

It is crucial to note that ostracism performs the depolarizing function much more effectively than a general election. The former signals the political community's condemnation of a policy bundle (as well as the person associated with it) and seeks to preclude that ideological position from gaining any voice in the public forum for a statutory term of ten years. The latter, in contrast, signals the political community's acceptance of a policy bundle and empowers that ideological position by distributing to it the authority of public offices.⁵³ In other words, ostracism aims to make a group's political power wither (and, frequently, perish). An ordinary election grants a group outsized access to public resources but still allows the opposing view to survive. Reversing high polarization requires an injection of change into a political system whose momentum pushes both sides to move farther away from each other,⁵⁴ and ostracism accomplishes this task much faster than an ordinary election.⁵⁵ Importantly, the speed with which ostracism fulfills its de-polarizing functions does not necessarily impact the sustainability of its

⁵⁰ Gomme et al., *Cimon*, *supra* note 49.

⁵¹ Gomme et al., *Thucydides*, *supra* note 49.

⁵² See, e.g., Arnold Wycombe Gomme & P.J. Rhodes, *Pericles (1)*, in OXFORD CLASSICAL DICTIONARY, *supra* note 21 (noting that after the ostracism of Thucydides, Pericles was able to continue his building program, was elected general every year, and became "Athens' unchallenged leader").

⁵³ To be sure, voting for the winning candidate might be seen as rejecting the policy platform put forth by the losing candidate, especially in a two-party system. But the fundamental difference is that a political system can ostracize *without necessarily* elevating the ostracized individual's political opponents above their existing share of political power.

⁵⁴ See, e.g., Cass R. Sunstein, *The Law of Group Polarization* 1 (Chi. John M. Olin L. & Econ. Working Paper No. 91), https://papers.ssrn.com/sol3/abstract_id=199668 (describing how deliberation moves groups "toward a more extreme point in the direction indicated by their own pre-deliberation judgments"); *id.* (manuscript at 18) (speculating that "polarization often ends or reverses as a result of some external shock").

⁵⁵ One caveat: For ostracism to perform its depolarizing function, the decisionmaking process needs to be relatively swift, and the judgment of banishment clear cut. This is because a drawn-out deliberative process as to whether a particular politician should indeed be ostracized risks further polarizing the political community through the pathology that Sunstein calls group polarization. See *id.* (manuscript at 3–4) (defining group polarization as the phenomenon (an "empirical regularity") in which "members of a deliberating group move toward a more extreme point in whatever direction is indicated by the members' pre-deliberation tendency"). Further, a judgment short of full exile (for example, because the decision is subject to appeal to a higher authority, permits partial participation in politics under predefined conditions, or allows the ostracized to maintain control of institutions that can serve as proxies of political influence) risks continuing the debate and contributing to further polarization. In short, ostracism should be speedy and decisive.

effects: After all, the statutory tenure of exile mandates a ten-year absence from the polity, and historical records suggest that Pericles enjoyed a long-standing period of support after the ostracisms of his opponents.⁵⁶

3. *Contestatory Democracy*

Ostracism also furthers the goals of contestatory democracy, which “values contestation and resistance as necessary parts of a healthy state.”⁵⁷ Within any political community, there are institutional structures that tend to subordinate groups of citizens while facilitating a certain, perhaps predetermined order.⁵⁸ At Athens, the procedure of ostracism enabled ordinary citizens to monitor and contest the leadership of aristocratic factions, by reminding the latter on an annual basis that non-elite groups could decisively determine the outcome of intra-elite strife.⁵⁹ In addition to this symbolic role, banishment also fulfills the function of enhancing participation of disengaged voters: By providing an outlet to channel popular resentment, ostracism captures the political needs of those who lack a champion but who intensely disagree with the powerful.⁶⁰ Those voters can now make the direct choice to exile the object of their hatred, instead of having to channel their opposition through support of other public figures whose platform they may not endorse.⁶¹ In other words, ostracism combats political apathy and voter abstention due to alienation—it enables people to vote against those they oppose without voting for others.

A combination of ostracism’s depolarizing and contestatory functions reveals another, perhaps darker use of this electoral device: a cleansing of

⁵⁶ See *supra* note 52.

⁵⁷ Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 843 (2021).

⁵⁸ For example, wealth, education (in particular in the art of rhetoric and public speaking), and the unequal distribution of access to those opportunities could have resulted in systematic subordination in classical Athens had it not developed robust mechanisms of democratic participation—ostracism among them. See Josiah Ober, *Public Speech and the Power of the People in Democratic Athens*, 26 POL. SCI. & POL. 481, 483–84 (1993).

⁵⁹ See FORSDYKE, *supra* note 29, at 151 (“By reminding elites annually of the potential of non-elites to intervene decisively in violent intra-elite conflict, the institution of ostracism served as a potent symbol of the ability of non-elites to determine the outcome.”).

⁶⁰ See, e.g., James Adams, Jay Dow & Samuel Merrill III, *The Political Consequences of Alienation-Based and Indifference-Based Voter Abstention: Applications to Presidential Elections*, 28 POL. BEHAV. 65, 74 (2006) (showing that alienation from political candidates depressed voter participation in presidential elections in 1980, 1984, and 1988).

⁶¹ Modern recall elections perform similar functions by empowering voters to directly remove currently serving politicians from office before the expiration of their elected terms, thus channeling voter distrust in *representative* democracy. See, e.g., Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 273, 278 (2004) (discussing the “resurgence of direct democracy,” of which recall elections form a part, as “partially the result of public disgust with and distrust of representative institutions”). Ostracism goes further: All citizens, regardless of whether they hold offices, can be ostracized, and banishment extends to the entire public sphere.

political emotions. In other words, occasionally democratic politics becomes so sharply divisive that the people have built up deep anger, frustration, and discontent. Regardless of the substantive merits of the policies associated with those exercising political power, the electorate simply needs to remove them from public view in order to reach a state of catharsis—a purgation of those destabilizing emotions—which then enables the restoration of ordinary politics on a clean slate.⁶² Such was the purpose of ostracizing Themistocles, who had led the Greeks to an astounding victory against the Persian invasion at the Battle of Salamis with his strategic genius, in 480 BCE.⁶³ The ancient historian Plutarch characterized Themistocles's exile, then, “not [as] a penalty, but a way of pacifying and alleviating that jealousy which delights to humble the eminent, breathing out its malice into this disfranchisement.”⁶⁴

So far, this Part of the Article has argued that the Athenian electoral mechanism of ostracism performs three core democratic functions. It combats failures in elite competition and the hydraulic pressure for democracy to degenerate into tyranny. It depolarizes a political community in which public opinions are distributed on two ends of an ideological spectrum. It also furthers contestatory democracy with participatory and cathartic benefits. Before proceeding to the next Part of the Article, which applies this framework to the contemporary context, it is important to clarify that the Athenian electoral procedure is but an example of the broader phenomenon of political banishment. Not all practices or institutions of exiling powerful figures will share each precise feature of the Athenian mechanism. Broadly conceived, ostracism can be defined as any practice within an egalitarian society⁶⁵ that

- (1) channels a commonly shared desire to banish a figure from the political community;
- (2) by directly removing the figure from the public sphere of political engagement and deliberation (rather than, for example, by empowering the figure's opponent in the usual course of

⁶² It is notable that the concept of catharsis originates in Aristotelian literary criticism. See generally Leon Golden, *Catharsis*, 93 *TRANSACTIONS & PROC. AM. PHILOLOGICAL ASS'N* 51 (1962).

⁶³ Andrew Robert Burn & P. J. Rhodes, *Themistocles*, in *OXFORD CLASSICAL DICTIONARY*, *supra* note 21.

⁶⁴ 2 PLUTARCH, *PLUTARCH'S LIVES: THEMISTOCLES AND CAMILLUS, ARISTIDES AND CATO MAJOR, CIMON AND LUCULLUS* 63 (E.H. Warmington ed., Bernadotte Perrin trans., Harv. Univ. Press, 1914).

⁶⁵ While ostracism primarily arises in democratic political arrangements (and is indeed often designed to preserve the democratic institutions that constitute those political arrangements), any society that aspires to egalitarianism (even if an incomplete version of it) can, in theory, ostracize. For example, an oligarchic society managed by a small circle of elite could banish a particularly powerful member of the governing class to preserve existing intra-elite equality. But of course, the focus of this Article lies in the use of ostracism in democratic societies.

- electoral contest);
- (3) for a fixed duration; and
 - (4) is primarily designed to preserve the democratic institutions of the polity, while potentially also bringing depolarizing and cathartic benefits.

This definition allows us to see ostracism as a peculiar mode of democratic political contest. Modern scholarship has generated a spectrum of theories of politics, ranging from those that characterize it as war to those that characterize it as presuming fundamental agreement.⁶⁶ On the one extreme, Carl Schmitt has conceptualized politics as largely equivalent to war, or more precisely, as essentially involving the distinction between friend and enemy.⁶⁷ Enmity, in turn, entails the possibility of war and mutual (and physical) killing: An extreme consequence of war, and of the political dimension, is the “existential negation of the enemy.”⁶⁸ In other words, politics perennially features the possibility of physically eliminating one’s opponents through warfare. On the other hand, contemporary theorists have developed a model of democratic politics grounded in agonistic pluralism, which postulates a political opponent not as an enemy but as an adversary.⁶⁹ Importantly, contestants in politics recognize the legitimacy of the ideas of their adversaries even if they oppose the implementation of those by the state: That is, despite their substantive disagreement on policies, contestants in agonistic politics still share an adherence to fundamental norms and the “ethico-political principles of democracy.”⁷⁰ This conception frames politics not in terms of pure antagonism and the associated presence of extermination, but as a “social order in which persons might live together in peace and social solidarity within a single polity and yet preserve the possibility of ongoing contestation about what actions the polity might take.”⁷¹

Ostracism emerges as an effective procedure when antagonism—which identifies politics with the possibility of war and the end of extermination—

⁶⁶ Robert Post insightfully surveys this line of literature in *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319 (2010).

⁶⁷ See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26 (George Schwab trans., Univ. of Chi. Press 2007) (1932) (“The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.”). An even more direct framing of this analogy comes from CARL VON CLAUSEWITZ, *ON WAR* 23 (J.J. Graham trans., 1918), which characterizes war as “a continuation of political commerce[] [i.e., politics] by other means.”

⁶⁸ SCHMITT, *supra* note 67, at 33; see also BENJAMIN A. SCHUPMANN, *CARL SCHMITT’S STATE AND CONSTITUTIONAL THEORY: A CRITICAL ANALYSIS* 70 (2017) (describing Schmitt’s concept of the political with reference to the “Friend-Enemy distinction and its possibility of mutual killing”).

⁶⁹ Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RSCH. 745, 755 (1999).

⁷⁰ *Id.*

⁷¹ Post, *supra* note 66, at 1340.

starts to better characterize democratic contests than agonism—which sees politics as premised on fundamental agreement on norms but featuring conflicts between legitimate adversaries. In other words, both the desire to banish and the political will behind exiling prominent public figures strengthen when political contestants no longer view their opponents as legitimate adversaries, no longer see the policies of their opponents as deserving of a place in the public sphere or the marketplace of ideas, and no longer expect their opponents to advance those policies through agreed-upon procedures or norms. Ostracism flourishes during an erosion of the fundamental agreement to adhere to democratic principles, when agonistic pluralism is on the decline. On the other hand, ostracism is not an instrument of politics as war. Banishing a public figure from political engagement for a pre-defined period of time does not (and is not designed to) extinguish their existence—instead, it merely expresses the democratic judgment to leave their voices and personalities outside of the political community temporarily, with their return welcomed after the expiration of the statutory period of exile. In this way, ostracism is grounded in a hope to restore the procedures and the fundamental agreement on democratic norms that have characterized agonistic politics in the political community prior to the erosion of those norms. The fixed duration of banishment then signals both the polity’s aversion to eliminating the ostracized and its anticipation of their return, when the fundamental norms and the perceived legitimacy of political adversaries have recovered.

II.

OSTRACIZING FORMER PRESIDENT TRUMP?

A. *Trump’s Threats to American Democracy*

This Part of the Article applies the framework developed in Part I to recent efforts to remove former President Trump from the public eye. Ostracism—through a combination of restrictions on public appearances (e.g., social-media bans) and disqualification from future office-holding (e.g., through impeachment and conviction or section 3 of the Fourteenth Amendment)—is justified as former President Trump poses a substantial threat to our democratic institutions. Like the politicians with tyrannical ambitions whom Athens banished, Trump has attempted to subvert our country’s normal political processes. This Section documents and examines those profoundly harmful—even if ultimately unsuccessful—subversive practices that form the normative basis of political exile. As already emphasized, ostracism is a trans-ideological device that applies to anyone who poses a threat to our democracy, even if current politics counsels its usage against former President Trump.

Even before the results of the 2020 presidential election became clear, Trump tried to disrupt the counting process and to seed voter-fraud conspiracies among his supporters. Because of the pandemic and the surge of absentee voting, experts predicted that initial results, especially in battleground states, would favor Trump but gradually shift toward Biden as states finished counting the votes that were cast in person.⁷² As the pattern emerged on election night, and as his leads dissipated, Trump not only declared victory but also asked states to stop counting the remaining ballots—but not in states where he was behind in the tally.⁷³ Those calls to action spurred numerous rallies, where armed protestors shouted, “stop the steal,” in front of vote-counting facilities.⁷⁴ Trump’s rhetoric was equally dangerous, attacking the looming Biden victory as a “fraud on the American public” and directly undermining the legitimacy of the election itself.⁷⁵

Trump continued to exert inappropriate, if not unlawful, political pressure on election officials after they completed the vote count. In the case of Georgia, where Trump’s sizable lead on election night diminished and eventually turned into a razor-thin—but still substantial—margin in favor of Biden, the former President repeatedly asked the Republican Secretary of State to “find” the twelve thousand votes necessary to flip the election.⁷⁶ Commentators have observed that this phone call likely violated federal criminal laws, which prohibit knowingly or willfully depriving (or attempting to deprive) “the residents of a State of a fair and impartially conducted election process” by, for example, the procurement or tabulation of materially false ballots.⁷⁷ Finally, Trump’s efforts to overturn the election results culminated in an angry mob’s violent storming of the Capitol on January 6,

⁷² See Jonathan Lai, *The ‘Blue Shift’ in Pennsylvania Meant a 14-Point Swing from Trump to Biden*, PHILA. INQUIRER (Nov. 6, 2020), <https://www.inquirer.com/politics/election/biden-trump-pennsylvania-blue-shift-20201106.html>.

⁷³ See Jim Rutenberg, Jo Becker, Eric Lipton, Maggie Haberman, Jonathan Martin, Matthew Rosenberg & Michael S. Schmidt, *77 Days: Trump’s Campaign to Subvert the Election*, N.Y. TIMES (Jan. 31, 2021), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html>.

⁷⁴ Anna North, “*Stop the Count*” vs. “*Count Every Vote*”: *The Post-Election Protests Around the Country, Explained*, VOX (Nov. 5, 2020), <https://www.vox.com/2020/11/5/21550909/protests-trump-biden-maricopa-detroit-philadelphia>.

⁷⁵ Rutenberg et al., *supra* note 73.

⁷⁶ John Bowden, *Trump Asked Georgia Secretary of State to ‘Find’ 11.7k Ballots, Recalculate Election Result*, HILL (Jan. 3, 2021), <https://thehill.com/homenews/administration/532433-trump-asked-georgia-secretary-of-state-to-find-116k-ballots>.

⁷⁷ 52 U.S.C. § 20511; see also Eric Lipton, *Trump Call to Georgia Official Might Violate State and Federal Law*, N.Y. TIMES (Jan. 3, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-call-georgia.html> (discussing how Trump’s call could have constituted election interference); Trevor Potter & Mark Gaber, *Trump’s Call Is Still a Crime, Even if He Believes His Own Fraud Fantasies*, WASH. POST (Jan. 5, 2021, 2:21 PM), <https://www.washingtonpost.com/outlook/2021/01/05/trump-call-raffensperger-crime> (discussing how election fraud of the nature Trump possibly committed is both a federal and state criminal violation).

2021 in hope of stopping Congress's joint session from certifying Biden's victory—an action that legal scholars have characterized as treason.⁷⁸

When political pressure and incitement of protests proved insufficient,⁷⁹ the Trump campaign turned to the judiciary, seeking injunctions in dozens of federal and state courts to stop the vote count or pause the certification process.⁸⁰ None of these lawsuits succeeded.⁸¹ Indeed, jurists—even those appointed by the former President himself—have variously described those legal challenges as “rest[ing] on a fundamental and obvious misreading of the Constitution,”⁸² making “vague and conclusory” allegations with “fatal” defects,⁸³ asking the courts “to substitute its judgment for that of [the electorate],”⁸⁴ and producing a “Frankenstein’s Monster.”⁸⁵ Even the Supreme Court’s refusal to review did not put a stop to the Trump campaign’s baseless claims of voter fraud,⁸⁶ which have already resulted in a state attorney general’s request for sanction proceedings against lawyers involved in the

⁷⁸ See Carlton F.W. Larson, *The Framers Would Have Seen the Mob at the Capitol as Traitors*, WASH. POST (Jan. 7, 2021), <https://www.washingtonpost.com/outlook/2021/01/07/capitol-mob-treason/> (arguing that the Founders would have denounced the mob storming of the Capitol as treason, because “any armed insurrection to obstruct a law of the United States” would constitute “levying war against the United States” (quoting U.S. CONST. art. III, § 3)); see also Jeannie Suk Gersen, *Did Trump and His Supporters Commit Treason?*, NEW YORKER (Jan. 28, 2021), <https://www.newyorker.com/news/our-columnists/did-donald-trump-and-his-supporters-commit-treason/> (“[A] treason case against Trump himself might conceivably be built, if prosecutors could establish that he knew in advance that his supporters planned to violently assault the Capitol, rather than peacefully protest.”).

⁷⁹ See, e.g., Charles Davis, *There Is ‘No Doubt’ Joe Biden Won Georgia, Says Republican Secretary of State Brad Raffensperger*, BUS. INSIDER (Nov. 20, 2020), <https://www.businessinsider.in/politics/world/news/there-is-no-doubt-joe-biden-won-georgia-says-republican-secretary-of-state-brad-raffensperger/articleshow/79313601.cms>.

⁸⁰ E.g., *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992 (M.D. Pa. Nov. 21, 2020), *aff’d*, 830 F. App’x 377 (3d Cir. 2020); *Donald J. Trump for President, Inc. v. Benson*, No. 20-1567C, 2020 WL 6689092 (Fed. Cl. Nov. 12, 2020) (noting that the Trump campaign filed its complaint in the wrong court); *Donald J. Trump for President Inc. v. Hobbs*, No. CV2020-014248, 2020 WL 6691466 (Ariz. Super. Ct. Nov. 13, 2020).

⁸¹ By one count, the Trump campaign has lost at least fifty lawsuits challenging the election results in the courts. Alison Durkee, *Trump and The GOP Have Now Lost More Than 50 Post-Election Lawsuits*, FORBES (Dec. 8, 2020), <https://www.forbes.com/sites/alisondurkee/2020/12/08/trump-and-the-gop-have-now-lost-50-post-election-lawsuits/?sh=6ccd78762960>.

⁸² *Wis. Voters All. v. Pence*, No. 20-3791 (JEB), 2021 WL 23298, at *1 (D.D.C. Jan. 4, 2021).

⁸³ *Donald J. Trump for President v. Sec’y of Pa.*, 830 F. App’x 377, 381 (3d Cir. 2020) (opinion of Bibas, J.) (denying the motion for an injunction).

⁸⁴ Transcript of Hearing at 43, *Pearson v. Kemp*, No. 1:20-CV-4809-TCB, 2020 WL 7040582, at *1 (N.D. Ga. Dec. 7, 2020), *appeal dismissed*, 831 F. App’x 467 (11th Cir. 2020).

⁸⁵ *Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *3.

⁸⁶ See Amy Howe, *Justices Issue More Orders from Friday’s Conference, Decline to Fast-Track Election-Related Cases*, SCOTUSBLOG (Jan. 11, 2021), <https://www.scotusblog.com/2021/01/justices-issue-more-orders-from-fridays-conference-decline-to-fast-track-election-related-cases/> (noting the Supreme Court’s refusal to fast-track review of cases challenging the outcome of the 2020 election).

election lawsuits.⁸⁷

All of these interventions demonstrate a relentless push, on the part of the former President, to bypass the democratic process and evade the judgment of voters, without regard to rule-of-law values and our constitutional system. They reveal a conscious choice to overturn and subvert democracy—a ground that, of course, the previous Part of this Article has shown to justify ostracism.⁸⁸ In particular, the pressure exerted by Trump for officials to overturn election results represents a failure of elite competition within the community of conservative politicians—few of whom have dared to stand up to the former President.⁸⁹ Ostracism through, for example, social-media bans could not only deter such subversive practices but also foster healthier competition within the Republican Party.

B. *America at the Height of Polarization*

The United States is at the height of political polarization—a fact recognized by legal scholars,⁹⁰ as well as both liberal and conservative commentators.⁹¹ In 2019, partisanship dwarfed race, religion, education, age, and gender in predicting Americans’ attitudes and normative values across a large swath of subject matters.⁹² Our ideological preferences are so distributed toward the two ends of the spectrum that politics has become totalizing: Our political identity is now constitutive of our “psychological self-expression” and reliably tracks our socioeconomic background, cultural inclinations, and even consumption habits like whether we shop at Whole Foods or eat at Cracker Barrel.⁹³ Alarming, division previously based on discrete

⁸⁷ See Defendants Whitmer and Benson’s Motion for Sanctions Under 28 U.S.C. § 1927 at 3, *King v. Whitmer*, No. 2:20-CV-13134-LVP-RSW (E.D. Mich. Jan. 28, 2021).

⁸⁸ See *supra* Section I.B (explaining how ostracism serves the function of preserving democratic functions).

⁸⁹ See David A. Graham, *Republicans Back Trump Because of the Insurrection, Not Despite It*, ATLANTIC (Feb. 17, 2021), <https://www.theatlantic.com/ideas/archive/2021/02/republicans-support-trump-because-not-despite-insurrection/618034>.

⁹⁰ See, e.g., Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 157–58 (2017) (“We have also experienced severe political polarization.”); David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1, 4 (2019) (finding that “constitutional discourse has grown increasingly polarized over the past four decades”).

⁹¹ See, e.g., EZRA KLEIN, *WHY WE’RE POLARIZED* (2020) (offering a general discussion of polarization in the United States); MICHAEL LIND, *THE NEW CLASS WAR: SAVING DEMOCRACY FROM THE MANAGERIAL ELITE* (2020) (recognizing the polarized political environment).

⁹² *In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions: Partisanship Remains Biggest Factor in Public’s Political Values*, PEW RES. CTR. (Dec. 17, 2019), <https://www.pewresearch.org/politics/2019/12/17/in-a-politically-polarized-era-sharp-divides-in-both-partisan-coalitions> (showing large partisan gaps on questions of gun policy, racial attitudes, climate and environment, social safety net, and immigration).

⁹³ KLEIN, *supra* note 91, at 48, 70; see Michael Hendrix, *Why 2016 Came Down to Whole*

issues has evolved into broad affective polarization, characterized by distrust and animosity between affiliates of opposing political parties.⁹⁴ Scholars disagree over the ultimate cause of the increasingly polarized nature of our polity: group psychology,⁹⁵ a power gap left by elite inattention,⁹⁶ and economic inequality⁹⁷ are all candidates to blame. But what appears clear to all is the high level of polarization and the need for a remedy.

The ills of polarization are numerous. It divides the citizenry into opposing and unyielding camps, which then diminishes national unity by making members of the public “regard their fellow citizens as implacable enemies rather than members of a common enterprise.”⁹⁸ It leads to distrust of public officials. Especially in an age of misinformation and fake news,⁹⁹ voters of one ideological preference will not believe the words of officials who advocate differing policy outcomes, even in the face of overwhelming evidence to the contrary—the protestors who chanted, “stop the steal,” are but one example.¹⁰⁰ This effect then produces a vicious circle in which popular distrust of government authorities breeds even greater polarization. Lastly, a highly polarized polity is prone to democracy decay¹⁰¹ and “constitutional rot,” a “degradation of constitutional norms” that takes place during a prolonged period and features overreaching politicians who disregard the rules of fair political competition.¹⁰²

As this Article has already discussed,¹⁰³ unhealthy, heightened

Foods vs. Cracker Barrel, MEDIUM (Nov. 10, 2016), https://medium.com/@michael_hendrix/why-2016-came-down-to-whole-foods-vs-cracker-barrel-4361cb9b1e5f (noting that Trump won more than three-quarters of counties with a Cracker Barrel and only twenty-two percent of those with a Whole Foods).

⁹⁴ See generally Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129 (2019) (analyzing the rise of affective polarization in the United States).

⁹⁵ See KLEIN, *supra* note 91, at 1–79 (discussing the psychological tendency to classify people into groups and to favor those who belong to one’s own group, even if grouping makes no sense, which carries into the political sphere as the instinct to perceive those with different ideological commitments as enemies).

⁹⁶ See LIND, *supra* note 91, at 47–66 (characterizing current polarization as a result of the breakdown of the New-Deal establishments empowering the working class and the concomitant rise of an overclass of educated managers unresponsive to popular demands).

⁹⁷ See Balkin, *supra* note 90, at 152 (“Rising economic inequality can increase polarization.”).

⁹⁸ *Id.*

⁹⁹ See Dominic Spohr, *Fake News and Ideological Polarization: Filter Bubbles and Selective Exposure on Social Media*, 34 BUS. INFO. REV. 150, 152 (2017) (arguing that algorithms that curate online experiences are the source for polarization on social-media platforms).

¹⁰⁰ See *supra* note 74 and accompanying text.

¹⁰¹ See, e.g., *id.* (arguing that ideological polarization has a “measurable, negative impact” on democratic society, by discouraging pluralism in public discussions); Murat Somer & Jennifer McCoy, *Déjà vu? Polarization and Endangered Democracies in the 21st Century*, 62 AM. BEHAV. SCIENTIST 3, 3 (2018) (contending that, except in limited circumstances, polarization “has pernicious consequences for democracy”).

¹⁰² Balkin, *supra* note 90, at 151.

¹⁰³ See *supra* Section I.B.2

polarization can form the normative basis to ostracize. In the case of contemporary United States, the political banishment of former President Trump may be especially appropriate. Although the Democratic Party has certainly played its own role in polarization by veering increasingly to the left, the Republican Party's turn to the right has been, in comparison, much more substantial.¹⁰⁴ Ostracizing Trump, through a combination of restricting the dissemination of his political message and disqualification from future office, could put a decisive end to his polarizing politics.

C. *Inequality and Catharsis*

While the previous Sections have outlined the two strongest reasons for removing former President Trump from the public eye, ostracism could also serve two subsidiary symbolic and cathartic functions. First, the past few decades of economic growth and distributive policies have generated a level of inequality in our country that is unprecedented for almost a century: Recent estimates by economists, for example, show that the top one percent has as much net worth as the bottom ninety percent of the population.¹⁰⁵ This extraordinary concentration of wealth has translated into the elite's lack of responsiveness to popular demands.¹⁰⁶ Immense differences in material power, in other words, have created "enormous inequalities in political influence," with the result that the United States often functions more as an oligarchy than a democracy.¹⁰⁷ Ostracism of Trump—a former President who has attempted to subvert democratic institutions, effectuate polarizing policies, and overturn constitutional norms¹⁰⁸—could symbolize the democratic

¹⁰⁴ See, e.g., Theda Skocpol, *The Elite and Popular Roots of Contemporary Republican Extremism*, in UPENDING AMERICAN POLITICS: POLARIZING PARTIES, IDEOLOGICAL ELITES, AND CITIZEN ACTIVISTS FROM THE TEA PARTY TO THE ANTI-TRUMP RESISTANCE 3 (Theda Skocpol & Caroline Tervo eds., 2020).

¹⁰⁵ Matthew Smith, Owen Zidar & Eric Zwick, Top Wealth in the United States: New Estimates and Implications for Taxing the Rich 1 (July 19, 2019) (unpublished manuscript), <http://ericzwick.com/wealth/wealth.pdf> ("[W]ealth is very concentrated: the top 1% holds as much wealth as the bottom 90%."). Economic inequality manifests in the distribution of both income and wealth. See Thomas Piketty, Emmanuel Saez & Gabriel Zucman, *Distributional National Accounts: Methods and Estimates for the United States*, 133 Q.J. ECON. 553, 557 (2018) (showing that while the pretax income of the bottom half of adults stagnated from 1980 to 2014, that of the top one percent more than tripled, and arguing that government redistribution offset only a small fraction of pretax inequality); Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519 (2016) (showing that the top 0.1%'s share of national wealth increased from seven percent in 1978 to twenty-two percent in 2012—the highest level in over seventy years); see also Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421, 1423–24 (2018).

¹⁰⁶ See Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 569–73 (2021) (surveying politicians' lack of responsiveness to the policy preferences of low-income populations).

¹⁰⁷ JEFFREY A. WINTERS, OLIGARCHY 214 (2011).

¹⁰⁸ See *supra* Section II.A.

foundations of the American political system. Non-elites, that is, could definitively decide the outcomes of elite competition.

The political banishment of Trump would also generate cathartic benefits. The past few years of exhausting politics, exacerbated by a fatal pandemic and police brutality, have produced powerful discontent among the public.¹⁰⁹ Now more than ever, Americans need a catharsis of our pent-up, smoldering political emotions. Ostracizing the former President, by removing him from the public forum and uprooting his subversive practices from our polity, provides precisely this clean slate and facilitates the restoration of more ordinary political discourse.

* * *

From a more theoretical perspective, all three justifications for banishing former President Trump reflect a shift (albeit reversible) in American democratic politics from agonistic contests between legitimate adversaries to antagonistic struggles between friends and enemies.¹¹⁰ Former President Trump's efforts to bypass the democratic process by undermining public confidence in the 2020 Election reveal an erosion of the fundamental agreement to norms and principles that have thus far grounded and enabled peaceful democratic contest in the United States.¹¹¹ Polarization demarcates one ideological camp from another—a distinction that can eventually rise to the degree of dissociation and enmity envisioned by Schmitt. Misinformation chips away at the legitimacy of public officials and governance structures as perceived by ordinary citizens. Ostracism is an effective mechanism precisely during this erosion of traditional agonistic politics: it exiles the threat as the polity works to restore democratic norms and principles that will again enable agonistic contests.

III.

CONTEMPORARY PRACTICES OF OSTRACISM

The previous two Parts have primarily addressed the normative purposes and the theoretical foundations of ostracism in the ancient Greek and

¹⁰⁹ See JOHN L. CAMPBELL, *AMERICAN DISCONTENT: THE RISE OF DONALD TRUMP AND DECLINE OF THE GOLDEN AGE 2* (2018) (explaining the sources of public discontent through four lenses: stagflation (the combination of stagnation and inflation), the attribution of societal ills to minorities and immigration, increased conservatism, and political polarization).

¹¹⁰ See *supra* notes 66–71 and accompanying text (discussing the distinction between an agonistic and an antagonistic model of politics).

¹¹¹ See also William Baude, *The Real Enemies of Democracy*, 109 CALIF. L. REV. (forthcoming 2021) (manuscript at 119–20, 122) (identifying the “real enemies of democracy, at a more fundamental level [as] those who try to ignore the rules of the game after they have already lost it . . . [, former] President Donald Trump and those who fought for him”).

the modern American contexts. They have argued that threats to the democratic process and institutions, polarization, and discursive/cathartic benefits all justify efforts to banish certain prominent politicians from the political community. This Part turns to the nuts and bolts of the modern *practices* of ostracism, which differ from their classical Greek counterparts in two main ways: delegation of decisionmaking to elected representatives and the outsized role played by corporations in exiling politicians from public platforms. In assessing these unique features, this Part makes suggestions for piecemeal as well as more wholesale reform to democratize contemporary practices of political banishment.

A. The Political Processes of Banishment and More Radical Reforms

As discussed in Part I, the original Greek procedure of ostracism involved an exercise of *direct democracy*, in which the entire electorate assembled to decide whether and whom to exile from political participation.¹¹² This mechanism has the virtue of empowering the masses to overthrow the governing elite when the latter becomes excessively detached from the popular will and threatens the popular sovereignty that forms the basis of democracy. In contrast, the modern American process of political banishment does not constitute direct democracy but an authority delegated by the broader electorate to its representatives in Congress. This Section first surveys the two political mechanisms of ostracism in the current constitutional landscape before offering a critical assessment of ostracism by delegation. It then outlines possible reforms and discusses the conceptual foundations for delegation as opposed to direct democracy, arguing that in the specific context of ostracism, the traditional considerations that militate against direct democracy fade in strength and relevance.

Congress currently can disqualify an individual from future office-holding in two ways. First, there is the familiar route of impeachment and conviction, requiring a simple-majority vote from the House to impeach and a two-third supermajority vote from the Senate to convict of “Treason, Bribery, or other high Crimes and Misdemeanors.”¹¹³ In general, Congress serves as the final arbiter of any decision related to impeachment, as the Constitution assigns no role to the Executive, and the federal judiciary has held that disputes about impeachment procedure constitute a nonjusticiable political question, given both prudential factors and the status of impeachment as the

¹¹² See *supra* Part I.

¹¹³ See also *supra* note 11 (citing relevant constitutional provisions for impeachment and conviction). For a classic discussion on the impeachment procedure and practice, see CHARLES L. BLACK, JR. & PHILIP BOBBITT, *IMPEACHMENT: A HANDBOOK* (2018).

only constitutional check against the Article III branch.¹¹⁴ But despite the absence of external constraints, Senate conviction in particular represents a challenging path to disqualification from future office: Out of the twenty-one formal impeachments (including Trump's) initiated by the House, the Senate has only convicted eight and disqualified three from future office.¹¹⁵

Second, many legal scholars have pointed out that section 3 of the Fourteenth Amendment offers an alternative avenue for disqualification.¹¹⁶ The Constitution states:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.¹¹⁷

Barring a supermajority exemption from Congress, then, any official occupying a triggering office (member of Congress, officer of the United States, member of state legislatures, or officers of any state), having previously sworn an oath to defend the Constitution, and who then engages in a covered activity (insurrection, rebellion, and giving aid or comfort to enemies), will be prohibited from holding an enumerated office in the future.¹¹⁸

¹¹⁴ See *Nixon v. United States*, 506 U.S. 224, 235 (1993) (noting that impeachment serves as the sole check on the judiciary, so giving the courts any involvement in impeachment proceedings would destroy this necessary check on the judiciary's power).

¹¹⁵ *List of Individuals Impeached by the House of Representatives*, U.S. HOUSE OF REPRESENTATIVES (2021), <https://history.house.gov/Institution/Impeachment/Impeachment-List/> (listing West H. Humphreys, Robert W. Archbald, and G. Thomas Porteous—all federal judges at the time of impeachment—as the only officials convicted and disqualified from future office by the Senate). The Senate does not disqualify all convicted officials from future office-holding; Alcee Hastings, who was impeached and removed from a federal district-court position and subsequently had a long career as a representative in the House, serves as a recent example. See Harrison Smith, *Rep. Alcee Hastings, Civil Rights Lawyer and Judge Elected to 15 Terms in Congress, Dies at 84*, WASH. POST (Apr. 6, 2021), https://www.washingtonpost.com/local/obituaries/alcee-hastings-dead/2021/04/06/1bbd3e38-18da-11e9-8813-cb9dec761e73_story.html.

¹¹⁶ See Gerard Magliocca, *The 14th Amendment's Disqualification Provision and the Events of Jan. 6*, LAWFARE (Jan. 19, 2021), <https://www.lawfareblog.com/14th-amendments-disqualification-provision-and-events-jan-6> (detailing that Section 3 may exclude Trump and others from serving in Congress); James Wagstaffe, *Time to Reconsider the 14th Amendment for Trump's Role in the Insurrection*, JUST SEC. (Feb. 11, 2021), <https://www.justsecurity.org/74657/time-to-reconsider-the-14th-amendment-for-trumps-role-in-the-insurrection/>; *supra* note 19 and accompanying text (contrasting the lack of procedural barriers that face a section 3 claim with those that must be surpassed in an impeachment battle).

¹¹⁷ U.S. CONST. amend. XIV, § 3.

¹¹⁸ See Hemel, *supra* note 19 (outlining the constitutional requirements of disqualification under section 3 of the Fourteenth Amendment).

Scholars have also debated what body holds adjudicatory authority over these issues. Some have proposed a joint resolution by both houses of Congress that the politician in question (e.g., Trump) has engaged in an act of insurrection by encouraging the attack on the Capitol—the joint resolution would then provide at least persuasive authority in future proceedings.¹¹⁹ Some have suggested that section 3 disputes may arise in the context of party primaries should politicians involved with the Capitol storming decide to run for office in 2024—state election boards, and ultimately the Supreme Court, may be tasked with deciding the scope of covered conduct under the Fourteenth Amendment.¹²⁰ Others have counseled instead legislation passed by Congress and signed into law by President Biden (thus satisfying bicameralism and presentment). This last option may cohere with the vision of congressional responsibility for enforcement of the Fourteenth Amendment—codified as a matter of constitutional judgment in section 5¹²¹—but by naming particular individuals, may collide with the Constitution’s prohibition of bills of attainder.¹²²

Regardless of the form in which disqualification from future office takes, and however the section 3 debate is resolved, Congress will exercise primary decisionmaking power over any process of political banishment. That is, any ostracism instituted by political actors in the landscape of modern constitutional law will not be an exercise of direct democracy but of delegated powers: Instead of naming politicians on ballots to exile, ordinary citizens would have to rely on their representatives as faithful agents and instruments of expressing their political anger. In the case of impeachment, the constitutional role assigned to the states in the composition of the national government means that federalism will impact the nature and the outcome of any political efforts to ostracize.¹²³ Senatorial acquittal requires far less

¹¹⁹ Ackerman & Magliocca, *supra* note 19 (detailing how determining that Trump engaged in an insurrection in violation of section 3 “could be accomplished by a simple majority vote of both houses” versus a two-thirds majority required for impeachment).

¹²⁰ See Hemel, *supra* note 19 (concluding that there will likely be litigation over whether federal elected officials can run in 2024 due to section 3 challenges, and describing the myriad of different federal court decisions that will need to be consolidated before the Supreme Court); Mark Graber, *Section Three to the Rescue*, CONSTITUTIONALIST (Jan. 11, 2021), <https://theconstitutionalist.org/2021/01/11/section-three-to-the-rescue-by-mark-graber> (detailing how section 3 offers a more “politically feasible” route to barring Trump from public office because there is no immediacy required, unlike impeachment, nor would newly elected officials have to convince former Vice President Pence that Trump is unfit).

¹²¹ U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

¹²² U.S. CONST. art. I, § 9, cl. 2.; see also CONG. RSCH. SERV., LSB10567, CAPITOL UNREST, LEGISLATIVE RESPONSE, AND THE BILL OF ATTAINDER CLAUSE (2021), <https://crsreports.congress.gov/product/pdf/LSB/LSB10567>.

¹²³ For a classic statement of this broader aspect of federalism, see Herbert Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

support than a majority of the electorate: In Trump's first impeachment trial, for example, Senators who voted to convict represent about eighteen million more Americans than those who voted to acquit, despite the final judgment of acquittal.¹²⁴ In the case of implementing Fourteenth Amendment's section 3 bar on future office-holding, even a simple majority in the Senate requires only a representation of eighteen percent of the country.¹²⁵ These institutional and constitutional features weaken the direct-democracy functions of ostracism, which no longer empowers non-elite populations to adjudicate decisively elite competition for power. The cathartic and discursive benefits of ostracism may also diminish as citizens have relatively little participation or process-related (though retain their outcome-generated) opportunities for cleansing their political emotions.

While the (admittedly diminished) benefits of ostracism, in the form of disqualification from future office, still outweigh the costs, reforms may make the political process a more effective democratic mechanism of banishment. In particular, the Senate's role in both the impeachment and the section 3 proceedings may be reconsidered. Such a re-imagining of the Senate's function is not a wild dream: In the case of judicial impeachments, for example, previous legislative action has made Congress fundamentally rethink the senatorial role for the removal of Article III judges.¹²⁶ In 1941, the House passed a bill that would, in essence, transfer the power of convicting lower-court judges, after an initiation of formal impeachment by the House, from the Senate to a special court convened by the Chief Justice.¹²⁷ Judgments reached by this special court would then appeal to the Supreme Court.¹²⁸ This proposal—which apparently enjoyed wide-spread support from the American Bar Association¹²⁹—to empower the Supreme Court (to which the lower federal courts are ultimately accountable for their decisions) with respect to judicial removals elicits an analogy for ostracism of a (former) President. Since the President is unique in her accountability to a

¹²⁴ Christina Zhao, *Senators Who Voted to Convict Trump Represent 18 Million More Americans Than Those Who Voted to Acquit*, NEWSWEEK (Feb. 5, 2020), <https://www.newsweek.com/senators-who-voted-convict-trump-represent-18-million-more-americans-those-who-voted-acquit-1485972>.

¹²⁵ See J.J. McCullough, *Why States Still Matter*, NAT'L REV. (Sept. 11, 2018), <https://www.nationalreview.com/2018/09/states-key-to-senate-legitimacy> (noting that control over the Senate requires support from only 18% of the United States population); see also Jonathan Gould & David Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. (forthcoming 2022) (manuscript at 4), https://papers.ssrn.com/abstract_id=3797051 (discussing structural biases against the Democratic Party in structural constitutional provisions).

¹²⁶ For a general overview and evaluation of these proposals, see, for example, MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 162–66 (3d ed. 2019).

¹²⁷ H.R. 146, 77th Cong. (1941).

¹²⁸ *Id.*

¹²⁹ GERHARDT, *supra* note 126, at 164.

national constituency—a fact repeatedly emphasized by both the Supreme Court and scholarly commentators—there is reason to think that decisions of ostracism (including disqualification from future office) should rest with the national electorate that put the President into office in the first place. A process instantiating this background rationale might still empower the House to initiate impeachment (or reach a judgment under section 3 of the Fourteenth Amendment), but then make senatorial conviction either fully dependent on or highly deferential to the results of a national referendum that meets a sufficiently high level of voter participation. This would parallel, for the most part, the ancient Greek process of ostracism (initiated by the legislative assembly and then put to a vote of all eligible citizens).¹³⁰ Such a procedure would have the advantage of more effectively channeling the contestatory, empowering, and cathartic functions of ostracism, without sacrificing the requirement of institutional mobilization.

Skeptics might raise objections of constitutionality: The Constitution sets up a republic that might be thought repugnant to any exercise of direct democracy, of which the Founders harbored serious distrust as they constructed a constitutional scheme of separation of powers. The *locus classicus* for the argument that the ancient Greek version of direct democracy is incompatible with republican governance can be found in *The Federalist*, in which James Madison distinguishes “pure democracy,”¹³¹ “a society consisting of a small number of citizens, who assemble and administer the government in person,”¹³² from a republic, characterized by the “delegation of the government . . . to a small number of citizens elected by the rest.”¹³³ In a subsequent discussion about the structure of the Senate, Madison makes the comparison to ancient Greek democracy explicit, observing that “the true distinction between [ancient political institutions] and the American governments lies in the total exclusion of the people in their collective capacity from any share in the latter, and not in the total exclusion of the representatives of the people, from the administration of the former.”¹³⁴ That is, a hallmark of American constitutionalism consists in the complete exclusion of the people themselves (acting in a collective democratic rather than represented capacity) from governance, as well as the complete delegation of governmental powers to elected representatives. More fundamentally, the Founders criticized democratic rule for its tendency to “yield to the impulse of sudden and violent passions,”¹³⁵ to sacrifice legislative expertise for excessive fidelity to popular desires, and to privilege immediately desirable policies above

¹³⁰ See *supra* notes 27–28 and accompanying text.

¹³¹ THE FEDERALIST NO. 10, at 51 (James Madison) (J.R. Pole ed., 2005).

¹³² *Id.*

¹³³ *Id.* at 52.

¹³⁴ THE FEDERALIST NO. 63, at 341 (James Madison) (J.R. Pole ed., 2005).

¹³⁵ THE FEDERALIST NO. 62, at 334 (James Madison) (J.R. Pole ed., 2005).

longstanding norms that advance welfare in their “gradual and unobserved operation.”¹³⁶ Delegating senatorial power or granting deference to a national referendum, one might then argue, would collide with the Constitution’s guarantee of republican, rather than radically democratic, government.

But whatever merits the Founding-era arguments may have had, their import diminishes in the context of ostracism, whose unique processes and functions distinguish it from the practice of direct democracy in *lawmaking*—the principal target of the *Federalist*’s criticism. Deferring to a national referendum in disqualifying a President from future office-holding is more akin to election than legislation. Since few challenge the legitimacy of voting for a candidate for public office, the criticism that members of a political community lack legislative expertise is applicable only insofar as the electorate will have *less* knowledge in exercising a choice to banish than in an ordinary election—a groundless assumption. Indeed, critics often make the mistake of comparing direct democracy to “an idealized construct of the legislative process” that ignores the problems of deadlock and interest-group capture inherent in representative democracy.¹³⁷ In contemporary debate, scholars who have criticized direct democracy frequently ground their assessments in the defectiveness of the ballot initiative process in drafting statutory language (e.g., without the benefit of being shepherded through committees with subject-matter expertise)¹³⁸ or generating norms that harm minorities and marginalized populations in areas such as affirmative action.¹³⁹ These concerns are inapposite to ostracism, which aims to disqualify individuals from political participation instead of devising regulatory regimes or carrying the potential to inflict group-based stigma. To the extent that the House initiates any process for disqualification, deferring to the national democratic will at the senatorial stage represents “complementary direct democracy,” which requires the people and certain elected

¹³⁶ THE FEDERALIST NO. 63, *supra* note 134, at 338.

¹³⁷ Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1350 (1985) (reviewing DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984)).

¹³⁸ See Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 297–99 (detailing the many levels of committee, bicameral, or executive review that is available when elected officials legislate, compared to direct democracy); Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFFALO L. REV. 903, 908–09 (2006) (explaining that direct vote legislation is poorly drafted, sometimes benignly, and sometimes subversively).

¹³⁹ See Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 529–30 (1994) (noting that the protection provided by a republican democracy for powerless groups “is absent when the representative legislative scheme is bypassed by direct democracy”); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1551 (1990) (“Initiatives declared English the official language in Arizona, Colorado, and Florida. Voters in Arkansas, Colorado, and Michigan banned funding for poor women seeking abortions. California voters authorized involuntary AIDS testing for sex crime suspects and for assailants of police and emergency workers.”).

representatives to “act in concert,” rather than “substitutive direct democracy,” which bypasses entirely the legislative process.¹⁴⁰ The constitutional and prudential arguments against direct democracy, therefore, apply with far less force to decisions of political banishment.

In any event, senatorial deference to the popular will in disqualifying a politician from future office likely constitutes a political question beyond the reach of the judiciary. In the leading case, *Nixon v. United States*, the Supreme Court found, at least with respect to impeachment, a textually demonstrable commitment of the conviction process to the Senate, including delegation of evidentiary hearings to an internal committee.¹⁴¹ In the case of the Fourteenth Amendment, section 5’s explicit authorization of congressional legislation for enforcement may justify a similar reading of senatorial exclusivity (in delegating its powers or deferring to the judgment of another entity) and nonjusticiability. To be sure, such a reform proposal will face immense political headwind, but the project of this Article is primarily intellectual rather than political.

B. *Corporations and Exile from the Public Forum*¹⁴²

Another distinguishing feature of contemporary practices of ostracism consists in the significant power wielded by corporate actors in banishing democracy-threatening politicians from various public fora of deliberation and debate. As already discussed, prominent social-media platforms and technological firms suspended Trump’s accounts or removed incendiary content within days of the Capitol storming.¹⁴³ Much of the decisionmaking has not been transparent, and importantly, none of the corporate actors suggests that their decisions reflect democratic judgment or their perception of

¹⁴⁰ Eule, *supra* note 139, at 1510, 1512.

¹⁴¹ *Nixon v. United States*, 506 U.S. 224, 230 (1993). Disputes under the Guarantee Clause itself, U.S. CONST. art. IV, § 4, are also nonjusticiable political questions. The petitioner in *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), challenged precisely a voter measure on corporate revenue tax on the grounds that an exercise of direct democracy violated the Constitution’s guarantee of a republican form of government—the Supreme Court declined to adjudicate this question. *Id.* at 133, 135–36.

¹⁴² One caveat: I do not use the term “public forum” in its specialized sense under the First Amendment’s framework for analyzing government restrictions on speech but rather use it to refer to any channel or means—whether a physical place like the Athenian *agora* or a virtual platform like Twitter—by which the public ordinarily engages in political discourse. Note, however, that some courts have held, in connection to former President Trump’s attempts to block users from his private Twitter account, that Twitter accounts “intentionally opened for public discussion . . . , repeatedly used [] as an official vehicle for governance, [with] its interactive features accessible to the public without limitation” are indeed public fora for purposes of the First Amendment. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), *certiorari granted, judgment vacated as moot, and remanded sub nom. Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

¹⁴³ Thompson, *supra* note 16.

popular desires. Twitter's public announcement of permanent suspension of Trump's account reveals little detail about the process or the identity of the decisionmakers, offering only its determination that Trump's tweets "were highly likely to encourage and inspire people to replicate the criminal acts" associated with the Capitol storming and consequently violated the Glorification of Violence policy.¹⁴⁴ Similarly, Reddit justified its ban on the subreddit, r/donaldtrump, on the basis of its "site-wide policies prohibit[ing] content that promotes hate, or encourages, glorifies, incites, or calls for violence against groups of people or individuals."¹⁴⁵

Standing in sharp contrast, however, is Facebook's approach to adjudicating what content and voices it would banish from its online community: On January 21, Facebook referred its temporary ban on Trump's account to the Oversight Board, an institution empowered to make binding rulings on content removal.¹⁴⁶ Commentators have already weighed in on this widely-watched decision whether to reinstate Trump's account: Some have contended, precisely as Part II argues, that restoring Trump's account would invite "violence, hate, and disinformation that will cost lives and undermine democracy";¹⁴⁷ others, however, have predicted that the Oversight Board's prior rulings make a determination to reinstate Trump's account likely.¹⁴⁸ This much-anticipated ruling by the Oversight Board ended up presenting a clear victory to neither side: It upheld Facebook's decision to restrict Trump's access to the platform, on the basis of the "clear immediate risk of harm to life, electoral integrity, and political participation" presented by the storming of the Capitol on January 6.¹⁴⁹ But at the same time, the Board criticized the indefinite duration of the suspension as a potentially disproportionate and "standardless penalty," asking Facebook to re-examine its decision and impose an appropriate penalty (including future restoration of

¹⁴⁴ *Permanent Suspension of @realDonaldTrump*, *supra* note 7.

¹⁴⁵ Mike Isaac & Kate Conger, *Reddit Bans Forum Dedicated to Supporting Trump, and Twitter Permanently Suspends His Allies Who Spread Conspiracy Theories*, N.Y. TIMES (Jan. 27, 2021), <https://www.nytimes.com/2021/01/08/us/politics/reddit-bans-forum-dedicated-to-supporting-trump-and-twitter-permanently-suspends-his-allies-who-spread-conspiracy-theories.html>.

¹⁴⁶ Rebecca Klar, *Facebook Oversight Board to Rule on Trump Ban in 'Coming Weeks'*, HILL (Apr. 16, 2021), <https://thehill.com/policy/technology/548641-facebook-oversight-board-delays-decision-on-trump-ban>.

¹⁴⁷ Real Facebook Oversight Board, *Public Comment Number PC-07787*, in PUBLIC COMMENTS APPENDIX FOR OVERSIGHT BOARD CASE 2021-001-FB-FBR, <https://www.oversightboard.com/sr/decision/2021/001/public-comments>.

¹⁴⁸ See Paul Barrett, *Facebook's New Board Has Incentives to Bring Back Donald Trump*, BLOOMBERG (Mar. 23, 2021), <https://www.bloomberg.com/news/articles/2021-03-23/trump-s-facebook-ban-will-likely-be-overturned-by-new-oversight-board> (arguing that the Board has "tended to frame the factual context of the disputed posts in a narrow way, an approach that can minimize the potential harm the speech in question could cause," and explaining how in this case the Board has narrowed its analysis to just two posts).

¹⁴⁹ *Case Decision 2021-001-FB-FBR*, OVERSIGHT BD. 31 (May 5, 2021), <https://www.oversightboard.com/sr/decision/2021/001/pdf-english>.

Trump's account) within six months of the opinion.¹⁵⁰ In response, Facebook decided to suspend Trump for at least two years and to reinstate his account only if the serious risk to public safety recedes.¹⁵¹

The remainder of this Section proceeds as follows. It first provides an overview of the Oversight Board's structure and process before discussing ostracism's conceptual implications for this type of adjudication. It then argues that an important element is missing from both the structure of the Board and the underlying logic of its decisions: a due sensitivity to democratic legitimacy.

Facebook's Oversight Board represents the institutional culmination of years of debate about content moderation, which has progressed from murky internal rules to a systematic, codified set of Community Standards.¹⁵² By 2018, public outcry over its interference with the 2016 election (in connection with Cambridge Analytica, a data consulting firm that provided assistance to Trump's campaign) exerted sufficient pressure on the company that Mark Zuckerberg proposed an independent, Supreme-Court-like structure to decide matters of permissible speech.¹⁵³ A constitution-like written charter for the Oversight Board emerged in 2019,¹⁵⁴ and the Board started issuing rulings in 2021.¹⁵⁵

Precisely as Zuckerberg envisioned, the institutional structure of the Oversight Board resembles a court: The Board consists of at least eleven members and would grow to around forty members when fully staffed, appointed at first by Facebook and then selected by a committee convened by the Board based on the candidates' qualifications.¹⁵⁶ Currently, the Board's membership boasts prominent academics, former politicians, and nonprofit leaders of different ideological commitments.¹⁵⁷ Like judicial review of administrative determinations, an original poster of prohibited content can

¹⁵⁰ *Id.* at 1.

¹⁵¹ Nick Clegg, *In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit*, FACEBOOK (June 4, 2021), <https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump>.

¹⁵² Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2427–48 (2020) (describing the development of both procedures used to police content, and the people responsible for creating the guidelines for violations of Community Standards).

¹⁵³ See Ezra Klein, *Mark Zuckerberg on Facebook's Hardest Year, and What Comes Next*, VOX (Apr. 2, 2018), <https://www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge>.

¹⁵⁴ *Oversight Board Charter*, FACEBOOK (Sept. 2019), https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf.

¹⁵⁵ See *Board Decisions*, OVERSIGHT BD. (2021), <https://oversightboard.com/decision> (showing board rulings issued beginning in 2021).

¹⁵⁶ *Oversight Board Charter*, *supra* note 154, art. 1, §§ 1, 8.

¹⁵⁷ *Board Membership*, OVERSIGHT BD. (2021), <https://oversightboard.com/meet-the-board>.

petition the Board for review of Facebook's decision by satisfying the requirement of finality and "hav[ing] exhausted [otherwise available] appeals."¹⁵⁸ Like the Supreme Court, the Board exercises discretion over which cases it hears.¹⁵⁹ In contrast, the adjudication procedure resembles more the operation of the federal courts of appeals: A panel of members will review each case, with the composition kept anonymous to ensure independent judgment, and a majority of the Board may initiate—somewhat similar to en banc reviews—a "re-review" of panel judgment by a different panel.¹⁶⁰ The Board's determination on content is final and binding on Facebook, which will promptly implement the decision unless contrary to law, while the Board's policy guidance will only supply persuasive authority.¹⁶¹ In the case of bans on politicians, Facebook generally refers the final decision to the Oversight Board.¹⁶²

The normative values underlying the Oversight Board reflect its court-like structure and its quasi-adjudicative function. Not unlike constitutional guarantees to a politically insulated judiciary,¹⁶³ Facebook conspicuously promotes the independence of the Board, contending that its "independent judgment is critical to its function," emphasizing that members are "chosen for the diversity of their expertise and the quality of their judgment," and funding the administration of the Board from "an independent trust."¹⁶⁴ Scholarly literature analyzing the Oversight Board similarly focuses on judicial values of due process, fundamental rights, and independence.¹⁶⁵

Ostracism's implication here is that we must conceptualize the Facebook Oversight Board's structure and function as manifesting not only judicial values of independence and impartiality but also political values of democratic legitimacy and popular responsiveness. While the former may more accurately ground adjudications of permissible speech, whether to ban high-profile politicians such as former President Trump involves more than balancing the interests of community norms against values of the freedom of expression: it should be underpinned by a *democratic* judgment on the

¹⁵⁸ *Oversight Board Charter*, *supra* note 154, art. 2, § 1.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* art. 3, §§ 2, 7.

¹⁶¹ *Id.* art. 4 ("When a decision includes policy guidance or a policy advisory opinion, Facebook will take further action by analyzing the operational procedures required to implement the guidance, considering it in the formal policy development process of Facebook, and transparently communicating about actions taken as a result.").

¹⁶² Klar, *supra* note 146 (noting that normally the decision is turned around in 90 days, but that the Oversight Board had extended the deadline for public comments after receiving over 9,000).

¹⁶³ U.S. CONST. art. III, § 1 (noting that judges will retain their positions as long as they display "good Behaviour" and will not be penalized by reduced pay).

¹⁶⁴ *Oversight Board*, OVERSIGHT BD. (2021), <https://oversightboard.com>.

¹⁶⁵ See Klonick, *supra* note 152, at 2474–87 (assessing the Oversight Board's procedural safeguards).

politician's threat to the institutions of our political community. To be sure, the decisionmaking of the Oversight Board ought to be independent, but independent of corporate pressures originating from Facebook rather than independent of the democratic will of the country. Only in light of this framing can the Oversight Board (and future entities) serve the direct-democratic functions of ostracism.

The potential democratic deficit of the Oversight Board (and similar adjudication of public figures' access to social media platforms, which have increasingly become sites of political and ideological contest¹⁶⁶) is, in fact, evident precisely in its dissimilarity with the judiciary. Despite the rhetoric about the Oversight Board's independence and court-like structure, it conspicuously lacks the kind of judicial infrastructure that helps federal courts obviate the criticism stemming from democratic accountability. In the past two centuries, the Article III branch has developed a vast (even if often cryptic) doctrine—concerning political questions and nonjusticiability—ensuring judicial discipline where, in the famous words of Professor Bickel, an issue's "intractability to principled resolution," its "sheer momentousness . . . , which tends to unbalance judicial judgment," and "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from" counsel a court's inaction.¹⁶⁷ Needless to say, the Oversight Board has no equivalent of a political-questions doctrine that would enable it to defer to elected representatives or the political branches where such prudential considerations are present.

The Oversight Board's ruling in Facebook's indefinite suspension of Trump's account also reveals a more fundamental issue with contemporary practices of political banishment. Ostracism, as already discussed, is a democracy-protecting device.¹⁶⁸ Although it has the incidental effect of imposing a penalty on the public figure who has been ostracized (after all, exile from one's home state constitutes a sizable punishment, especially in the pre-globalized world of ancient Greece), ostracism is not primarily a *punitive* legal regime. This is evident from the fact that ostracized politicians never lost their Athenian citizenship or forfeited their property,¹⁶⁹ and they could return freely to Athens after the ten-year statutory period, when

¹⁶⁶ See JASON GAINOUS & KEVIN M. WAGNER, *TWEETING TO POWER: THE SOCIAL MEDIA REVOLUTION IN AMERICAN POLITICS* *passim* (2014) (discussing how social media sites have become new political fora).

¹⁶⁷ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 184 (1962).

¹⁶⁸ See *supra* Part I.

¹⁶⁹ See *supra* note 29 and accompanying text. Both monetary fines and disenfranchisement were common types of punishment in Athens. See ADRIAAN LANNI, *LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS* 40 (2006).

political emotions had cooled off. In other words, the point of ostracizing someone was not to punish them for having committed a crime or something inherently wrongful¹⁷⁰—indeed, one of the most famous victims of ostracism, Themistocles, had led Athenians to astounding victories in the Persian War¹⁷¹—but to preserve democratic institutions, regardless of the fault (or lack thereof) of the ostracized.

But in the Oversight Board ruling's analysis, punishment takes center stage. Banning a politician from access to a social-media platform is, in essence, conceptualized as a personal "penalty" imposed on an individual as a response to his violation of Facebook's community standards and set of rules applicable to platform use.¹⁷² The decision against the indefinite duration of Trump's suspension is a move in the right direction, but the Oversight Board grounds its decision in proportionality—a recurring principle in criminal law¹⁷³—commanding Facebook to re-impose a "penalty . . . based on the gravity of the violation and the prospect of future harm."¹⁷⁴ But if banishing contemporary politicians is meant to serve the end of preserving our democratic institutions, the principle of proportionality is less helpful—at least where it is construed to require the punishment be proportional to the offense.¹⁷⁵ Again, particularly in light of the structural democracy deficit of the Oversight Board, future platform adjudication of similar cases will need to take into account the democratic legitimacy of its decisionmaking to further the functions of ostracism.

One final clarification: Incorporating a due sensitivity to democratic legitimacy into platform adjudication does not require that the platforms themselves constitute political communities. Facebook (or for that matter, Twitter, Reddit, or any other platform that facilitates online exchange) is not itself a polity: its users, connected primarily through their individual networks of friendship and interests, are not united by a common vision of governance and the political good or bounded by the rights and responsibilities of citizenship. In other words, deference to majoritarian preferences in the context of platform adjudication does not manifest in polling the users of the platform. Instead, it focuses on the democratic will of the polity to which the banned politician belongs.

¹⁷⁰ Of course, the ostracized could have committed wrongful acts prior to banishment (for example, undermining democratic institutions of the state). The point is rather that ostracism is not designed to punish the wrongdoer, but to restore democratic norms.

¹⁷¹ See *supra* notes 63–64 and accompanying text.

¹⁷² *Case Decision 2021-001-FB-FBR*, *supra* note 149, *passim*.

¹⁷³ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 49 (8th ed. 2018).

¹⁷⁴ *Case Decision 2021-001-FB-FBR*, *supra* note 149, at 33.

¹⁷⁵ The alternative is to interpret the principle to require the period of ostracism be proportional to the degeneration of democracy.

CONCLUSION

This Article defends recent efforts—in the forms of disqualification from future office and bans on social media—to remove former President Trump from the public eye, against accusations that they represent the excess of cancel culture. In fact, in the world's first democracy, Athenian citizens would assemble every year to decide whether to banish a prominent political figure from their community. I have argued that this electoral procedure—ostracism—fulfills three core democratic functions: It rectifies the failures of intra-elite competition while combatting those practices that subvert democratic institutions; it depolarizes a state in which public opinions are scattered at the two extremes of an ideological spectrum; lastly, it furthers contestatory democracy with symbolic and cathartic benefits. From a more theoretical perspective, ostracism—bearing a striking similarity to modern cancel culture—flourishes during an erosion of democratic norms and perceived legitimacy of one's political opponents.

To be sure, ostracism is no panacea to the ills and defects of our political system. Contemporary practices of political banishment represent exercises of delegated powers rather than direct democracy, while entrusting much of the decisionmaking process of ostracism to corporate actors, given the channels and platforms of political discourse in the age of social media. But given the current state of American politics—a former President who has made every attempt to overturn the results of a legitimate election, a highly polarized public, and an exhausted, frustrated citizenry—ostracism may well be the answer.