A Lost Opportunity to Protect Democracy Against Itself: What the Supreme Court Got Wrong in *Trump v. Anderson*

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Introduction

In *Trump v. Anderson*,[1] a divided Supreme Court achieved unusual unanimity in an important case. All nine Justices agreed that state governments could not use Section 3 of the Fourteenth Amendment to disqualify former President Donald Trump from running for the presidency in the 2024 election. Section 3, the Court ruled, is not "self-enforcing."[2] Unfortunately, the Court achieved unanimity by making a grave error. In so doing, they went against the text and original meaning of the Fourteenth Amendment and undermined a potentially vital constitutional safeguard of liberal democracy.

Section 3 states that "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

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[1] 601 U.S. 100 (2024).

[2] *Id.* at 110–17.

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."[3] The plaintiffs in the case argued that Trump had engaged in insurrection by instigating the January 6, 2021, attack on the Capitol in order to stay in power after losing the 2020 presidential election. By focusing exclusively on the self-execution issue, the Court left for another day all the other arguments at stake in the *Trump v. Anderson* case, such as whether the Jan. 6, 2021, attack on the Capitol qualifies as an "insurrection," whether Trump "engaged" in it, whether his actions were protected by the First Amendment, whether Trump received adequate due process, and whether the presidency is an "office . . . under the United States" covered by Section 3. The Justices may hope they can avoid ever having to decide these questions.

In this article, I explain what the Court got wrong. I also consider some of the broader issues raised by the case that the Justices did not address because they disposed of the litigation against Trump on the self-enforcement issue.

Part I provides a brief overview of the history of the Section 3 litigation against Trump. In Part II, I explain why the Court got the issue of self-enforcement badly wrong. In the process, I also address the argument that disqualification required a prior criminal conviction for "insurrection."[4] Part III considers the question of whether the January 6 attack qualifies as an "insurrection," and—more briefly—whether Trump "engaged" in it. The answers to both questions are "yes," though the second is a closer call than the first.

Part IV addresses broader implications of Section 3 for constitutional democracy. There is an obvious tension between respect for democracy and provisions that limit voter choice, as Section 3

[3] U.S. Const. amend. XIV, § 3.

[4] This issue was the subject of an amicus brief I filed in the case. *See* Brief of Amicus Curiae Professor Ilya Somin in Support of Respondent, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719) [hereinafter Somin, Amicus Brief], https://www.supremecourt.gov/DocketPDF/23/23-719/299426/20240131152417959_23-719%20Amicus%20BOM%20Somin%20PDFA.pdf.

necessarily does. Nonetheless, there is good reason for this and some other constitutional constraints that protect the democratic process against itself. The Supreme Court's effective gutting of Section 3 gravely weakens one of those constraints.

Finally, Part V summarizes the implications of the *Trump v. Anderson* decision for the future. The Court's ruling largely guts enforcement of Section 3 against federal officeholders and candidates for federal office. But it leaves open the possibility that Section 3 can still be enforced against state officials and candidates for state offices.

I do not attempt to address every issue raised by the Section 3 case against Trump, instead focusing on the one on which the Supreme Court based its decision, plus a few others that have broad applicability and on which I have points to make that have, I believe, not been sufficiently covered by previous commentaries on the case.

For those reasons I do not address the much-debated issues of whether the President is an "officer of the United States" and therefore barred from future office-holding if he engages in insurrection, and whether the presidency is an "office . . . under the United States" that insurrectionists are forbidden to hold in the future.[5] Similarly, I do not consider the question of whether the

[5] For detailed statements of opposing views on this question, see William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. 605 (2024) (arguing that the President is covered under both provisions); Mark Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers*, U. Md. Legal Studies Rsch. Paper No. 2023-16 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591133 (same); Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 Tex. Rev. L. & Politics 350 (2024) (arguing that the President is not "an officer of the United States"), and Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 Harv. J. L. & Pub. Pol'y 310 (2024) (arguing that the presidency is not an "office. . . under the United States"). I have previously summarized my perspective on the "officer" issue in Ilya Somin, *Why President Trump is an "Officer" who Can be Disqualified From Holding Public Office Under Section 3 of the 14th Amendment*, Reason (Sept. 16, 2024), https://reason.com/volokh/2023/09/16/why-president-trump-is-an-officer-who-can-be-disqualified-from-holding-public-office-under-section-3-of-the-14th-amendment/, and Ilya Somin, *Yes, Trump Is Disqualified from Office*, Bulwark (Nov. 30, 2023), https://www.thebulwark.com/p/trump-disqualified-office-fourteenth-amendment.

Colorado courts gave Trump constitutionally adequate due process; I have previously addressed this latter issue in my amicus brief before the Supreme Court.[6] I also do not go into the argument that Trump's actions qualify as speech protected by the First Amendment.[7]

I. Overview of the Trump Section 3 Litigation

After losing the 2020 presidential election to Joe Biden, then-President Donald Trump refused to concede that he had been defeated, instead falsely claiming that he was a victim of voter fraud. Trump and his political allies filed numerous lawsuits challenging the election results, almost all of which were rejected by the courts or withdrawn by the plaintiffs themselves after it became clear they had no chance of success.[8] Several of the decisions rejecting Trump's election challenges were written by conservative judges who had been appointed by Trump himself.[9]

But Trump refused to concede defeat, even after his legal challenges had failed. Instead, he and various political allies attempted to pressure Vice President Mike Pence into rejecting duly cast electoral votes for Biden, and pressure state officials into falsifying vote totals and substituting fake electors for those duly chosen.[10]

As a result of Trump's continued efforts to overturn the 2020 election result, hundreds of his supporters were inspired to attack

[6] *See* Somin, Amicus Brief, *supra* note 4 at 17–25.

[7] This issue is discussed in detail in the decision of the Colorado Supreme Court ruling that Trump is disqualified under Section 3. *See* Anderson v. Griswold, 543 P.3d 283, 336–42 (Colo. 2023), *rev'd* Trump v. Anderson, 601 U.S. 100 (2024).

[8] For a detailed overview of the litigation following the 2020 election, see John Danforth et al., *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Election* (July 2022), https://lostnotstolen.org/.

[9] *See, e.g.*, *id.* at 57 (citing Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 382 (3d Cir. 2020) (Bibas, J.) (expressing that Trump's claims "ha[d] no merit")).

[10] For an extensive overview of these machinations, see H.R. Rep. No. 117-663, Final Report: Select Committee to Investigate the January 6th Attack on the United States Capitol chs. 2–3 (2022), available at https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf.

the Capitol on January 6, 2021, the date on which Congress met to certify the electoral vote totals. Their attack was defeated by police and military forces, but only after five people were killed and over 140 police officers injured.[11] After the failure of the assault, Trump was ultimately forced to leave office on January 20, 2021, as required by law. He did not attempt further resistance to the transition of power.

The idea that the January 6 attack qualifies as an "insurrection" requiring Trump's disqualification under Section 3 first emerged soon after the attack itself, advanced by legal scholars Gerard Magliocca and Mark Graber.[12] Proceedings began against a number of lower-level participants in the attack who had previously held public office.[13]

But the idea of disqualifying Trump himself gained new impetus from the circulation of an article advocating that position. The article was written by prominent right-of-center originalist legal scholars William Baude and Michael Stokes Paulsen.[14] Although not published until 2024, the article was posted to the SSRN website on August 14, 2023,[15] and quickly became a major focus of academic and public debate.

[11] Alanna Durkin Richer & Michael Kunzelman, *Hundreds of Convictions, But a Major Mystery Is Still Unsolved 3 Years after the Jan. 6 Capitol Riot*, Associated Press (Jan. 5, 2024), https://apnews.com/article/capitol-riot-jan-6-criminal-cases-anniversary-bf436efe760751b1356f937e55bedaa5.

[12] For early arguments raising this possibility, see, e.g., Gerard Magliocca, *The 14th Amendment's Disqualification Provision and the Events of Jan. 6*, Lawfare (Jan. 19, 2021), https://www.lawfaremedia.org/article/14th-amendments-disqualification-provision-and-events-jan-6, and Mark Graber, *Treason, Insurrection, and Disqualification: From the Fugitive Slave Act of 1850 to Jan. 6, 2021*, Lawfare (Sept. 26, 2022), https://www.lawfaremedia.org/article/treason-insurrection-and-disqualification-fugitive-slave-act-1850-jan-6-2021.

[13] *See, e.g.*, New Mexico *ex rel.* White v. Griffin, No. D-101-CV-2022-00473, 2022 WL 4295619 at *24 (NM. Dist. Ct., Sept. 6, 2022) (quo warranto action against New Mexico state officeholder who participated in the January 6 attack), *cert. denied*, 144 S. Ct. 1056 (2024).

[14] William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. 605 (2024).

[15] *See id.*

With the impetus and inspiration provided by the Baude-Paulsen article, a number of lawsuits were filed seeking Trump's disqualification from the upcoming 2024 presidential election, many of them initiated by the activist organization Citizens for Responsibility and Ethics in Washington (CREW).[16]

Many of these cases were dismissed on various procedural grounds.[17] The lawsuit filed by CREW on behalf of a group of

[16] For an overview of these cases, see Hyemin Han & Caleb Benjamin et al., *The Trump Disqualification Tracker*, *Section 3 Challenges as of March 4, 2024*, Lawfare (Mar. 4, 2024), https://www.lawfaremedia.org/current-projects/the-trump-trials/section-3-litigation-tracker. As of March 4, 2024, the date of the *Trump v. Anderson* decision, Lawfare "stopped tracking state-by-state Section 3 challenges in light of the Court's ruling." *Id.*

[17] *See* Castro v. Dahlstrom, No. 1:23-cv-00011-JMK (D. Alaska Jan. 26, 2024), https://s3.documentcloud.org/documents/24427447/castro-v-dahlstrom-et-al_dismissal.pdf (dismissed for lack of jurisdiction); Castro v. Fontes, No. CV-23-01865-PHX-DLR, 2023 U.S. Dist. LEXIS 215802, at *17 (D. Ariz. Dec. 4, 2023) (dismissed for lack of subject matter jurisdiction), *aff'd* Castro v. Fontes, No. 23-3960, 2024 U.S. App. LEXIS 13639 (9th Cir. Mar. 29, 2024) (affirming dismissal following the decision in *Trump v. Anderson*); Castro v. Weber, No. 2:23-cv-02172 DAD AC (PS), 2023 WL 6931322, at *2 (E.D. Cal. Oct. 19, 2023) (dismissed with prejudice for lack of subject matter jurisdiction); Castro v. Trump, No. 23-80015-CIV, 2023 WL 7093129, at *1 (S.D. Fla. June 26, 2023) (dismissed for lack of Article III standing and ripeness), *cert. denied*, 144 S. Ct. 265 (2023); Chafee v. Trump, Nos. 24-01, 24-02 (Mass State Ballot Law Comm'n Jan. 22, 2024), https://s3.documentcloud.org/documents/24372010/dismissal-without-prejudice.pdf (dismissed for lack of jurisdiction); LaBrant v. Benson, No. 23-000137-MZ, 2023 WL 8786168 (Mich. Ct. Cl. Nov. 14, 2023) (denied), *aff'd sub nom.* Davis v. Wayne Cnty. Election Comm'n, No. 368615, 2023 WL 8656163 (Mich. Ct. App. Dec. 14, 2023), *appeal denied sub nom*, LaBrant v. Sec. of State, 998 N.W.2d 216 (Mich. 2023); Growe v. Simon, 2 N.W.3d 490 (Minn. 2024) (per curiam) (dismissed with prejudice as to primary ballot; dismissed without prejudice as to general election ballot); Castro v. Aguilar, No. 2:23-cv-01387-GMN-BNW, 2024 WL 81388, at *2 (D. Nev. Jan. 8, 2024) (dismissed for lack of standing); Castro v. N.H. Sec'y of State, No. 23-CV-416-JL, 2023 WL 7110390, at *9 (D.N.H. Oct. 27, 2023) (dismissed for lack of standing), *aff'd sub nom*. Castro v. Scanlan, 86 F.4th 947 (1st Cir. 2023); Castro v. Toulouse Oliver, No. 1:23-CV-00766-MLG-GJF, 2024 U.S. Dist. LEXIS 7165, at *16 (D.N.M. Jan. 12, 2024) (dismissed for lack of subject matter jurisdiction); Martin v. N.C. State Bd. of Elections, No. 23CV037438-910 (N.C. Super. Ct. Dec. 20, 2023) (dismissed for lack of jurisdiction, pending appeal); State *ex rel*. Nelson v. Griffin-Valade, No. S070658, 2024 Ore. LEXIS 2 (Or. Jan. 12, 2024) (denying relief without prejudice), *petition for reconsideration denied*, State *ex rel.* Nelson v. Griffin-Valade, No. S070658, 2024 Ore. LEXIS 56 (Sup. Ct. Or. Feb. 1, 2024); Castro v. Amore, No. CV 23-405 JJM, 2023 WL 8191835, at *1 (D.R.I. Nov. 27, 2023) (dismissed in light of the First Circuit's opinion in *Castro*, 86 F.4th 947); Castro v. Trump, No. CV 3:23-4501-MGL-SVH, 2023 WL 8767192, at *12 (D.S.C. Nov. 7, 2023)) (recommendation that relief be denied), *adopted in part sub nom.* Castro v. SC Elections Comm'n, No. 3:23-4501-MGL, 2024 WL 340779 (D.S.C. Jan. 30, 2024), *appeal dismissed*, Castro v. Trump, No. 3:23-4501-MGL, 2024 U.S. App. LEXIS 5300 (4th Cir. Mar. 5, 2024) Castro v.

Colorado voters opposed to Trump was the first to proceed to a decision on the merits. The state trial court ruled for Trump on the ground that Section 3 does not apply to the President, even though—significantly—the court also found that he had engaged in insurrection.[18] The Colorado Supreme Court ruled against Trump,[19] overturning the trial court decision on the issue of the application of Section 3 to the President, and also holding for the plaintiffs on the other issues at stake in the case.

Later, an Illinois state court and the Secretary of State of Maine also ruled against Trump in their states' respective Section 3 cases.[20] They relied on reasoning similar to that of the Colorado Supreme Court.

Trump, No. 4:23-CV-556-Y (N.D. Tex. Feb. 7, 2024), https://s3.documentcloud.org/documents/24427301/177116604801.pdf (dismissed for insufficient service of process); Castro v. Doe, 2024 U.S. Dist. LEXIS 54759 (N.D. Tex., Jan. 10, 2024), *adopted*, Castro v. Doe, No. 4:23-cv-00613-P, 2024 U.S. Dist. LEXIS 52231 (N.D. Tex. Mar. 25, 2024) (dismissed for want of personal jurisdiction and failure to timely serve); Castro v. Copeland-Hanzas, No. 2:23-CV-453 (D. Vt. Feb. 12, 2024), https://s3.documentcloud.org/documents/24429114/dismissal-without-prejudice_copeland.pdf (dismissed following Castro's failure to serve the defendants); Ithaka et al. v. Trump, No. 24-2-00119 (Wash. Super. Ct. Jan. 19, 2024) (dismissed); Castro v. Warner, No. 2:23-CV-00598, 2023 WL 8853726, at *6 (S.D. W. Va. Dec. 21, 2023) (dismissed for lack of standing), *appeal dismissed sub nom.* Castro v. Sec'y of W. Va., No. 24-1040, 2024 WL 3339290 (4th Cir. Mar. 5, 2024); Castro v. Wis. Elections Comm'n, No. 2023CV002288 (Wis. Cir. Ct. Mar. 4, 2023) (dismissed); Bangstad v. Trump, No. 2024CV000053 (Wis. Cir. Ct. Mar. 4, 2024) (dismissed); Newcomb v. Gray, No. 2023-CV-003610, (Wyo. Dist. Ct. Jan. 4, 2024), https://s3.documentcloud.org/documents/24357996/order-granting-defendant-s-motion-to-dismiss.pdf (dismissed for lack of ripeness; on appeal).

[18] Anderson v. Griswold, 2023 WL 8006216 (Colo. Dist. Ct., Nov. 17, 2023), *rev'd*, 543 P.3d 283 (Colo. 2023), *aff'd on other grounds sub nom.* Trump v. Anderson, 601 U.S. 100 (2024).

[19] *See* Anderson v. Griswold, 543 P.3d 283, *rev'd sub nom.* Trump v. Anderson, 601 U.S. 100 (2024).

[20] *See* Anderson v. Trump, No. 2024COEL000013, slip op. at 36–37 (Ill. Cir. Ct. Feb. 28, 2024), https://s3.documentcloud.org/documents/24449331/2024_illinois.pdf (Trump disqualified;decision stayed pending appeal); In re Challenges of Rosen, et al., Ruling of the Secretary of State (Me. Sec'y of State, Dec. 28, 2023), https://www.maine.gov/sos/news/2023/Decision%20in%20Challenge%20to%20Trump%20Presidential%20Primary%20Petitions.pdf, *aff'd sub nom.* Trump v. Bellows, No. AP-24-01, 2024 WL 989060, at *9 (Me. Super. Ct. Jan. 17, 2024) (Trump disqualified; case remanded to Secretary of State Bellows pending the outcome of *Trump v. Anderson*), *appeal dismissed sub nom.* Trump v. Sec'y of State, 307 A.3d 1089 (Me. 2024).

The federal Supreme Court quickly decided to hear the Colorado case, which it did on an accelerated schedule, in order to resolve it before the Colorado state Republican primary scheduled for March 5, 2024. The Supreme Court's decision in *Trump v. Anderson* overturned the Colorado Supreme Court ruling disqualifying Donald Trump from the presidency under Section 3 of the 14th Amendment.[21] It did so on the grounds that Section 3 is not "self-executing."

II. What the Court Got Wrong on Self-Enforcement

In a per curiam opinion jointly authored by five Justices, including Chief Justice John Roberts, the Court ruled that only Congress, acting through legislation, has the power to determine who is disqualified and under what procedures. This outcome was predictable based on the oral argument,[22] which focused on this issue to the exclusion of virtually all the other questions at stake in the case. But the Court nonetheless got the issue badly wrong.

The Court's unanimity in reversing the Colorado Supreme Court undermines claims that the result was dictated by the conservative Justices' partisan or ideological sympathy for Trump. Nonetheless, unanimity is no guarantee of correctness. And the seeming unanimity was belied by four Justices' rejection of much of the majority's reasoning. Section 3 states that "No person" can hold any state or federal office if they had previously been "a member of Congress, . . . an officer of the United States," or a state official and then "engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."[23]

By focusing exclusively on the self-execution issue, the Court left for another day all the other arguments at stake in *Trump v. Anderson*, such as whether the January 6, 2021, attack on the Capitol qualifies as an "insurrection," whether Trump "engaged" in it, whether his actions were protected by the First Amendment, whether Trump received adequate due process, and whether the President is an "officer

[21] 601 U.S. 100 (2024).

[22] For my analysis of the oral argument, see Ilya Somin, *Thoughts on the Supreme Court Oral Argument in the Trump Section 3 Case*, Reason (Feb. 8, 2024), https://reason.com/volokh/2024/02/08/thoughts-on-the-supreme-court-oral-argument-in-the-trump-section-3-case/.

[23] U.S. Const. amend. XIV, § 3.

of the United States" covered by Section 3.[24] The Justices may have hoped they could avoid ever having to decide these questions. As William Baude, one of the main architects of the Section 3 argument against Trump, suggested, perhaps "[t]he ruling's real function was to let the court reverse the Colorado Supreme Court and avoid the political firestorm that might have ensued, without requiring the court to take sides on what happened on Jan. 6."[25]

The Court's resolution of the self-enforcement issue is based on badly flawed reasoning and relies heavily on dubious policy arguments invoking the overblown danger of a "patchwork" of conflicting state resolutions of Section 3 issues. The Court's venture into policy was also indefensibly one-sided, failing to consider the practical dangers of effectively neutering Section 3 with respect to candidates for federal office and holders of such positions.

A. Text and Original Meaning

Under the Court's approach, only Congress has the power to determine which people are to be disqualified and under what procedures—at least when it comes to candidates for federal office and officials holding those offices. The majority claimed that Congress's Section 5 power to enact "appropriate" legislation enforcing the 14th Amendment is the exclusive mode of enforcing Section 3.[26] It held that "[t]he Constitution empowers Congress to prescribe how . . . determinations [on Section 3 disqualification] should be made" and that "[t]he relevant provision is Section 5, which enables Congress, subject of course to judicial review, to pass 'appropriate legislation' to 'enforce' the Fourteenth Amendment."[27]

This language appears to exclude any other mode of enforcing Section 3, at least against federal officeholders and candidates for federal office.[28] To be sure, the majority also referred to the fact that "[i]n the years following ratification, the House and Senate exercised their unique powers under Article I to adjudicate challenges

[24] All of these issues were addressed at length in the Colorado Supreme Court ruling. *See* Anderson v. Griswold, 543 P.3d at 306–42.

[25] Will Baude, *A Principled Supreme Court, Unnerved by Trump*, N.Y. Times (July 5, 2024), https://www.nytimes.com/2024/07/05/opinion/supreme-court-trump.html.

[26] Trump v. Anderson, 601 U.S. at 109–16.

[27] *Id.* at 109–10.

[28] *See* Part V, *infra*, for discussion of implications for state and local offices.

contending that certain prospective or sitting Members could not take or retain their seats due to Section 3."[29] But it did not indicate that these deliberations were constitutionally permissible, and it did not reject or modify its earlier statement that Section 5 is "the relevant provision" for enforcing Section 3.[30]

There are several flaws in the Court's analysis. The most basic is that there is no good reason to believe that Section 5 is the *exclusive* mode of enforcing Section 3. Nothing in the text suggests otherwise. To repeat, Section 3 states that "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."[31] This reads like a categorical prohibition. It is not limited only to those people covered by enforcement legislation. Nor are there any other exceptions, other than for those who have been specifically exempted by a two-thirds vote in both houses of Congress. In the absence of such a legislative exemption, the text presumes that covered persons are to be disqualified, regardless of anything else that might happen. As Baude and Paulsen put it, "Section Three requires no implementing legislation by Congress. Its commands are enacted into law by the enactment of the Fourteenth Amendment."[32] Section 3, they note, "does not grant a power to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself," much like other presidential qualifications laid out in the Constitution, such as the requirement that the president be at least 35 years old.[33]

Section 5 in no way changes that textual presumption. As the Colorado Supreme Court emphasized in its ruling,[34] Section 5 em-

[29] Trump v. Anderson, 601 U.S. at 114.

[30] *Id.* at 109.

[31] U.S. Const. amend. XIV, § 3.

[32] Baude & Paulsen, supra note 14, at 622.

[33] *Id.* at 622–23.

[34] *See* Anderson v. Griswold, 543 P.3d at 312–13.

powers Congress to enforce not just Section 3 but also every other part of the Fourteenth Amendment, including its protections against racial and ethnic discrimination, the Due Process Clause, and more. These other provisions are all considered to be self-executing, under longstanding federal Supreme Court precedent.[35] Section 5 legislation is not the exclusive mode of enforcement for these other parts of the amendment.

Thus, state governments and federal courts can enforce these provisions even in the absence of congressional Section 5 enforcement legislation. Otherwise, as the Colorado Supreme Court noted, "Congress could nullify them by simply not passing enacting legislation."[36] Why should Section 3 be any different? The Supreme Court decision does not give us any good answer to that question.

Allowing such nullification would be inconsistent with the primary goal of Section 3, preventing the return to power of former Confederate insurrectionists.[37] If Congress could prevent that merely by failing to enact enforcement legislation or by repealing previously enacted law, that objective would be gravely compromised.

As the Supreme Court ruling notes,[38] Congress's Section 5 power is "remedial" in nature. Under the Court's landmark precedent in *City of Boerne v. Flores*, an exercise of Section 5 power must be "congruent and proportional" to the violations of the amendment it is intended to remedy.[39] If Section 5 legislation is remedial in nature, including when it comes to enforcing Section 3, that implies other entities—state governments and federal courts—have the initial responsibility for ensuring compliance with Section 3. The role of Section 5 is to remedy violations of that duty, not to be the exclusive enforcement mechanism.

Under the text such purported congressional exclusivity is even more problematic for Section 3 than for other parts of the

[35] *See, e,g.,* The Civil Rights Cases, 109 U.S. 3, 20 (1883) (the Fourteenth Amendment "is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.").

[36] Anderson v. Griswold, 543 P.3d at 314.

[37] On the centrality of this objective for the framers of the Fourteenth Amendment, see Mark A. Graber, Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform After the Civil War 92–94 (2023). [from Mark to War in large and small caps]

[38] Trump v. Anderson, 601 U.S. at 115 (noting that "Section 5 is strictly remedial") (quotation marks omitted).

[39] *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997).

Fourteenth Amendment. Section 3 explicitly indicates that Congress may lift disqualifications "by a vote of two-thirds of each House." There would be little need for that provision if Congress could prevent disqualification simply by not passing implementing legislation or by affirmatively exempting those it wished to protect from any enforcement legislation it chooses to enact. As the three liberal justices—Ketanji Brown Jackson, Elena Kagan, and Sonia Sotomayor—noted in their concurring opinion, "[i]t is hard to understand why the Constitution would require a congressional supermajority to remove a disqualification if a simple majority could nullify Section 3's operation by repealing or declining to pass implementing legislation."[40]

The per curiam opinion argues that the "remedial" nature of Section 5 indicates that states are barred from enforcing Section 3 because, "such state enforcement might be argued to sweep more broadly than congressional enforcement could under our precedents," thereby leading to the "implausible" conclusion that "the Constitution grants the States freer rein than Congress to decide how Section 3 should be enforced with respect to federal offices."[41]

But there is no reason to think such state enforcement authority would be significantly broader than that of Congress. After all, both congressional and state enforcement authority would only extend to disqualifying persons who previously held relevant offices and "shall have engaged in insurrection or rebellion against the [the United States], or given aid or comfort to the enemies thereof."[42]

If the scope of Congress's "remedial" authority is narrowly construed to include only situations where a violation of Section 3 has already occurred, then perhaps state power would be broader, since the latter could make provision for enforcement in advance of violations. But such a divergence is entirely plausible in a situation where one entity has "remedial" authority, while another must ensure that violations that require remedies do not arise in the first place. And, as a practical matter, any enforcement

[40] Trump v. Anderson, 601 U.S. at 121 (Sotomayor, Kagan, & Jackson, JJ., concurring in the judgment).

[41] *Id.* at 115 (per curiam opinion).

[42] U.S. Const. amend. XIV, § 3.

measures taken in advance of possible violations could only disqualify officials and candidates who have engaged in activities that trigger disqualification. They could not, for example, be disqualified merely on suspicion that they might start an insurrection or rebellion in the future.

The per curiam opinion also complains that state enforcement is impermissible because it would "burden" Congress's power to remove Section 3 disabilities by a two-thirds vote in each house.[43] The majority feared that "if States were free to enforce Section 3 by barring candidates from running in the first place, Congress would be forced to exercise its disability removal power before voting begins if it wished for its decision to have any effect on the current election cycle."[44] But it is inherent in the nature of a power to lift a disqualification that it only takes effect after it is exercised. Until then, the disqualification remains in force. The "burden" on Congress arises from this inherent attribute of the combination of disqualifications and the power to remove them. If Congress wants the removal to have effect at Time X, it must enact it before X occurs. Because of the majority's neglect of relevant text and original meaning, prominent right-of-center originalist legal scholar Michael Rappaport labelled the Court's ruling an "originalist disaster," even though he ultimately believes that Trump should not have been disqualified because the January 6 attack was a "riot," not an "insurrection."[45] As Rappaport noted, the per curiam "opinion relies upon spurious, non-textual reasoning," because, while the constitutional text bars states from violating the Fourteenth Amendment, it does not prevent them from enforcing it.[46]

[43] Trump v. Anderson, 601 U.S. at 113.

[44] Rappaport, *supra* note 45.

[45] Michael Rappaport, *The Originalist Disaster in* Trump v. Anderson, The Originalism Blog (Mar. 5, 2024), https://originalismblog.typepad.com/the-originalism-blog/2024/03/the-originalist-disaster-of-trump-v-andersonmike-rappaport.html; see also Aziz Z. Huq, *Structural Logics of Presidential Disqualification: An Essay on* Trump v. Anderson, Harv. L. Rev. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4900090 at 7–8 (emphasizing the majority's deviation from originalist methodology). Huq also offers additional criticisms of the majority's reliance *on City of Boerne* and the "remedial" nature of Section 5. *Id.* at 20–22.

[46] *Id*.

The per curiam opinion emphasizes the need for uniformity in determining eligibility for federal office and argues that states lack the power to make such determinations:

> Because federal officers "'owe their existence and functions to the united voice of the whole, not of a portion, of the people,'" powers over their election and qualifications must be specifically "delegated to, rather than reserved by, the States." *U. S. Term Limits, Inc. v. Thornton*, 514 U. S. 779, 803–804 (1995) . . . . But nothing in the Constitution delegates to the States any power to enforce Section 3 against federal officeholders and candidates.[47]

This argument ignores the long-standing role of states in enforcing and adjudicating other constitutional qualifications for candidates for federal office, such as the requirements that the President must be 35 years old and a "natural born" citizen of the United States.[48] In 2016, there was litigation over claims brought by Trump supporters to the effect that Texas Republican Senator Ted Cruz, then Trump's chief rival for the GOP presidential nomination, was not a natural born citizen. State courts in Pennsylvania and New Jersey ruled that Cruz was eligible, rejecting the arguments against him.[49] But no one doubted that these state courts had the authority to adjudicate the issue.

In a 2012 decision written when he was a lower-court judge on the U.S. Court of Appeals for the Tenth Circuit, Supreme Court Justice Neil Gorsuch upheld a decision by Colorado state officials to bar from the ballot a would-be presidential candidate who was clearly not a natural born citizen. Then-Judge Gorsuch wrote that "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office."[50] This reasoning applies to Section 3 just as readily as to the Natural Born Citizen Clause. As Aziz Huq puts it, "[w]hy should one read

[47] Trump v. Anderson, 601 U.S. at 111 (citation omitted).

[48] U.S. Const. art. II, § 5, Cl. 1; *cf*. Huq, *supra* note 45, at 25–26 (noting this inconsistency).

[49] *See* Elliott v. Cruz, 137 A.3d 646 (Pa. Cmwlth. Ct. 2016); Williams v. Cruz, OAL Dkt. No. STE 5016-16 (N.J. Off. of Admin. Law, Apr. 12, 2016), https://media.philly.com/documents/Judge's+ruling+Ted+Cruz+to+remain+on+NJ+ballot.pdf.

[50] Hassan v. Colorado, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.).

the Constitution to allow States to enforce all other disqualification provisions in the Constitution except one hinging on past participation in insurrection or rebellion?"[51]

U.S. Term Limits v Thornton, a 1995 precedent heavily relied on by the Court, holds that states cannot impose term limits on members of Congress, reasoning that states lack the power to impose additional qualifications for holding federal office beyond those specified in the Constitution.[52] But that is not what Colorado did here. The state was merely trying to enforce a qualification already in the Constitution (that spelled out in Section 3), not impose a new one.

U.S. Term Limits was a close 5–4 decision, featuring a strong dissent by Justice Clarence Thomas, in which he argued that states can in fact add additional qualifications for candidates for federal office on their ballots, so long as doing so isn't specifically forbidden by the Constitution. As Thomas put it, "Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress."[53] If so, the same reasoning would empower states to prescribe requirements presidential candidates must meet to secure their electoral votes.

Thomas nonetheless joined the per curiam opinion in *Trump v. Anderson*. Perhaps he did so based on respect for precedent. But the per curiam opinion actually goes further in constraining states than *U.S. Term Limits* did. The former blocks states from enforcing an existing qualification for office mandated by the Constitution, not just imposing new ones.

The per curiam opinion relies heavily on a distinction between Section 3 disqualifications from state office and disqualifications from holding federal office.[54] It holds that states may potentially apply Section 3 to the former but cannot reach the latter without specific authorization from congressional legislation.[55]

This distinction between state and federal offices is nowhere to be found in the text and original meaning of Section 3. Indeed, as the Court indicated in a footnote, at least one candidate for federal

[51] Huq, *supra* note 45, at 26.

[52] *See generally* U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).

[53] *Id.* at 845 (Thomas, J., dissenting).

[54] *See* Trump v. Anderson, 601 U.S. at 111–13.

[55] *See id.*

office—John Christy, a former Confederate who had won an election for a Georgia seat in the House of Representatives—was disqualified prior to any congressional enforcement legislation.[56] More such cases could easily have occurred, if not for the fact that in 1872—just four years after the ratification of the Fourteenth Amendment—Congress passed a sweeping amnesty act lifting Section 3 disqualifications for all but a few of those covered by Section 3.[57]

The per curiam *Trump v. Anderson* opinion also relies on *Griffin's Case*,[58] an 1869 ruling written by Supreme Court Chief Justice Salmon P. Chase, indicating that congressional legislation is required to enforce Section 3.[59] But, as the three liberal Justices noted in their concurring opinion, *Griffin's Case* was a "nonprecedential, lower court opinion by a single Justice in his capacity as a circuit judge."[60] In the nineteenth century, Supreme Court Justices routinely heard lower court cases in this way.[61] Rulings that Justices issued in that capacity did not speak for the Supreme Court as a whole. Even if the decision had some precedential weight for lower courts in the region where it was decided (Virginia),[62] it was not binding on the federal Supreme Court, or on state and federal courts elsewhere, including in Colorado.

In addition, Chief Justice Chase contradicted his own conclusion from *Griffin's Case* in *In re Davis*,[63] an 1868 circuit court case involving the treason prosecution of former Confederate President

[56] *See id.* at 113 & n.3.

[57] *See* An Act to Remove Political Disabilities Imposed by the Fourteenth Article of the Amendments to the Constitution of the United States, ch. 193, 17 Stat. 142 (1872). The act has come to be known as the General Amnesty Act of 1872. *See Presidential Pardons and Congressional Amnesty to Former Confederate Citizens*, 1865–1877, National Archives (Nov. 2014), https://www.archives.gov/files/research/naturalization/411-confederate-amnesty-records.pdf.

[58] *See* Trump v. Anderson, 601 U.S. at 109 (citing Griffin's Case, 11 F. Cas. 7, 26 (No. 5,815) (C.C. Va. 1869) (Chase, Circuit Justice)).

[59] For a detailed critique of *Griffin's Case*, see Baude & Paulsen, *supra* note 14, at 644–59. For a defense, see Blackman & Tillman, *supra* note 5, at 404–483.

[60] *Id.* at 122 (Sotomayor, Kagan, & Jackson, JJ., concurring in the judgment).

[61] Supreme Court justices routinely "rode circuit" until 1911. *See* David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 Minn. L. Rev. 1710, 1711–12 (2007).

[62] *See* Blackman & Tillman, *supra* note 5, at 498 (suggesting *Griffin's Case* might be a binding precedent in the Fourth Circuit, which includes Virginia). *But see* Cawthorn v. Amalfi, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring) (arguing that *Griffin's Case* is not binding).

[63] In re Davis, 7 F. Cas. 63, 90, 92–94, (C.C.D. Va. 1871) (Chase, Circuit Justice).

Jefferson Davis. There, Chase held that Section 3 is in fact self-executing.[64] *In re Davis* is no more a binding precedent than *Griffin's Case*. But the contradiction between the two suggests that Chase is far from a consistent and reliable source on the issue of self-execution.

From the standpoint of original meaning, it is also notable that Congress enacted multiple bills granting Section 3 amnesties to ex-Confederates by the required two-thirds majority, between 1868 and 1870, before it had enacted any enforcement legislation.[65] Such acts would make little sense if Section 3 was understood to create disqualifications only for people covered by additional enforcement legislation.

Academic critiques of the Section 3 case against Trump fail to plug these holes in the Supreme Court's reasoning on self-enforcement.[66] The most extensive such defense, that by Josh Blackman and Seth Barrett Tillman,[67] fails to account for the fact that the text gives no indication that additional legislation is required. Nor does it account for the numerous ex-Confederates who were disqualified or presumed to be disqualified even before any enforcement legislation was enacted.

Blackman and Tillman try to reconcile Chief Justice Chase's positions in *Griffin's Case* with that in *In re Davis*, on the ground that the former involved "offensive" use of Section 3 as a "sword" (an attempt to disqualify an official from office), while the latter was a "defensive" use of Section 3 as a "shield" (an attempt by Davis to use Section 3 to forestall a prosecution for treason).[68] However, they admit they have no clear evidence of what Chase's reason for distinguishing the two cases was, and no such distinction is recorded in the cases themselves.[69]

[64] *See id.*

[65] For an overview, see Ron Fein & Gerard Magliocca et al., States Can Enforce Section 3 of the 14th Amendment Without Any New Federal Legislation, Free Speech for People, Issue Report No. 2023-01 6–7 (2023), https://www.justsecurity.org/wp-content/uploads/2023/04/backgrounder-free-speech-for-people.pdf.

[66] For leading academic defenses of Trump's position in the litigation, see Blackman & Tillman, *supra* note 5, and Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 Harv. J. L. & Pub. Pol'y 310 (2024).

[67] *See generally* Blackman & Tillman, *supra* note 5.

[68] *Id.* at 484–502.

[69] *See id.* at 487 (discussing Chase's ruling in *Davis*, and noting "If you're looking for a clear statement of how Chase viewed the question, you're out of luck").

More generally, the "sword-shield" theory runs afoul of the lack of any such distinction in the text of the amendment, and of the many cases where ex-Confederates were presumed to be disqualified even before enforcement legislation was enacted.[70] In the recent case of *DeVillier v. Texas*,[71] decided a few weeks after Trump v. Anderson, the Supreme Court did note that "[c]onstitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts."[72] Josh Blackman has cited this ruling as additional support for his and Tillman's position.[73] But the Court in *DeVillier* chose not to resolve the issue of whether the Takings Clause of the Fifth Amendment is self-enforcing, because the Justices concluded there is a remedy available in state court.[74] So the scope of this pronouncement on self-execution is unclear, and is in any event a dictum unnecessary to the resolution of the case.

Perhaps more important, Section 3 is not a "constitutional right," but a structural limitation on government power, preventing some types of dangerous individuals from holding office. Even if constitutional rights are not self-enforcing in some situations, it doesn't follow that such structural constraints must be. The "sword-shield" distinction makes little sense in a structural context, because the point of structural constraints is not to protect individuals against violations of specified rights, but to protect society as a whole against excessive assertions of government power or (as in the case of Section 3) allowing that power to fall into the wrong hands.

When dealing with individual rights, it is at least plausible to argue that the holder needs judicial protection more when threatened with criminal or civil sanctions by the state, then when he or she seeks to use the right "offensively." Arguably, the danger to

[70] *See supra* note 66 and accompanying text.

[71] 601 U.S. 285 (2024).

[72] *Id*. at 291.

[73] Josh Blackman, *Unanimous Supreme Court Adopts the Sword-Shield Dichotomy to Explain How Constitutional Rights Can Be Litigated*, Reason (Apr. 17, 2024), https://reason.com/volokh/2024/04/17/unanimous-supreme-court-adopts-the-sword-shield-dichotomy-to-explain-how-constitutional-rights-can-be-litigated/.

[74] *DeVillier*, 601 U.S. at 292 (holding that "this case does not require us to resolve that question").

the individual is greater in the former case than the latter. By contrast, the offense-defense distinction makes little difference when it comes to Section 3. Regardless of who started the legal proceedings in question, the purpose of Section 3 is not to protect specific individuals, but all of society. The value of that protection depends on the nature of the office that the insurrectionist holds or aspires to, and how egregiously he or she might abuse its powers if given the chance.

Professor Kurt Lash has highlighted evidence that leading Republican federal Representative Thaddeus Stevens and Pennsylvania state Representative Thomas Chalfant both believed that enforcement legislation was necessary.[75] In the case of Stevens, it is not clear whether he thought that enforcement legislation was legally essential or merely necessary for pragmatic reasons, because enforcement would not be effective without it. For example, Stevens opined that Section 3 "will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do."[76]

But Stevens could simply have been referring here to the possibility that enforcement legislation would be needed to overcome possible resistance by recalcitrant southern state authorities. In the very same speech quoted by Lash, Stevens referred to the danger that, if Section 3 were enacted, "there will be if not a Herod, then a worse than Herod elsewhere to obstruct our actions."[77] Herod, of course, was the notoriously tyrannical King of Israel at the time of the birth of Christ. This clearly refers to obstructionism by former Confederate states. Enforcement legislation, Stevens suggested, was needed to overcome that resistance.[78]

The same goes for Stevens's June 13, 1866, reference to the need for "proper enabling acts," also cited by Lash.[79] This statement occurs in the context of Stevens's fears that the removal of provisions

[75] *See* Lash, *supra* note 5, at 374–79.

[76] *See id.* at 375 (quoting Cong. Globe, 39th Cong., 1st Sess. 2544 (1866)).

[77] Cong. Globe, 39th Cong., 1st Sess. 2544 (1866).

[78] *See id.*

[79] Lash, *supra* note 59, at 375 (quoting Cong. Globe, 39th Cong., 1st Sess. 3148 (1866)).

that would have disenfranchised "all rebels" was a mistake that "endanger[ed] the Government of the country, both state and national," by creating the possibility that the "next president and Congress" would be under the control of "reconstructed rebels."[80] The purpose of the "proper enabling acts" that Stevens had in mind was to forestall this possibility by enacting legislation which "shall do justice to the freedmen and enjoin [their] enfranchisement as a condition precedent" to admitting members of Congress from the southern states.[81] This is rather clearly *not* a statement that additional legislation was required merely to ensure disqualification of those covered by Section 3. But even if Stevens's statements referred to legal rather than practical necessity, the statements of one member of the House of Representatives are not sufficient to outweigh both the clear meaning of the text and the general understanding that many ex-Confederates were presumptively disqualified even prior to the enactment of any enforcement legislation.[82]

Chalfant's statements are even less compelling evidence than those of Stevens. Chalfant was a Democrat and an opponent of the Fourteenth Amendment, and his views are not good evidence of the views of the amendment's supporters.[83] Moreover, Chalfant did not argue that enforcement legislation was legally necessary, but merely that disqualification required that "guilt must be established" by a "tribunal."[84] Chalfant did not explain why state courts or federal courts could not qualify as such tribunals. Finally, Chalfant's implicit assumption that disqualification is analogous to a criminal penalty[85] goes against the reality that disqualifica-

[80] Cong. Globe, 39th Cong., 1st Sess. 3148 (1866).

[81] *Id.*

[82] *See supra* note 58 and accompanying text.

[83] *See* Lash, *supra* note 5 at 375 (noting Chalfant's opposition).

[84] *Id.* at 375–76 (quoting Hon. Thomas Chalfant, member from Columbia County, in the House, January 30, 1867, on Senate Bill No. 3 (the proposed amendment), The Appendix to the Daily Legislative Record Containing the Debates on the Several Important Bills Before the Legislature of 1867, at LXXX (George Bergner ed., 1867)).

[85] For example, he argued that disqualification was a "question of guilt or innocence." *Id.* at 377. He also suggested that refusals to seat members of Congress disqualified under Section 3 would require transforming Congress "into a criminal court, for the trial of its members on criminal charges, for crimes committed years before the election?" *Id.*

tion is merely a civil disability, comparable to failure to meet other qualifications for officeholding.[86]

B. The Overblown Specter of a "Patchwork" of Conflicting State Decisions

The main motive for the Court's decision seems to have been not purely legal considerations, but rather practical concerns that letting states adjudicate Section 3 disqualifications will lead to a "patchwork" of conflicting procedures and determinations.[87] The per curiam majority opines that "state-by-state resolution of the question whether Section 3 bars a particular candidate for President from serving would be quite unlikely to yield a uniform answer."[88] Similarly, the concurring opinion by the three liberal Justices invokes the danger of "a chaotic state-by-state patchwork, at odds with our Nation's federalism principles."[89] On top of that, some critics of the Section 3 case against Trump warned that partisan state officials will seek to disqualify opposing-party candidates for specious reasons.[90]

These are at least somewhat legitimate concerns. But they are overblown. If state officials or state courts reach unsound or contradictory legal conclusions about the meaning of Section 3 (for example, by adopting overbroad definitions of what qualifies as an "insurrection" or what qualifies as "engaging" in it), their determinations could be reviewed in federal court, and the Supreme Court could impose a uniform definition of the terms in question. Indeed, the Court could have done so in this very case. Non-uniform interpretations of provisions of the federal Constitution by state and lower federal courts can and do occur in many contexts. Settling such issues is one of the reasons we have a Supreme Court in the first place. A large part of its docket routinely consists of cases where state supreme courts and federal appellate courts have reached divergent interpretations of one or another federal law or constitutional provision. Section 3 challenges need not be any different.

[86] *See* discussion in § II.D, *infra.*

[87] Trump v. Anderson, 601 U.S. at 116.

[88] *Id.*

[89] *Id.* at 118–19 (Sotomayor, Kagan, & Jackson, JJ., concurring in the judgment).

[90] *See, e.g.*, Michael McConnell, *Responding About the Fourteenth Amendment, "Insurrection," and Trump*, Reason (Aug. 12, 2023), https://reason.com/volokh/2023/08/12/prof-michael-mcconnell-responding-about-the-fourteenth-amendment-insurrection-and-trump/.

Perhaps Section 3 cases are special because they are more likely to turn on contested factual claims than litigation over a candidate's age or "natural born" citizen status. But conflicting factual determinations about candidate eligibility for office can also arise with respect to other constitutional qualifications for the presidency. For example, there might be disputes over the accuracy or validity of a candidate's birth certificate (recall "birther" claims that Barack Obama wasn't really born in the United States and that his birth certificate was fake). The same goes for the requirement that the President must have been a resident of the United States for 14 years prior to taking office. There could potentially be factual disputes about where the President lived at any given time.

The possibility of divergent conclusions on such issues is an unavoidable aspect of a system in which control over elections for federal offices is largely left to individual states rather than reserved to a federal government agency. As leading conservative legal scholar Christopher Green notes, "Federalism itself is a state-by-state patchwork" and "lack of uniformity in the Electoral College is a feature, not a bug."[91] He points out that the Constitution's "conferral of power to 'each state' to decide how electors are to be selected requires that we tolerate disuniformity . . . [because] it was designed for the very purpose of creating disuniformity: independent decisions by those in each state about what qualities were most important in a President."[92] Perhaps the Framers of the Constitution made a mistake in structuring the system that way. Maybe it would be better if we had a national agency administering all elections for federal office, like Elections Canada, which fulfills that function in our neighbor to the north.[93]

[91] Christoper Green, Trump v. Anderson *and Federalist 68*, The Originalism Blog (Mar. 4, 2024), https://originalismblog.typepad.com/the-originalism-blog/2024/03/trump-v-anderson-and-federalist-68.html. *See also* Vikram D. Amar & Jason Mazzone, *The Supreme Court's Misplaced Emphasis on Uniformity in* Trump v. Anderson *(and* Bush v. Gore*)*, Justia, Verdict (Mar. 25, 2024), https://verdict.justia.com/2024/03/25/the-supreme-courts-misplaced-emphasis-on-uniformity-in-trump-v-anderson-and-bush-v-gore (making a similar point).

[92] Green, *supra* note 80 (quoting U.S. Const. art. II, § 1, cl. 2).

[93] For an overview of the powers of Elections Canada, see *The Role and Structure of Elections Canada*, Elections Can. (Nov. 7, 2023), https://www.elections.ca/content.aspx?section=abo&dir=role&document=index&lang=e.

But the Founders chose otherwise. As the per curiam opinion recognizes, "the Elections and Electors Clauses . . . authorize States to conduct and regulate congressional and Presidential elections, respectively."[94] That gives state governments initial authority (subject to federal judicial review) to enforce other constitutionally required qualifications for federal office. Section 3 is no different. Even if the Fourteenth Amendment does not delegate states any specific authority to enforce Section 3, such power is inherent in the general grant of authority to conduct and regulate presidential and congressional elections that is already present in Articles I and II.

Concerns about a potential "patchwork" of conflicting state rulings are ultimately policy objections to the Constitution's decentralized state-by-state scheme of election administration. As the conservative Justices (rightly) love to remind us in other contexts, courts are not permitted to second-guess policy determinations that are under the authority of other branches of government, nor are they permitted to second-guess—as in this case—the Framers and ratifiers of the Constitution.

Professor Neil Siegel offers a somewhat different rationale for the Court's reliance on concerns about inconsistent state decisions, at least when it comes to enforcing Section 3 against presidential candidates.[95] He argues that states lack the power to disqualify presidential candidates with broad support, because doing so could create a spillover effect where one or a few states can prevent the election of a presidential candidate with broad support in the nation as a whole, one that would otherwise have the support of an electoral college majority.[96] The validity of Siegel's argument turns in part on the broader validity of his "collective action federalism" theory of constitutional interpretation, which argues that the federal government has broad power to forestall "collective action" problems between the states, which arise when states have poor incentives to produce public goods they all value, or when states create spillover effects

[94] Trump v. Anderson, 601 U.S. at 112 (citing U.S. Const.art. I, § 4, cl. 1; art. II, § 1, cl. 2).

[95] Neil Siegel, *Narrow But Deep: The* McCulloch *Principle, Collective-Action Theory, and Section Three Enforcement*, Duke Public Law & Legal Theory Series No. 2024-48 (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4909114.

[96] *Id*. at 13–16.

harming other states.[97] Elsewhere, I have outlined significant reservations about the theory.[98]

Even aside from more general concerns about collective action federalism, it is important to recognize that any such collective action problem created by allowing state disqualification should be weighed against the danger to the Constitution and our democratic system of allowing an insurrectionist to hold the most powerful office in the land.[99] If such a scenario occurs, it could cause grave harm, far outweighing that of preventing a potentially legitimate political leader from holding office. Moreover, the latter problem is in large part mitigated by the availability of federal court (including Supreme Court) review of state disqualification decisions.[100]

If a combination of partisan bias and voter ignorance leads to the election of a dangerous insurrectionist to high office,[101] that too is a collective action problem, arising from the fact that most individual voters have little incentive to seek out relevant information and use it wisely.[102] Moreover, individual states may have little or no incentive to address the problem of voter ignorance by means other than Section 3 disqualification, since much of the harm caused by ignorance within one state will be borne by people in other states, Thus, widespread availability of state-level Section 3 remedies is itself way to alleviate interstate collective action problems.

If the Court was going to base its ultimate decision in the *Trump v. Anderson* Section 3 case on policy considerations, it should have at least weighed the practical concerns on the other side: the danger of letting insurrectionists return to power and subvert liberal democracy again. That danger is especially acute in a case where the insurrectionist is a candidate for the most powerful office in the land. Moreover, some

[97] For elaboration of that theory, see Neil Siegel, The Collective Action Constitution (2024); and Robert Cooter & Neil Siegel, *Collective Action Federalism: A General Theory of Article I*, Section 8, 63 Stanford L. Rev. 115 (2010).

[98] Ilya Somin, *Federalism and Collective Action*, Jotwell, June 20, 2011, available at https://conlaw.jotwell.com/federalism-and-collective-action/.

[99] *See* Part IV, *infra*, (discussing this danger).

[100] *See id*. (discussing this point in more detail).

[101] *See id*. (discussing this possibility).

[102] On voter ignorance and bias as a collective action problem, see Ilya Somin, Democracy and Political Ignorance: Why Smaller Government is Smarter ch. 3 (2nd ed. 2016).

degree of "patchwork" divergence may be preferable to a uniform-but-wrong resolution of a Section 3 issue by the federal government, or to congressional nullification of Section 3 by inaction.

C. The Concurring Opinions

While the Supreme Court ruling was unanimous, it is notable that both Justice Amy Coney Barrett (writing for herself alone) and the three liberal Justices (in a joint opinion) wrote concurrences that seem to reject, or at least call into question, much of the majority's reasoning. Barrett agreed that "States lack the power to enforce Section 3 against Presidential candidates," and suggested that the Court should have limited its holding to that point, without ruling that "federal legislation is the exclusive vehicle through which Section 3 can be enforced."[103] But she failed to explain how the Court could have found a rationale for holding that Section 3 enforcement requires congressional legislation when it comes to presidential candidates that would not apply with equal force to other federal officeholders. Similarly, she did not explain what other mechanism, besides federal legislation, there might be for Section 3 enforcement, if states lack the power to do it, especially in a system where states generally control the mechanics of the electoral process.

The three liberal Justices also argued that the Court's reasoning went too far. They correctly emphasized that the majority had "next to no support for its requirement that a Section 3 disqualification can occur only pursuant to legislation enacted for that purpose."[104] But if that is their view, they should have dissented rather than concurred in judgment. The supposed need for legislation the primary basis for the Court's holding that states cannot enforce Section 3. Indeed, metadata in the electronic version of the decision publicized by the Supreme Court reveal that the concurring opinion by the three liberals was originally drafted as a dissent written by Justice Sonia Sotomayor alone (it is not clear whether the other two liberal Justices planned to join it).[105]

[103] Trump v. Anderson, 601 U.S. at 118 (Barrett, J., concurring in part and in the judgment).

[104] *Id.* at 122 (Sotomayor, Kagan, & Jackson, JJ., concurring in the judgment).

[105] *See* Mark Joseph Stern, *Supreme Court Inadvertently Reveals Confounding Late Change in Trump Ballot Ruling*, Slate (Mar. 4, 2024), https://slate.com/news-and-politics/2024/03/supreme-court-metadata-sotomayor-trump-dissent.html.

Instead, Sotomayor and the other two liberals decided to concur in the result, relying on *U.S. Term Limits* and other similar precedents and emphasizing the fear that divergent state decisions might cause practical problems.[106] But, as we have seen, these issues are overblown, and can arise with state adjudications of cases involving other constitutional qualifications for the presidency.

D. Why A Criminal Conviction is Not Required for Disqualification Under Section 3

In the public debate over the Section 3 cases, much was made of the idea that Trump could not be disqualified unless he were first convicted on criminal charges of insurrection. As conservative *Washington Post* columnist Jim Geraghty, put it, "[i]f you're going to throw a presidential candidate off the ballot for engaging in an insurrection through his personal actions, shouldn't he first be convicted of engaging in an insurrection?"[107] Similar arguments were advanced in a number of amicus briefs filed in support of Trump, including one by several former Republican Attorneys General.[108]

The argument that a criminal conviction is necessary for disqualification is a variant of the idea that Section 3 is not self-enforcing. It holds that enforcement legislation is not only needed, but also must take the form of a statute imposing criminal liability for insurrection.

Neither the text nor the original meaning of Section 3 requires a preexisting criminal conviction.[109] Nothing in Section 3's text

[106] *See* Trump v. Anderson, 601 U.S. at 119–20 (Sotomayor, Kagan, & Jackson, JJ., concurring in the judgment).

[107] James Geraghty, *The Colorado Supreme Court Just Proved Trump's Point*, Wash. Post (Dec. 20, 2023), https://www.washingtonpost.com/opinions/2023/12/20/colorado-supreme-court-ballot-decision-helped-trump/.

[108] *See* Brief of Former Attorneys' General Edwin Meese III, et al., in Support of Petitioner, Trump v. Anderson, 601 U.S. 100 (No. 23-719), at 24–25 ("This statute looks exactly like what one would expect for legislation implementing Section 3. It defines the elements of the pertinent crimes, sets forth the range of punishments, and commands that any person convicted under it be disqualified from holding an office 'under the United States.' The big problem for those advocating for the Colorado decision is that President Trump has not been convicted of violating Section 2383. For that matter, he has never even been *charged* with violating Section 2383."); *see also* Brief of U.S. Senator Ted Cruz, et. al., in Support of Petitioner, Trump v. Anderson, 601 U.S. 100 (No. 23-719), at 7–9.

[109] Some points in this section are adapted from my amicus brief in *Trump v. Anderson*. *See generally* Somin, Amicus Brief, *supra* note 4.

mentions a conviction—or even a criminal charge—much less makes it a precondition for disqualification.[110] If Section 3's drafters had wanted to disqualify only individuals who had previously been convicted of insurrection or some other criminal offense, they easily could have said so in the text. Instead, Section 3 simply states that it applies to a person who has "engaged in insurrection"—not a person "convicted for engaging in insurrection."[111]

When interpreting Section 3, courts should prioritize ordinary meaning over "secret or technical meanings that would not have been known to ordinary citizens in the founding generation."[112] Nothing in the text would lead an ordinary citizen in 1868 to assume that Section 3 requires a prior criminal conviction before disqualification can be imposed. To the contrary, the text suggests that anyone who "engaged in insurrection" is automatically disqualified, regardless of whether they have been convicted of a crime or not. And disqualification from office is not itself a criminal punishment any more than it is a punishment to be barred from the presidency by virtue of lacking one of the other constitutionally required qualifications, such as being a "natural born citizen" or being at least 35 years old.

Members of the drafting Thirty-Ninth Congress who supported the Fourteenth Amendment maintained that Section 3 amended the constitutional qualifications for office rather than imposed punishment. For example, Senator Lot Morrill of Maine highlighted the "obvious distinction between the penalty which the State affixes to a crime and that disability which the State imposes and has the right to impose against persons whom it does not choose to entrust with official station."[113] Senator Waitman Willey agreed that Section 3 is "not . . . penal in its character, it is precautionary. It looks not to the past, but it has reference, as I understand it, wholly to the future. It is a measure of self-defense."[114]

[110] *See* Worthy v. Barrett, 63 N.C. 199 (N.C. 1869); State *ex rel.* Sandlin v. Watkins, 21 La. Ann. 631 (La. 1869); In re Tate, 63 N.C. 308 (N.C. 1869); Jennifer K. Elsea, Cong. Rsch. Serv., LSB10569, The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment 2 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10569 ("Section 3 of the Fourteenth Amendment does not expressly require a criminal conviction, and historically, one was not necessary.").

[111] U.S. Const. amend. XIV, § 3.

[112] District of Columbia v. Heller, 554 U.S. 570, 577 (2008).

[113] Cong. Globe, 39th Cong., 1st Sess. 2916 (1866).

[114] *Id.* at 2918.

Moreover, in its implementation, Section 3 in the vast majority of cases would have been either unnecessary or utterly ineffective if interpreted to disqualify only persons previously convicted of criminal offenses. No one at the time of drafting and ratification in 1866-68 suggested that persons serving long prison terms were a threat to hold office. The possibility of prior criminal conviction was rendered nearly impossible after President Johnson issued his two broad pardons for former Confederates.[115]

Near the end of the war, General Ulysses S. Grant allowed Robert E. Lee and the Army of Northern Virginia to surrender under terms that allowed "each officer and man . . . to return to their homes, *not to be disturbed by United States authority* so long as they observe their paroles and the laws in force where they may reside."[116] Lee's army—and other Confederate forces who surrendered on similar terms—included many men who could have been disqualified under Section 3, because they had previously held public office. This included Lee himself, subject to disqualification by virtue of his previous service as a high-ranking U.S. Army officer (Section 3 disqualifies any insurrectionist who had previously taken an oath as an "officer of the United States," a category that included commissioned military officers).[117] Certainly, neither the framers nor ratifiers of Section 3 thought that Lee and others like him were exempt from disqualification merely because they were

[115] *See* President Andrew Johnson, *Proclamation of Amnesty and Reconstruction* (May 29, 1865), https://www.loc.gov/resource/rbpe.23502500/?st=pdf&pdfPage=2; President Andrew Johnson, *Granting Full Pardon and Amnesty for the Offense of Treason Against the United States During the Late Civil War*, Proclamation No. 179 (Dec. 25, 1868), https://www.presidency.ucsb.edu/documents/proclamation-179-granting-full-pardon-and-amnesty-for-the-offense-treason-against-the. For further discussion, see Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 94–95 (2021).

[116] General Ulysses S. Grant to Gen. Robert E. Lee, Apr. 9, 1865, https://www.battlefields.org/learn/primary-sources/lt-gen-ulysses-s-grants-terms-agreement-entered-gen-robert-e-lee-appomattox (emphasis added).

[117] *See* John Reeves, The Lost Indictment of Robert E. Lee: The Forgotten Case Against an American Icon 131 (2018). There was debate over whether the terms of Lee's parole precluded future prosecution, but many believed it would. *Compare id.* at 54 ("[R]eporters seemed to believe that . . . the agreement with Grant protected Lee and his officers from prosecution by federal authorities. . . ."), *with id.* at 64 ("[President] Johnson . . . believed [the United States] could still prosecute Lee once the end of the war was declared.").

not prosecuted for insurrection—and likely could not have been prosecuted, given the terms of their surrender.

Instead, when implemented during Reconstruction, it was clear that disqualification under Section 3 could not and did not hinge on a prior criminal conviction. Even though Jefferson Davis was not convicted, there was broad agreement that he was disqualified from office even after his treason prosecution was abandoned.[118] Hundreds of individuals submitted amnesty requests believing that Section 3 applied to them even though none of them were ever convicted of crimes related to their roles in the Civil War.[119] More recently, a 2022 decision by the Georgia Office of Administrative Hearings, drawing upon Reconstruction-era history, also rejected a requirement of a prior criminal conviction.[120]

At least eight public officials, ranging from a U.S. Senator to a local postmaster, have been formally adjudicated to be disqualified from public office under the Disqualification Clause since its ratification in 1868, including six disqualified during Reconstruction.[121] Yet, during Reconstruction no person disqualified from public office after the Fourteenth Amendment was ratified, no person whom the government attempted to disqualify, no person who sought amnesty under Section 3, and no person amnestied under Section 3 was first convicted of a relevant offence stemming from disloyal behavior.[122]

[118] *See* Brief of *Amici Curiae* American Historians in Support of Respondents, Trump v. Anderson, 601 U.S. 100 (No. 23-719), at 27–30.

[119] Fein & Magliocca, *supra* note 66, at 8, 12.

[120] Rowan v. Greene, Docket No. 2222582 2222582-OSAH-SECSTATE-CE-57-Beaudrot, at 13 (Ga. Off. State Admin. Hearings May 6, 2022), https://s3.documentcloud.org/documents/21902607/marjorie-taylor-greene-ruling.pdf ("Nor does 'engagement' require previous conviction of a criminal offense."); *see also* New Mexico *ex rel.* White v. Griffin, 2022 WL 4295619, at *24 ("[N]either the courts nor Congress have ever required a criminal conviction for a person to be disqualified under Section Three.").

[121] For a detailed listing of officials disqualified under Section 3, see CREW, Public Officials Adjudicated to be Disqualified under Section 3 of the Fourteenth Amendment (2023), https://www.citizensforethics.org/reports-investigations/crew-reports/past-14th-amendment-disqualifications/. For further discussion of these cases, see Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 Const. Comment. 87 (2021), and Elsea, *supra* note 111.

[122] *See* Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153, 196–214 (2021); Fein & Magliocca, *supra* note 66, at 9–10.

A standard element of our legal system is that the same events often give rise to both civil and criminal liability. For example, a person who commits rape, murder, or assault is subject to criminal penalties and also to civil suits by his or her victims. In such cases, a criminal conviction is *not* a prerequisite to civil liability. Indeed, even an actual *acquittal* on criminal charges does not necessarily preclude civil lawsuits against the perpetrator. Consider the case of O.J. Simpson, who was famously acquitted of criminal charges in the murders of his ex-wife Nicole Brown Simpson and Ron Goldman, but later lost a civil case filed by the victims' families.[123] The criminal acquittal did not stop Simpson from incurring $33.5 million in civil liability.[124] The criminal and civil cases were distinct, and the result of one did not determine that of the other. The same reasoning applies here.

If there is no general requirement of a criminal conviction, there can also be no specific requirement that disqualification requires a conviction under 18 U.S.C. § 2383, the federal insurrection statute (despite claims to the contrary by some amicus briefs).[125] In his dissenting opinion before the Colorado Supreme Court, Justice Carlos Samour stated that "[i]f any federal legislation arguably enables the enforcement of Section Three, it's Section 2383" and cited the failure to prosecute and convict Trump under that provision as one of the reasons for his opposition to the majority decision.[126]

But nothing in that law indicates that it is the exclusive mode of enforcing Section 3. Indeed, Section 2383 has its origins in the Confiscation Act of 1862, enacted six years before the Fourteenth Amendment, and many aspects of Section 2383 indicate that it has a distinct purpose that only partially overlaps with Section 3.[127] The Colorado Supreme Court majority rightly concluded that Section 2383 "cannot be read to mean that *only* those charged and convicted of violating that law are constitutionally disqualified from holding future office without assuming a great deal of meaning not present in the text of the law."[128]

[123] *See* Rufo v. Simpson, 103 Cal. Rptr. 2d 492 (Cal. Ct. App. 2001) (upholding civil judgment against Simpson).

[124] *See id.* at 493–94.

[125] *See* Meese et al., Amicus Brief, *supra* note 109; Cruz et al., Amicus Brief, *supra* note 109.

[126] Anderson v. Griswold, 543 P.3d at 348, 355 (Samour, J., dissenting).

[127] I have covered this issue in detail in my amicus brief in the case. *See* Somin, Amicus Brief, *supra* note 4, at 12–16.

[128] Anderson v. Griswold, 543 P.3d. at 316.

To be sure, Section 2383 does state that anyone who "engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."[129] But, unlike Section 3, it applies to anyone who engages in "rebellion or insurrection," and not just to current and former officeholders. In addition, it only bars future officeholding in the federal government—unlike Section 3, it does not also apply to state offices.

For these and other reasons,[130] it seems clear that Section 2383 is distinct from Section 3, in some respects imposing a more sweeping disqualification than Section 3 does, while in other respects not going as far. At the very least, it cannot be regarded as the exclusive mode of enforcing Section 3.

III. Why the January 6 Attack on the Capitol Was an Insurrection

One of the points at issue in the Supreme Court case considering whether Trump should be disqualified under Section 3 of the Fourteenth Amendment is whether the events of that day qualify as an "insurrection." It should be an easy call. The January 6 attack was an insurrection under any plausible definition of that term.[131] This may be why Donald Trump's lawyer before the Supreme Court, Jonathan Mitchell, did not even attempt to contest this issue in his brief before the Court.[132]

As legal scholar Mark Graber has shown, contemporary definitions of "insurrection" prevalent at the time the Fourteenth Amendment was enacted were quite broad—possibly broad enough to encompass any violent resistance to the enforcement of a federal statute, when that resistance was motivated by a "public purpose."[133]

[129] 18 U.S.C. § 2383.

[130] *See* Somin, Amicus Brief, *supra* note 4, at 12–16.

[131] Some material in this Part is adapted, in revised form, from Ilya Somin, *The January 6 Attack was an Insurrection*, Reason (Jan. 6, 2024), https://reason.com/volokh/2024/01/06/the-january-6-attack-was-an-insurrection/.

[132] *See* Brief for the Petitioner, Trump v. Anderson, 601 U.S. 100 (No. 23-719), at 33–38 (arguing that President Trump did not *personally* engage in insurrection but not contesting that the events of January 6 themselves constituted an insurrection).

[133] Graber, *supra* note 12, at 4; *see also* Mark Graber, *Section Three of the Fourteenth Amendment: Insurrection*, Wm. & Mary Bill Rts. J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4733059; Baude & Paulsen, *supra* note 5, at 674–716 (reaching a similar conclusion).

That definition surely includes the January 6 attack, mounted by people who believed Trump was entitled to remain President for another term and were willing to use force to ensure he could do so.

I am not convinced that courts should actually adopt such a broad definition. It could set a dangerous precedent. As Graber notes, on that theory people who violently resisted enforcement of the Fugitive Slave Act would qualify as insurrectionists, too.[134]

But January 6 was an insurrection even under a narrow definition that covers only violent attempts to illegally seize control of the powers of government. After all, the attackers were using force to try to keep the loser of the 2020 election in power, blocking the transfer of authority to the rightful winner. If that isn't a violent attempt to seize government power, it's hard to know what is.

It is true that many, of those who participated genuinely thought that they were acting to support the rightful winner of the election and thus believed they weren't doing anything illegal.[135] But much the same could be said of the ex-Confederates who were the original targets of Section 3.[136] Most of them believed their states had a constitutional right to secede, and they had much better grounds for that belief than Trumpists ever had for the utterly indefensible claim that the election was stolen from him (a belief uniformly rejected in numerous court decisions, including by judges appointed by Trump himself).[137]

It is sometimes claimed that the mob attacking the Capitol was unarmed or not violent enough to qualify as an insurrection. That would be news to the five people who were killed, and the over 140 police officers injured.[138] There could easily have been many more fatalities had the attackers been more successful in carrying out their plans to

[134] Graber, *supra* note 12.

[135] For the argument that this proves January 6 was not an insurrection, see Lawrence Lessig, *A Terrible Plan to Neutralize Trump Has Entranced the Legal World*, Slate (Sept. 19, 2023), https://slate.com/news-and-politics/2023/09/trump-disqualification-colorado-ballot-hail-mary.html.

[136] I discuss this point in detail in Ilya Somin, *Insurrectionists Who Think they are Upholding the Constitution are Still Insurrectionists—and Still Subject to Disqualification Under Section 3 the Fourteenth Amendment*, Reason (Sept. 22, 2023), https://reason.com/volokh/2023/09/22/insurrectionists-who-think-they-are-upholding-the-constitution-are-still-insurrectionists-and-still-subject-to-disqualification-under-section-3-the-fourteenth-amendment/.

[137] *See id.*

[138] *See* Richer & Kunzelman, *supra* note 11.

"hang Mike Pence" and kill members of Congress. Donald Trump apparently expressed support for this goal at the time;[139] Pence and the members managed to escape. And it just isn't true that the mob was unarmed. After extensive consideration of evidence, Colorado courts found otherwise:

> [C]ontrary to President Trump's assertion that no evidence in the record showed that the mob was armed with deadly weapons or that it attacked law enforcement officers in a manner consistent with a violent insurrection, the district court found—and millions of people saw on live television, recordings of which were introduced into evidence in this case—that the mob was armed with a wide array of weapons . . . . The court also found that many in the mob stole objects from the Capitol's premises or from law enforcement officers to use as weapons, including metal bars from the police barricades and officers' batons and riot shields and that throughout the day, the mob repeatedly and violently assaulted police officers who were trying to defend the Capitol . . . . The fact that actual and threatened force was used that day cannot reasonably be denied.[140]

A New Mexico trial court ruling holding that a New Mexico state official who participated in the attack on the Capitol is disqualified under Section 3, similarly concluded that the attack was an "insurrection":

> The mob that arrived at the Capitol on January 6 was an assemblage of persons who engaged in violence, force, and intimidation by numbers. The mob numbered at minimum in the thousands. Many came prepared for violence in full tactical gear. They used a variety of weapons, brutally attacked and injured more than one hundred police officers, sought to intimidate the Vice President and Congress, and called for the murder of elected officials, including the Vice President.[141]

[139] *See* Betsy Woodruff Swan & Kyle Cheney, *Trump Expressed Support for Hanging Pence during Capitol Riot, Jan. 6 Panel Told*, Politico (May 25, 2022), https://www.politico.com/news/2022/05/25/trump-expressed-support-hanging-pence-capitol-riot-jan-6-00035117.

[140] Anderson v. Griswold, 543 P.3d at 330–31.

[141] New Mexico *ex rel.* White v. Griffin, 2022 WL 4295619, at *18.

Prominent conservative legal scholar Steven Calabresi nonetheless argues that January 6 was not an insurrection.[142] He relied on a definition of "insurrection" from the 1828 edition of Webster's Dictionary:

> A rising against civil or political authority; the open and active opposition of a number of persons to the execution of a law in a city or state. It is equivalent to sedition, except that sedition expresses a less extensive rising of citizens. It differs from rebellion, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction. It differs from mutiny, as it respects the civil or political government; whereas a mutiny is an open opposition to law in the army or navy. *[I]nsurrection* is however used with such latitude as to comprehend either sedition or rebellion.[143]

The events of January 6 fit this definition to a T! The attack on the Capitol was obviously a "rising against civil or political authority" and even more clearly "the open and active opposition of a number of persons to the execution of a law in a city or state."[144] The mob incited by Trump sought to prevent the "execution" of the laws requiring transfer of power to the winner of the election.

Calabresi suggests that the January 6 attack was actually a "riot,"[145] a position also embraced by Michael Rappaport.[146] Perhaps so. But "riot" and "insurrection" are not mutually exclusive concepts. An event can be both at the same time; people can simultaneously engage in mass civil disorder (a riot), while doing so for the purpose of seeking to seize control of government power or some other "public purpose." Indeed, that is a common occurrence in history. The French Revolution, for example, began as a riot attacking the Bastille.[147]

[142] *See* Steven G. Calabresi, *Donald Trump and Section 3 of the 14th Amendment*, Reason (Dec. 31, 2023), https://reason.com/volokh/2023/12/31/donald-trump-and-section-3-of-the-14th-amendment/.

[143] *Insurrection*, Webster's Dictionary (1828), https://webstersdictionary1828.com/Dictionary/insurrection.

[144] *Id.*

[145] Calabresi, *supra* note 143.

[146] *See* Rappaport, *supra* note 45.

[147] *See* Simon Schama, Citizens: A Chronicle of the French Revolution 399–406 (1989).

Calabresi also argues that the attack was not large enough to qualify as an insurrection because it "occurred for three-and-one-half hours in one city only in the United States, Washington D.C., and not as an overall insurgency in multiple cities across the United States."[148] But the definition he himself cites indicates that an insurrection is "the open and active opposition of a number of persons to the execution of a law in *a* city or state."[149] That suggests one city is enough.

And there is no historical or modern evidence indicating that an insurrection must last some minimum length of time. A revolt that is quickly put down can still be an insurrection. The same goes for a revolt that is poorly planned and easily defeated.

If actions in multiple cities are required, a great many attempted coups and armed revolts would not count as "insurrections." It is common for attempts to seize power to focus on the capital city where the government is located. If the revolt is put down, it may not spread elsewhere. But that doesn't mean it was not an insurrection.

The Bolshevik seizure of power in Russia in 1917 initially involved just the capital city of St. Petersburg.[150] If the Provisional Government had managed to swiftly crush it, thereby preventing it from spreading to other cities, would that have meant it wasn't an insurrection?

Similarly, it seems obvious that Adolf Hitler's 1923 Beer Hall Putsch was as an insurrection. Yet, like the January 6 attack, it lasted only about one day (the evening of November 8, 1923 to the evening of the following day) and was limited to a single city (Munich, the capital of the German state of Bavaria).[151] The number of participants (several thousand) and the number of people injured was also similar to that of January 6; 1,265 people have been charged with offenses related to the attack on January 6, and many other participants likely got away without being identified or charged.[152]

[148] Calabresi, *supra* note 143.

[149] Webster's, *supra* note 144 (emphasis added); *see also* Calabresi, *supra* note 143.

[150] For a detailed account, see Richard A. Pipes, The Russian Revolution Ch. 11 (1991).

[151] For details, see Harold J. Gordon, Hitler and the Beer Hall Putsch (1972) and Ian J. Kershaw, Hitler, 1889–1936: Hubris 129–219 (1998).

[152] For the number of participants in the Beer Hall Putsch, see works cited *supra* note 152. On the number charged in the January 6 attack, see U.S. District Attorney's Office, District of Columbia, Three Years Since the Jan. 6 Attack on the Capitol, Jan. 6, 2024, https://www.justice.gov/usao-dc/36-months-jan-6-attack-capitol-0.

There were somewhat more fatalities (21) in the Beer Hall Putsch.[153] But 16 of them were participants in the coup (the others were four police officers and a civilian bystander).[154] The Bavarian police and troops who put down the revolt were less restrained in their use of force than U.S. law enforcement officers on January 6 (who only killed one of the attackers). That surely isn't a decisive difference between the two cases. More aggressive law enforcement action cannot by itself transform a mere "riot" into an insurrection, assuming the two are distinct categories to begin with.

It seems obvious that both the Beer Hall Putsch and the January 6 attack were insurrections, for the simple reason that both involved the use of force to illegally seize control of government power. It matters not how long they lasted, or that they were poorly planned and quickly put down. And it certainly does not matter that they both occurred in just one city.

Finally, it is worth noting that Section 3 imposes disqualification for participation in "rebellion" as well as "insurrection."[155] The two most famous pre–Civil War events in American history generally labeled rebellions were Shays's Rebellion (1786–87), and the Whiskey Rebellion of 1793.[156] Both were on a scale similar to the January 6 attack. Each involved no more than a few thousand rebels (only about 600 in the case of the Whiskey Rebellion; many fewer than January 6). Each occurred in one part of just one state (western Massachusetts and western Pennsylvania, respectively). The number of combat fatalities (nine for Shays's Rebellion, three or four for the Whiskey Rebellion, five on January 6) is also similar.[157]

The best argument for Trump on the "insurrection" issue is not that there was no insurrection at all, but that Trump himself did not

[153] *See Beer Hall Putsch*, History.com (Nov. 9, 2009), https://www.history.com/topics/european-history/beer-hall-putsch#section_2.

[154] *See id.*

[155] U.S. Const. amend. XIV, § 3.

[156] I develop this point in more detail in Ilya Somin, *Insurrection, Rebellion, and January 6: Rejoinder to Steve Calabresi*, Reason (Jan. 6, 2024), https://reason.com/volokh/2024/01/06/insurrection-rebellion-and-january-6-rejoinder-to-steve-calabresi/. This piece was a rejoinder to Steven G. Calabresi, *January 6, 2021 Was Not an Insurrection*, Reason (Jan. 6, 2024), https://reason.com/volokh/2024/01/06/january-6-2021-was-not-an-insurrection/.

[157] *See* Somin, *supra* note 157.

"engage" in it. After all, he did not participate in the attack himself, and he did not give specific orders to those who did.

On this issue, I have little to add to the detailed and thorough analyses by the trial judge in the Colorado case and by the Colorado Supreme Court. They, rightly in my view, both concluded that Trump "engaged" in insurrection because he knowingly and deliberately incited violence calculated to keep himself in power after losing an election. And he began doing so long before his now-famous speech to the crowd that later stormed the Capitol, on January 6, where he urged them to "fight like hell"—a statement that in other contexts might be interpreted to be just metaphorical.[158] As Judge Sarah Wallace wrote in the trial court decision, "Trump acted with the specific intent to incite political violence and direct it at the Capitol with the purpose of disrupting the electoral certification."[159]

One point, however, has not gotten enough attention in other analyses of the case: As the Colorado Supreme Court noted, while the attack on the Capitol was ongoing and the mob sought to kill or injure members of Congress, "President Trump ignored pleas to intervene and instead called on Senators, urging them to help delay the electoral count, which is what the mob, upon President Trump's exhortations, was also trying to achieve."[160] This was likely an attempt to use the violence as leverage to intimidate lawmakers to keep him in power. A political leader who uses violence by his supporters as leverage to try to seize power that does not belong to him is "engaged in insurrection" even if he does not otherwise participate in the violence. At the very least, that is true when those directly involved in the violence are pursuing the exact same goal as he is.

Leaders of terrorist groups who use hostage-taking as leverage to secure concessions desired by their organization are surely engaged in terrorism, even if they did not directly participate in the hostage-taking, and even if they may not have known about it in advance. This

[158] *See* Anderson v. Griswold, 543 P.3d. at 331–36 (recounting the relevant evidence and concluding that Trump "engaged in" insurrection); Anderson v. Griswold, 2023 WL 8006216, at *41–43 (same); *cf.* Baude & Paulsen, *supra* note 5, at 734–40 (presenting additional arguments that Trump "engaged in" insurrection).

[159] Anderson v. Griswold, 2023 WL 8006216 at *41.

[160] Anderson v. Griswold, 543 P.3d. at 335.

may have been true of Hamas terrorist leaders in Qatar who did not directly participate in the October 7, 2023, terrorist attack on Israel, but then tried to use the resulting seizure of hostages as leverage to force Israeli concessions, which was also the goal of the terrorists who did directly participate in the attack.[161] The Qatar-based Hamas leaders surely "engaged in" terrorism. By the same logic, Trump was "engaged in" insurrection when he sought to use the attack on the Capitol as leverage to achieve the exact same end sought by the attackers.

IV. Disqualification and Democracy

An important non-originalist criticism of efforts to disqualify Trump is the idea that doing so would undermine democracy.[162] The logic here seems obvious: removing a candidate from consideration necessarily limits the power of voters by narrowing the range of choices available to them. In that sense, it is anti-democratic. But constraints on voter choice can nonetheless sometimes help protect democracy and other liberal values. Section 3 is one such democracy-enhancing constraint on voter choice.

A striking flaw in the Supreme Court's majority and concurring opinions in *Trump v. Anderson* is the total failure of the Justices to consider the potential democracy-protecting benefits of disqualification. This might have been understandable if the Court had chosen to focus solely on originalist and textualist arguments, without reference to consequences. But once the Justices chose to rely heavily on practical consequentialist considerations about a "patchwork" of state decisions,[163] they should have considered consequentialist considerations on the other side, as well.

[161] Ismail Haniyeh and other Hamas leaders based in Qatar may not have known about the October 7 attack in advance, but later sought to use it as leverage. *See, e.g.*, Samia Nakhoul & Stephen Farrell, *Who Was Ismail Haniyeh and Why Is His Assassination a Blow to Hamas?*, Reuters (July 31, 2024), https://www.reuters.com/world/middle-east/obituary-tough-talking-haniyeh-was-seen-more-moderate-face-hamas-2024-07-31/.

[162] For this kind of argument, see, for example, Ross Douthat, *The Anti-Democratic Quest to Save Democracy From Trump*, N.Y. Times (Dec. 23, 2023), https://www.nytimes.com/2023/12/23/opinion/colorado-ruling-trump.html (arguing that disqualification would be "a remarkably undemocratic act"); Samuel Moyn, *Trump Should Not Be Disqualified by an Ambiguous Clause*, N.Y. Times (Dec. 29, 2023), https://www.nytimes.com/2023/12/29/opinion/trump-section-3-14th-amendment.html (arguing disqualification is not "democratically appropriate").

[163] *See* § II.B, *supra*.

Democracy-preservation looms large among them. The potential consequences of an insurrectionist returning to power—especially to the most powerful office in the nation—are sufficiently grave that they could well easily outweigh any potential harm caused by "patchwork" determinations. This is especially true since judicial review can constrain the latter.[164]

Both the U.S. Constitution and the laws of many other democracies include various provisions disqualifying people from officeholding. These restrictions serve a variety of purposes, including ensuring that officeholders are at least minimally qualified, barring candidates who are likely to undermine democracy by promoting authoritarianism, and excluding those who threaten basic civil liberties and other liberal values.

Under the Constitution, the President must be at least 35 years old, be a "natural born citizen" of the United States, and have resided in the United States for at least 14 years.[165] The Twenty-Second Amendment bars from the presidency anyone who has already served two terms as President.[166] There are also age and residency restrictions for members of Congress.[167]

The natural-born-citizen requirement has been the object of much criticism, and I myself have argued that it is based on little more than xenophobic prejudice against immigrants and that it should be abolished.[168] But few would contend the other restrictions are so problematic as to be unacceptable in a democratic society, even though all of them significantly constrain voters' options. The age and residency restrictions are presumably intended to ensure that the President has the requisite maturity and knowledge of the country.

The Twenty-Second Amendment is particularly notable because it is intended to prevent the undermining of democracy through

[164] *See* discussion, § II.B, *supra*.

[165] U.S. Const. art. II, § 5, cl. 1.

[166] U.S. Const. amend. XXII.

[167] *See* U.S. Const. art. I, § 3, cl. 3 (qualification requirements for senators); U.S. Const. art. I, §, cl. 2 (qualification requirements for members of the House of Representatives).

[168] *See* Randall Kennedy & Ilya Somin, *Remove the Natural Born Citizen Clause from the Constitution. Let Immigrants be President*, USA Today (Sept. 18, 2020), https://www.usatoday.com/story/opinion/2020/09/18/immigrants-president-repeal-natural-born-citizen-clause-column/5805710002/.

consolidation of authority in the hands of one person, using the power of prolonged incumbency. Presidents who have already served two terms may be popular with voters, and their experience may make them unusually well-qualified for the job.

Indeed, the amendment was inspired by Franklin D. Roosevelt's serving four terms.[169] Many believe that FDR was one of the greatest Presidents. But the danger of creeping authoritarianism was enough to justify barring such individuals from further time in office. A former President who tried to use force and fraud to stay in power after losing an election is surely at least as great a menace to the future of liberal democratic institutions as one who consolidates power by serving more than two terms. Indeed, the former is most likely more reprehensible and dangerous than the latter.

Other democracies have sometimes taken broader measures to bar from office those who pose a threat to liberal democratic values. In the aftermath of World War II, West Germany banned both the Nazi and Communist parties from contesting elections.[170]

More recently, several post-communist Eastern European democracies have enacted "lustration" laws barring from office some categories of former officials under the Communist dictatorships overthrown between 1989 and 1991—particularly former agents of the secret police.[171]

It is possible that more countries should have adopted lustration laws. Had Russia followed the example of nations barring former Communist secret police officers from office, for instance, the world might have been spared the horrific reign of ex-KGB Lieutenant Colonel Vladimir Putin, with all its repression and unjust wars.

Disqualification laws might be unnecessary if voters could be relied on to reject dangerously illiberal, anti-democratic, incompetent

[169] For a brief overview of the Amendment's origins, see Scott Bomboy, *How the 22nd Amendment Came into Existence*, Nat'l Const. Ctr. (Dec. 5, 2019), https://constitutioncenter.org/blog/how-the-22nd-amendment-came-into-existence.

[170] *See* Ilya Somin, *Section 3 Disqualifications for Democracy Preservation*, Lawfare (Sept. 6, 2023), https://www.lawfaremedia.org/article/section-3-disqualifications-for-democracy-preservation. For a more generally overview of disqualification provisions in democratic constitutions, see Tom Ginsburg et. al., *Democracy's Other Boundary Problem: The Law of Disqualification*, 111 Cal. L. Rev. 1633 (2023).

[171] *See id.*

candidates at the polls. But widespread voter ignorance and bias makes exclusive reliance on electoral safeguards problematic.[172] That is especially true in eras of severe polarization like the current one when fear and hatred of the opposing party makes voters reluctant to penalize wrongdoing by their own party's leaders, or even leads them to embrace it.[173] We are currently in an era of "negative partisanship" when many voters hate and fear the opposing party, and therefore are reluctant to ever support it,[174] even if the alternative is a menace to democratic institutions. Ironically, but logically, democracy-preserving limitations on democracy are most necessary in situations where candidates who menace democratic values enjoy substantial popular support.

Liberal democratic institutions are less vulnerable to erosion in long-established democracies like the U.S. than in post-communist Russia or post-Nazi Germany. But social scientists warn it would be a mistake to discount the dangers of "deconsolidation" entirely.[175]

It is sometimes argued that voters have an inherent right to choose whatever leaders they want, even if their judgment is dangerously flawed. John Stuart Mill effectively rebutted this argument in his classic work *Considerations on Representative Government*, where he pointed out that "the exercise of any political function, either as an elector or as a representative, is power over others."[176] Mill thus contends that choosing leaders cannot be a purely individual right that voters can exercise as they please.

[172] For an overview of the dangers of political ignorance, see generally Ilya Somin, Democracy and Political Ignorance: Why Smaller Government is Smarter (2nd ed. 2016).

[173] For an overview of ways in which voter ignorance and bias are more dangerous in periods of severe polarization, see Ilya Somin, *Perils of Partisan Bias*, Volokh Conspiracy, Wash. Post (Dec. 16, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/16/the-perils-of-partisan-bias/.

[174] For an overview, see Alan I. Abramowitz & Steven W. Webster, *Negative Partisanship: Why Americans Dislike Parties but Behave Like Rabid Partisans*, 39 Advances in Pol. Psych. 119 (2018).

[175] For an overview of the potential for "deconsolidation," see Roberto Stefan Foa and Yascha Mounk, *The Danger of Deconsolidation; The Democratic Disconnect*, 27 J. Democracy 5 (2016). *See also* Steven Levitsky & Daniel Ziblatt, How Democracies Die (2017).

[176] John Stuart Mill, Considerations on Representative Government 206 (Henry Holt & Co. ed. 1873).

As Mill pointed out, a free society can justifiably restrict access to political office far more than individual liberties, which generally affect mostly the rights-holders themselves and those who voluntarily interact with them. It would be unjust and unconstitutional to severely restrict the personal liberty of people under the age of 35, or to bar Nazis and communists from expressing their views. But banning the former from seeking the presidency, and the latter from running for public office in post-World War II Germany, is far more defensible.

The right to wield the coercive power of government should often be more narrowly restricted than the right of individuals to control their own lives. Indeed, sometimes it may be necessary to limit the former in order to protect the latter.

If voters are prone to systematic errors that could undermine the institutions of liberal democracy, it makes sense to have structural constitutional safeguards against them. And if some categories of people—whether they be insurrectionists or former functionaries of authoritarian regimes—are likely to prove a menace to democracy or to liberal values if given the power to do so, it makes sense to bar them from holding public office.

Reliance on electoral checks alone is particularly problematic in situations where the would-be officeholder has a record of trying to undermine electoral democracy itself, and could well do so again if allowed access to power. Putin and other former communist secret police officers tasked with suppressing dissent are obvious examples. And so too are Trump and others complicit in his attempt to use force and fraud to stay in power after losing an election. One of the most compelling reasons to deny such people access to political power is that they are likely to use it to destroy the very institutions of electoral accountability that usually serve to constrain politicians.

To put it a different way: Sometimes, limits on voter choice are necessary to protect democracy from itself. One such democracy-protective limitation on democracy is excluding from power people whose track record indicates they are likely to undermine democratic institutions.

Exclusion serves the obvious function of preventing these people from getting another chance to destroy democratic institutions. Those who have tried to do so once are disproportionately likely to

do so again, if given the opportunity. In addition, disqualification can serve as a deterrent. If ambitious officeholders know that involvement in insurrection leads to a lifetime bar from further access to public office, they may be less likely to take the risk of engaging in such activities.

Perhaps things are different in situations where these people have atoned for their past actions and credibly committed to changing their ways. But, even then, it's not clear whether such promises can be trusted. And Trump has shown no remorse and continues to claim his actions were entirely justified.[177]

It is, obviously, by no means certain that Trump or other insurrectionists would again try to subvert the democratic process if they return to positions of power, or even that they will be able to return to power at all. As I write these words in the late summer of 2024, Trump is again the GOP nominee for the presidency, but he might well lose the general election, which looks to be a close call. But even a relatively small risk of such recidivism is a grave danger. Even if the chance of such action is "only," say 10 or 20 percent, that is a severe risk, especially if we remember that even an unsuccessful attempt to seize power illegally can result in substantial loss of life and injuries, as the January 6 attack did. The danger is, of course, magnified when the office the insurrectionist holds is the most powerful in the land: the presidency. Such a grave danger clearly outweighs the risks of a "patchwork" of state decisions, especially since the latter can be mitigated by judicial review.[178]

In addition to protecting democracy from itself, disqualification can also serve other valuable purposes. Some limitations on democracy are necessary to protect other liberal values. This is the traditional justification for constitutional limits on democratic majorities' power, for purposes of protecting civil liberties and property rights, and preventing invidious state-sponsored discrimination on the basis of race, sex, and religion. In many cases, these dangers can be mitigated by enforcing constitutional rules after the fact, through

[177] *See, e.g.*, Karen Yourish & Charlie Smart, *Trump's Pattern of Sowing Election Doubt Intensifies in 2024*, N.Y. Times, (May 24, 2024), https://www.nytimes.com/interactive/2024/05/24/us/politics/trump-election-results-doubt.html (documenting numerous instances where Trump has continued to claim the 2020 election was rigged, and defended his efforts to overturn it).

[178] *See* discussion in § II.B, *supra*.

judicial review, and other institutions. But we cannot categorically exclude the possibility that sometimes liberal rights can be protected only by barring those who intend to violate them from coming to power in the first place.

The democracy and liberalism-protecting functions of Section 3 are not without risk. Some "insurrections" are morally justified, as when people resist enforcement of deeply unjust laws such as the Fugitive Slave Acts of the nineteenth century.[179] In addition, there could be "slippery slope" risks from partisan election officials seeking to use Section 3 to disqualify their political opponents. For example, Professor Michael McConnell warned that disqualifying Trump could "empower . . . partisan politicians such as state Secretaries of State to disqualify their political opponents from the ballot."[180]

Both problems are worth taking seriously. But the former danger is mitigated by the fact that, in a well-established democracy, insurrectionists are far more likely to be illiberal authoritarians than those seeking to defend liberal values. Thus, the risk of disqualifying a few "good" insurrectionists is outweighed by the benefit of disqualifying a larger number of evil ones. The slippery slope danger is constrained by requirements of due process and judicial review. If biased officials adopt overly broad definitions of "insurrection" or otherwise abuse the process, disqualified candidates can challenge such determinations and get them reversed in state or federal courts.[181] Indeed, the Trump disqualification litigation itself illustrates how this process could work. In each state where it was attempted, Trump was able to present evidence and arguments in court explaining why he should not be disqualified (with the exception of those where efforts to disqualify him were dismissed on procedural grounds).[182]

And such disqualifications can ultimately be reviewed by the federal Supreme Court, which can override rogue disqualifications by possibly biased state courts. If the Supreme Court had not

[179] *See* Somin, *Democracy Preservation*, *supra* note 150. *C.f.* Graber, *supra* note 12.

[180] Michael McConnell, *Responding About the Fourteenth Amendment, "Insurrection," and Trump*, Reason (Aug. 12, 2023), https://reason.com/volokh/2023/08/12/prof-michael-mcconnell-responding-about-the-fourteenth-amendment-insurrection-and-trump/.

[181] For more detailed discussion, see *id.*

[182] *See* cases cited in note 17, *supra*.

dismissed *Trump v. Anderson* on dubious self-execution grounds, it could have exercised that review function in this very case, and in the process it could have established a useful precedent for future disqualification cases.

V. The Impact of the Court's Decision

The most significant impact of the Court's decision is that it largely neuters Section 3, at least with respect to candidates seeking federal office. The sweeping nature of the Court's reasoning goes far beyond the specific case of Trump, or even presidential candidates more generally. It covers nearly all potential disqualifications of insurrectionists seeking federal office. Even if Trump himself never again holds public office, the Court's decision creates a risk that other dangerous former insurrectionists might. In principle, Congress could enact new Section 5 enforcement legislation. But in this era of severe polarization, that is unlikely to happen at any time in the near future, if ever.

Perhaps the one good aspect of the Court's ruling is that it eliminates most, if not all, remaining uncertainty about whether Trump can assume the presidency if he wins the 2024 election. By holding that Section 5 enforcement legislation is the sole mechanism by which federal officeholders can be disqualified, the decision likely forestalls such potential scenarios as a Democratic-controlled Congress refusing to certify Trump's election. In theory, Congress could enact new enforcement legislation between now and January 20, 2025 (when Trump would take office, should he win). But that is incredibly unlikely. After the new administration takes power on January 20, 2025, any new enforcement legislation that might threaten Trump (should he be elected) would be subject to his veto, and it is almost impossible that Congress would muster the two-thirds majorities in both houses needed to override it.

Some observers have suggested that the Court's ruling does not clearly bar Congress from refusing to certify Trump's electoral votes in the event he wins the 2024 general election.[183] But I believe such a conclusion is implicit in the Court's repeated emphasis on the idea

[183] *See* Scott Anderson et al., *Section 3 Disqualification Answers—and Many More Questions*, Lawfare (Mar. 4, 2024), https://www.lawfaremedia.org/article/section-3-disqualification-answers-and-many-more-questions (suggesting this possibility).

that Section 5 legislation is the exclusive enforcement mechanism.[184] Refusal to certify electoral votes is not Section 5 legislation, or indeed legislation at all.[185] The Court did suggest that Congress might have authority to consider the Section 3 eligibility of its own members.[186] But the President, of course, is not a member of Congress. Still, there may be some residual uncertainty on the certification issue, because the Court did not directly address it.

The price of relative certainty is that Section 3 is largely neutered with respect to federal officeholders. Unless and until Congress enacts new Section 5 enforcement legislation, former officeholders who engaged in insurrection will be mostly free to return to power and try their hand at subverting democracy again, at least if their goal is to seek federal offices as opposed to state ones.

The Court suggested that state governments could still disqualify insurrectionists from holding state office, though it stopped short of definitively indicating even that much.[187] That question may need to be further litigated in the future. On March 18, 2024, just two weeks after it decided *Trump v. Anderson*, the Supreme Court refused to hear the case of a New Mexico January 6 participant who had been disqualified from a state office by a state court.[188] Potentially, people who engaged in insurrection while holding federal office (or after

[184] *See* discussion in §II.A, *supra*.

[185] *See* INS v. Chadha, 462 U.S. 919, 952 (1983) (explaining that Article I requires "bicameralism and presentment" in order to enact legislation); *but cf.* Derek T. Muller, *Administering Presidential Elections and Counting Electoral Votes After* Trump v. Anderson, SSRN (Aug. 5, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4916797 (arguing Congress could still refuse to certify electoral votes for candidates it deems ineligible under Section 3, though also urging that it not do so in the absence of prior legislation enacting standards for determining eligibility); Gerard N. Magliocca, *The Potential for Chaos in the Wake of the Supreme Court's Colorado Ballot Decision*, Wash. Monthly (Mar. 13, 2024), https://washingtonmonthly.com/2024/03/13/the-potential-for-chaos-in-the-wake-of-the-supreme-courts-colorado-ballot-decision/ (arguing that there could be additional litigation in the event of such a scenario); Huq, *supra* note 45, at 38–41 (arguing there could be post-election conflict over Trump's eligibility).

[186] *See* Trump v. Anderson, 601 U.S. at 114.

[187] Trump v. Anderson, 601 U.S. at 109–14 (emphasizing the distinction between federal and state offices).

[188] *See* Griffin v. New Mexico *ex rel.* White, 144 S. Ct. 1056 (2024) (denying petition for certiorari); *see also* Mariana Alfaro, *Supreme Court Rejects Appeal by New Mexico Official Ousted from Office over Jan. 6*, Wash. Post (Mar. 18, 2024), athttps://www.washingtonpost.com/politics/2024/03/18/griffin-supreme-court-insurrection-clause/ (describing the case).

doing so) might still be disqualified from holding or seeking state office by state courts or state election officials. The Court's reasoning focuses on the office that insurrectionists currently hold or seek at the time disqualification is sought, rather than the one they held while engaged in insurrection.

Some insurrectionist federal officeholders or candidates for federal office might be potentially convicted under 18 U.S.C. § 2383, the federal insurrection statute, which the Court's opinion describes as enforcement legislation under Section 5.[189] But such convictions may be difficult to obtain, especially in the case of those who promoted and aided insurrection indirectly, as Trump did.

Perhaps political norms will prevent insurrectionists from being elected to powerful offices in the future. But if norms were that effective, Trump probably would never have been elected to office in the first place, and he certainly would not once more be a major-party nominee for the presidency, despite his attempt to use force and fraud to stay in power after losing the 2020 election. As in the period after the Civil War, which gave rise to the enactment of Section 3, norms today are far from a fool-proof protection against former insurrectionists returning to power.

Conclusion

Section 3 is intended to protect liberal democracy against allowing insurrectionists to return to power in situations where norms fail. It is one of a number of constitutional safeguards intended to protect democracy and liberal values against catastrophically bad choices by voters. In *Trump v. Anderson*, the Supreme Court largely gutted that protection on the basis of highly dubious reasoning at odds with text and original meaning. The Court's reasoning is also defective on consequentialist grounds; the Justices overvalued the dangers of a "patchwork" of state decisions, and underestimated the danger of letting authoritarian insurrectionists return to power. We can only hope the Court's error does not turn out to have grave costs for American democracy.

[189] *See* Trump v. Anderson, 601 U.S. at 115.