

# [***Opinion: Why the Supreme Court is playing politics on Trump***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6B91-6XV1-JBSS-S00M-00000-00&context=1516831)

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**Body**

(CNN) &#8212; Thursday's [*oral arguments at the Supreme Court*](https://www.cnn.com/2024/02/08/politics/takeaways-supreme-court-trump-ballot/index.html) were ostensibly about the meaning of a long-dormant section of the US Constitution's 14th Amendment, which disqualifies from future federal office those who've engaged in insurrection after swearing an oath to the Constitution. But the justices spent remarkably little time actually analyzing that provision's text, which had figured prominently in the Colorado Supreme Court's December ruling that former [*President Donald Trump couldn't appear*](https://www.cnn.com/2023/12/19/politics/trump-colorado-supreme-court-14th-amendment/index.html) on that state's 2024 ballot.

Instead, the two-hour-plus session focused on repeated efforts by the justices to identify reasons why they don't have to decide whether Trump engaged in an"insurrection" in his actions before and on January 6, 2021 - not because the Constitution says they can't or shouldn't decide it, but because they repeatedly worried about what it would mean if individual states were able to do so.

What's especially remarkable about this line of questioning is how transparently political it is - not from the perspective of partisan ***politics***, but rather the high ***politics*** of institutional relationships. In essence, the question the justices kept coming back to was, if [*Section 3 of the 14th Amendment*](https://constitution.congress.gov/browse/amendment-14/section-3/) disqualifies those who engage in "insurrection" from future federal office, which institution in our system is best situated to decide whether a specific person meets that threshold? Although the justices may not all agree on what the right answer is, there seemed to be at least seven votes, and perhaps as many as all nine, for the proposition that the Colorado Supreme Court isn't it - not because of anything the Constitution says, but because of the consequences that would follow if it were.

From a historical perspective, it's not remotely surprising to think the justices might structure their decision on the insurrection case around these kinds of institutional considerations. From its celebrated ruling in [*Marbury v. Madison in 1803*](https://guides.loc.gov/marbury-v-madison#:~:text=The%20U.S.%20Supreme%20Court%20case,by%20Chief%20Justice%20John%20Marshall.) (in which the court established its power to strike down federal laws in a ruling that President Thomas Jefferson couldn't ignore even if had wanted to) to [*some of its most significant*](https://tile.loc.gov/storage-services/service/ll/usrep/usrep074/usrep074506/usrep074506.pdf) (if less-well-known) rulings after the Civil War, to the desegregation cases in the 1950s and 1960s, to the Watergate tapes case in 1974, the Supreme Court has regularly approached its job at least partly from the perspective of how best to preserve the legitimacy of the court both in the eyes of the public and in the eyes of the other branches it checks and balances. Yes, it was also resolving legal disputes - but with an eye toward the broader institutional, and political, implications of its actions.

Constitutional text may or may not have been invoked in these cases, but it was seldom dispositive - such as in 1974, when the court read into [*Article II of the Constitution*](https://www.law.cornell.edu/constitution/articleii) an executive privilege nowhere mentioned, but then explained why [*President Richard Nixon couldn't use that privilege*](https://constitutioncenter.org/blog/anniversary-of-united-states-v-nixon) to resist a subpoena for the Watergate tapes.

As in that case, the court regularly forged compromises - ones that allowed it to rule with one voice in cases in which unanimity would speak louder than the words the court actually uttered; ones that allowed it to publish decisions, as in Brown v. Board of Education, which struck down "[*separate but equal*](https://www.britannica.com/event/Brown-v-Board-of-Education-of-Topeka)" public schools for children of different races, that were deliberately intended to be accessible to non-lawyers; ones that kept the court in high esteem not only because it was necessarily right, but because the perception was that it was acting responsibility.

The irony of today's argument is how much this mentality had become a bete noire among conservatives - who have blamed it for many of the earlier court's perceived sins in cases recognizing a right to privacy, a right to abortion and so on. Indeed, one of the central defenses of the move toward "originalism" (trying to divine the original public meaning of the Constitution's text) as the dominant methodology for interpreting the Constitution has been that it cuts political and institutional legitimacy considerations out of the analysis.

To that way of thinking, all that matters is the "correct" legal understanding of the printed text, no matter what effects that answer might produce. The justices must decide what those who drafted the Constitution meant when they used words like "commerce" or "cruel and unusual" or "unreasonable searches and seizures," and the answer must always dictate the ruling of the courts. Otherwise, the argument goes, they're not acting as courts.

If nothing else, Thursday's argument proved how incomplete (if not fundamentally inaccurate) that approach to the Supreme Court's role is and always has been. The Supreme Court is one institution in a federal system with plenty of others. Its power comes from those other institutions - and from the public.

Our acceptance of its decisions, in turn, depends at least in part on public faith that the court is managing those relationships responsibly - faith that comes in part from the justices' fidelity to the Constitution's text, but just as much from their appreciation of and accommodation for the consequences of their decisions. All of that includes how the Supreme Court answers discrete legal questions, but it isn't limited to that enterprise.

***Politics*** are an inevitable part of what the Supreme Court does; the problem is the justices' own refusal to admit as much - which is why arguments like the one on Thursday are such fascinating counterexamples.

Ultimately, it seems likely that the court is going to keep Trump on the ballot this November by reversing the Colorado ruling as an overreach of state power without taking a position, one way or the other, on whether his conduct ought to disqualify him from holding any federal office going forward. But the same court may also soon clear the way for the [*criminal prosecution of Trump*](https://www.cnn.com/2024/02/07/opinions/supreme-court-dont-let-trump-delay-douglas/index.html) for his role in the events of January 6 to go forward if it denies him a stay of the criminal trial he faces in Washington, DC. (Trump denies all wrongdoing.)

Indeed, we may get both of those rulings within days of each other - with the Supreme Court clearing the way for people to vote for Trump come November with one hand, while potentially exposing reasons why they shouldn't with the other. That may strike many as a kind of Solomonic compromise - something that might seem out of kilter with our partisan political preferences, but that might be better institutional ***politics*** in the long run. If nothing else, it will remind everyone, perhaps including the justices themselves, that ***politics*** and principle are not mutually irreconcilable, even (if not especially) in thedecisions of the US Supreme Court.

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