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THE TRUMP DISQUALIFICATION CASE: THE HALLEY'S COMET OF CONSTITUTIONAL LAW

Section Three of the Fourteenth Amendment bars officials who "engaged in" an "insurrection" after taking an oath to support the Constitution of the United States from holding public office. Enacted immediately after the end of the Civil War, Section Three was designed to prevent the leadership class of the Confederate states from reassuming power after those states were readmitted to the Union, but its language was not limited to that historical context. It reads, in full:

> 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

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> enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[1]

The disqualification provision was sporadically enforced for about two years, after which Congress in 1872, by a two-thirds vote, passed an "Amnesty Act" lifting the disqualification for most violators.[2] No less a figure than Confederate Vice President Alexander Stephens was admitted to a seat in the House of Representatives in 1873, to the acclaim of his fellow Democrats.[3]

Prior to 2023, few Americans were aware of Section Three and almost no one—including constitutional law scholars—had given any serious thought to the possibility it could have modern application.[4] It was barely mentioned in the leading constitutional law casebooks.[5] The Biden Administration did not bring the case that would have made it relevant to the 2024 election. (That is, it did not charge former President Donald J. Trump with the crime of engaging in insurrection.) Then Section Three suddenly was discovered by two distinguished originalist scholars.[6] It blazed across the skies of courts and headlines, and it went to the Supreme Court, where two other important scholars declared it "perhaps one of the most important cases in American history."[7] Then it disappeared from public attention as rapidly as it had appeared. Section Three was the Halley's Comet of constitutional law.

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[1] U.S. Const. amend. XIV, § 3.

[2] Act of May 22, 1872, ch. 193, 17 Stat. 142.

[3] 2 James G. Blaine, Twenty Years of Congress: From Lincoln to Garfield 546–47 (Norwich, Henry Bill Publ'g Co. 1886).

[4] The only full-length constitutional analyses of the issue before 2023 were Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153 (2021); and Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87 (2021). This Author covered the topic for half a day in his Stanford Law School course entitled *Reconstruction: Adding the Thirteenth, Fourteenth, and Fifteenth Amendments* (Winter 2021 & Spring 2023).

[5] Two casebooks contained brief discussions of Section Three, including the possibility of application to former President Trump, in their post-2020 editions. Michael Stokes Paulsen, Michael W. McConnell, Samuel L. Bray & William Baude, The Constitution of the United States 1380–81 (5th ed. 2023); Sanford Levinson, Jack M. Balkin, Akhil Reed Amar, Reva B. Siegel & Cristina Rodríguez, Processes of Constitutional Decisionmaking: Cases and Materials 366–67 (8th ed. 2022).

[6] William Baude of the University of Chicago Law School and Michael Stokes Paulsen of the University of St. Thomas School of Law. Both are close personal friends of the Author of this Article. *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. 605 (2024).

[7] Brief of Akhil Reed Amar and Vikram David Amar as Amici Curiae in Support of Neither Party at 1, Trump v. Anderson, 144 S. Ct. 662 (2024) (No. 23-719).

Superstition held that Halley's Comet portended the defeat and destruction of a prominent leader, as happened to Harold Godwinson at the Battle of Hastings a few months after the comet appeared over England in 1066. Fingers were crossed for a repeat from 2023 to 2024, with former President Trump stepping in for the role of Harold. Supporters of Mr. Trump had forcibly entered the Capitol on January 6, 2021, threatened violence against Vice President Mike Pence and others, and delayed the counting of the electoral votes for more than five hours, spurred on by Mr. Trump's false claims that the election had been stolen.[8] Mr. Trump was not physically present at the Capitol incursion, but he had egged on the rioters at a rally nearby, with perfunctory admonitions to remain peaceful. Could it be said that the three-hour lawless disruption of congressional proceedings was an "insurrection" and that Mr. Trump "engaged in" it? If so, Mr. Trump's detractors thought, he could be stricken from the ballot and the danger of a second Trump presidency eliminated without need for consulting the voters.

Despite the novelty of the argument, many influential people were convinced that indeed Mr. Trump was ineligible to be on the ballot. A 4-3 majority of the all-Democrat-appointed Colorado Supreme Court held that Section Three disqualified Mr. Trump from the ballot.[9] The Secretary of State of Maine, also a Democrat, did the same.[10] The case hurtled toward the Supreme Court with remarkable speed. The Colorado Supreme Court issued its decision on December 19, 2023. Mr. Trump's lawyers petitioned for certiorari on January 3, and the Court granted the petition two days later. Oral argument was held

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[8] Melissa Quinn et al., *Pence Announces Biden's Victory After Congress Completes Electoral Count*, CBS News (Jan. 7, 2021, 7:05 AM EST), https://www.cbsnews.com/live-updates/electoral-college-vote-count-biden-victory.

[9] Anderson v. Griswold, 543 P.3d 283 (Colo. 2023). Interestingly, the split on the Colorado Supreme Court was not based on political party. All were appointed by Democratic governors. Nicholas Riccardi, *Colorado Supreme Court Declares Donald Trump Is Ineligible for the White House*, Associated Press (Dec. 19, 2023, 9:56 PM ET), https://apnews.com/article/trump-insurrection-14th-amendment-2024-colorado-d16dd8f354eeaf450558378c65fd79a2. The Justices who had gone to elite out-of-state law schools voted to disqualify Mr. Trump. The dissenters were those who went to law school in-state. Kaelan Deese, *Justices Who Removed Trump from Colorado Ballot Attended Ivy League Law Schools*, Wash. Exam'r (Dec. 20, 2023, 5:38 PM), https://www.washingtonexaminer.com/news/2644116/justices-who-removed-trump-from-colorado-ballot-attended-ivy-league-law-schools.

[10] Jordan Freiman, Katrina Kaufman & Grace Kazarian, *Maine Secretary of State Disqualifies Trump from Primary Ballot*, CBS News (Dec. 29, 2023, 3:32 PM EST), https://www.cbsnews.com/news/trump-maine-primary-ballot-disqualified-secretary-of-state-shenna-bellows.

on February 8, and the decision came down less than a month later, on March 4—not coincidentally the day before the Colorado primary.

Once in the Supreme Court, the case for disqualifying the alleged insurrectionist had lost its dazzle. Not a single Justice—whether appointed by Republican or by Democratic Presidents—accepted the argument that Section Three kept the former President off the ballot. In an unsigned per curiam opinion joined by five Justices, accompanied by a concurrence by Justice Barrett and another concurrence by Justices Sotomayor, Kagan, and Jackson, the Court reversed the Colorado Supreme Court and held that states have no authority to enforce Section Three with respect to presidential candidates without empowerment by Congress, which has not been granted.[11] As a practical matter, because states control presidential electoral machinery, that rendered the effort to bar Mr. Trump from running for President defunct. Section Three then disappeared from the news as rapidly as it had appeared.[12] The idea that Mr. Trump is constitutionally disqualified dropped even from his opponents' campaign oratory. Like Halley's Comet, having streaked across the sky, the theory disappeared from sight and mind, leaving no trace on American politics.

That does not deprive the case of interest for students of constitutional law—not least as a case study in how the nine Justices of the Supreme Court respond when they are forced to decide a case of intense political consequence, with nothing but enigmatic text and no precedent to guide them. The case poses a host of unanswered or poorly answered questions in an intriguing corner of constitutional law. Again there is a similarity to the eponymous Comet in the centuries before Halley's scientific work: The immediate effect of the decision is clear for all to see, but its origins, its explanation, and its future are mostly a mystery.

I. Unanimity, Almost

Given the political stakes and the Court's well-known partisan divisions, it came as a surprise that the Justices decided the case unanimously. Six of the nine Justices were appointed by Republican Presidents, three of them by Mr. Trump himself, and three by Democrats.

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[11] Trump v. Anderson, 144 S. Ct. 662, 671 (2024) (per curiam).

[12] The decision came down March 4, 2024. With the exception of end-of-Term retrospectives, no major newspaper mentioned Section Three again after March 7, 2024.

Yet all nine agreed that neither Colorado nor any other state could keep Mr. Trump off the ballot, even assuming he had "engaged in" an "insurrection" within the meaning of the Constitution—a contentious question that the Court, unsurprisingly, preferred to avoid. The reason for this unanimous outcome was almost certainly pragmatic rather than textual or historical. As Justices Sotomayor, Kagan, and Jackson stated in concurrence, "Allowing Colorado to [keep a presidential candidate off the ballot on the ground that he is an oathbreaking insurrectionist] would, we agree, create a chaotic state-by-state patchwork, at odds with our Nation's federalism principles."[13] The simple and unanimous holding of the case was that States have no role in enforcing Section Three with respect to the presidency.

Whether such a "patchwork" would in fact be at odds with "our Nation's federalism principles" will be discussed below; the answer is not obvious. It is more likely that pragmatics drove the decision. It must have weighed on the Justices' minds that throwing the leading presidential candidate of a major party off the ballot would cause a public uproar, especially when the rationale for doing so—that Mr. Trump "engaged in" an "insurrection"—is more a partisan Rorschach test than an objective determination. The Justices were not willing to deprive tens of millions of people of their right to vote for the candidate of their choice for anything less than clear and reasonably indisputable reasons; much less on the basis of a Delphic piece of text that had never been raised in connection with any presidential election or previously interpreted by the Court. Of course, that is not what the per curiam opinion actually said, but it was hard not to read that message between the lines.

For the Court to achieve unanimity in a case like *Trump v. Anderson*[14]—a case so riven by partisan animosity—was a considerable achievement. Public confidence in the integrity of the electoral process matters a great deal, and if all nine Justices, despite their different partisan appointments and presumed leanings, come to the same conclusion, this would demonstrate to the public that the result was not based on their political precommitments. Unanimity here would send the same signal as unanimity did in *Brown v. Board*[15] or *United*

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[13] *Anderson*, 144 S. Ct. at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

[14] *Id.* at 664 (per curiam).

[15] 347 U.S. 483 (1954).

States v. Nixon[16]—but was so grievously lacking in *Bush v. Gore*.[17] That these nine Justices (almost) did so in this wrenching case deserves more commendation than they received.

But the Justices squandered the benefits of unanimity by venturing into issues not before them. Despite being unanimous on the only thing that mattered to the case, the Court produced one of the most acrimonious minority opinions in history. Not only did three concurring Justices accuse the five-Justice per curiam of unnecessarily "decid[ing] novel constitutional questions"—an accusation that seems undeniably true—but they attributed to the majority base partisan motives. The five Justices in the majority took this unnecessary step, according to the three who joined this concurrence, for the purpose of "insulat[ing] this Court and petitioner [Mr. Trump] from future controversy."[18] More pointedly, they claimed that "[t]oday, the majority goes beyond the necessities of this case to limit how Section 3 can bar an oathbreaking insurrectionist from becoming President."[19] Needless to say, it was this split and this accusation that dominated news coverage of the decision.[20]

Justice Barrett, sounding every bit like a frustrated teacher trying to calm a class of squabbling children, chided the majority for "address[ing] the complicated question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced," when it was "sufficient to resolve this case" to hold that "States lack the power to enforce Section 3 against Presidential candidates."[21] She likewise chided the other concurring Justices for raising such a fuss: "In my judgment, this is not the time to amplify disagreement with stridency. The Court

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[16] 418 U.S. 683 (1974).

[17] 531 U.S. 98 (2000).

[18] *Anderson*, 144 S. Ct. at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

[19] *Id.* at 674. In this sentence, the concurring Justices drop qualifying language like "alleged," and seem to presuppose that Mr. Trump actually *is* an "oathbreaking insurrectionist." *Id.*

[20] *See, e.g.*, Amy Howe, *Supreme Court Rules States Cannot Remove Trump from Ballot for Insurrection*, SCOTUSblog (Mar. 4, 2024, 12:09 PM), https://www.scotusblog.com/2024/03/supreme-court-rules-states-cannot-remove-trump-from-ballot-for-insurrection; Aaron Blake, *A Conspicuous Line on Trump from the Supreme Court's Left Flank*, Wash. Post (Mar. 5, 2024, 2:39 PM EST), https://www.washingtonpost.com/politics/2024/03/05/conspicuous-line-trump-supreme-courts-left-flank; Adam Liptak, *Trump Prevails in Supreme Court Challenge to His Eligibility*, N.Y. Times (Mar. 5, 2024), https://www.nytimes.com/live/2024/03/04/us/trump-supreme-court-colorado-ballot.

[21] *Anderson*, 144 S. Ct. at 671 (Barrett, J., concurring in part and concurring in the judgment).

has settled a politically charged issue in the volatile season of a Presidential election. Particularly in this circumstance, writings on the Court should turn the national temperature down, not up."[22] None of the other Justices joined her opinion.

II. What Exactly is the Holding of the Per Curiam Opinion?

For all the *sturm und drang*, it is not clear what exactly the per curiam Justices achieved in the non-unanimous parts of the opinion. Justice Barrett says that the per curiam opinion "address[ed] the complicated question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced."[23] The other concurring Justices assert that the per curiam opinion "announces that a disqualification for insurrection can occur only when Congress enacts a particular kind of legislation pursuant to Section 5 of the Fourteenth Amendment."[24] "In doing so," they continue, "the majority shuts the door on other potential means of federal enforcement."[25] But those words do not appear in the per curiam opinion. At no point does the majority plainly state that Section Three can be enforced only by means of Section Five legislation. To be sure, the per curiam opinion contains language that strongly *hints* at that conclusion. It states that "[t]he Constitution empowers Congress to prescribe how those determinations should be made. *The* relevant provision is Section 5, which enables Congress, subject of course to judicial review, to pass 'appropriate legislation' to 'enforce' the Fourteenth Amendment."[26] The direct article "the" might be taken to suggest that Section Five is the *only* relevant provision. The per curiam opinion added that "Congress's Section 5 power is critical when it comes to Section 3."[27]

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[22] *Id.*

[23] *Id.*

[24] *Id.* at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment); *see also id.* at 674 (referring to the majority's "requirement that a Section 3 disqualification can occur only pursuant to legislation enacted for that purpose," which will "foreclose future efforts to disqualify a Presidential candidate under that provision").

[25] *Id.* at 672.

[26] *Id.* at 667 (per curiam) (emphasis added). It also states: "The terms of the Amendment speak only to enforcement by Congress, which enjoys power to enforce the Amendment through legislation pursuant to Section 5." *Id.* at 668. This sentence, which is literally true, does not explicitly deny that parts of the Constitution other than the Fourteenth Amendment itself might have relevance.

[27] *Id.* at 667.

What does "critical" mean? Does it mean "exclusive"?[28] To state that Section Five is "the" relevant provision and that it is "critical" to enforcement of Section Three does not—quite—say that Section Three cannot be enforced in any other way. Finally, the per curiam observes that the judicial gloss on Section Five announced in *City of Boerne v. Flores*[29]—that Section Five legislation limiting state power must "reflect 'congruence and proportionality' between preventing or remedying that conduct 'and the means adopted to that end'"[30]—"limits *congressional* legislation enforcing Section 3."[31] Surely the Court did not mean to suggest that the *Boerne* gloss applies to congressional powers outside Section Five, or to state power. What, then, was the point of referring to "congruence and proportionality"?[32]

It is usually a mistake for dissenters to make the majority out to be worse (from their point of view) than it actually is, because this can be a self-fulfilling prophecy. At one point, Justices Sotomayor, Kagan, and Jackson describe the Court's dicta as "musings" that are "as inadequately supported as they are gratuitous."[33] But elsewhere, they say that the majority Justices "decide" novel constitutional questions and that the per curiam "shuts the door on other potential means of enforcement."[34] Which is it? Musings? Decisions? Shutdowns? There are a number of reasons, canvassed below, to doubt that the majority meant to hold that Section Five is the exclusive vehicle for enforcement of Section Three. Why would the concurring Justices leap to that

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[28] This is reminiscent of the Court's famous statement in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that "it is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. Does the adverb "emphatically" mean that no other department has such a power? Presumably not.

[29] 521 U.S. 507, 536 (1997).

[30] *Anderson*, 144 S. Ct. at 670 (quoting *Boerne*, 521 U.S. at 520).

[31] *Id.*

[32] The discussion of congruence and proportionality might seem to suggest that Section Five legislation enforcing Section Three must not extend farther than the strict terms of Section Three. But that is not the meaning of "congruence and proportionality" in *Boerne*. Congress is permitted to go beyond the strict terms of Section One (as interpreted by the Court) when this is appropriate as a means of enforcing the core. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966). *See generally* Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153 (1997). Moreover, the per curiam cites Section 2383 approvingly as "*congressional* legislation enforcing Section 3" even though that criminal statute extends more broadly than the strict terms of Section Three. *Anderson*, 144 S. Ct. at 670. Among other things, Section 2383 extends to incitement and to giving "aid or comfort," as well as actual engagement in the insurrection. 18 U.S.C. § 2383.

[33] *Anderson*, 144 S. Ct. at 673 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

[34] *Id.* at 672.

construction, rather than saying that the Court had left open the difficult question of how to enforce Section Three at the federal level?

Here is a theory: Perhaps an earlier draft of the per curiam opinion *did* hold that Section Three could be enforced only by means of Section Five legislation. Perhaps the concurring Justices, who had voted to produce a unanimous decision, protested. Perhaps the authors of the per curiam opinion realized that such a holding would be an overstep, and amended the opinion draft to eliminate the objectionable parts, but failed to scrub the draft of language that might be susceptible to the prior interpretation. Here is the kicker: Perhaps the Justices ran out of time to work things out. For obvious reasons, the Court must have felt the need to issue the opinion before the Colorado primary, so that the voters of Colorado would know for sure whether votes for Mr. Trump would count. Under this speculative narrative of what might have happened, the majority removed any clear holding about the need for Section Five legislation, but did not have time to scrub the opinion for the remaining suggestive language; this was enough to goad the concurring Justices into their acrimonious separate opinion, and Justice Barrett into her frustrated rebuke of both sides. Or maybe it was the concurring Justices who did not have time to revise their work in light of the changes in the majority. In other words, the rush to issue an opinion before the Colorado primary prevented the Justices from coming together on a single unanimous text. That robbed the nation of what would have been a reassuringly unanimous and nonpartisan decision.

Why is it unlikely that the majority held that Section Five is the exclusive vehicle for enforcement of Section Three? Let us count the ways.

First, the Court unambiguously acknowledged that states have authority to enforce Section Three with respect to state candidates and officeholders. Of course that makes sense; "the States enjoy sovereign 'power to prescribe the qualifications of their own officers'" and "nothing in [the Fourteenth Amendment] plainly withdraws from the States this traditional authority."[35] This shows that, although Section Five empowers Congress to enforce the Amendment, there are other possible sources of enforcement authority, which are not erased by the existence of Section Five. Below, I will address whether Article II, Section One, Clause Two, which empowers state legislatures to set the

[35] *Id.* at 667 (per curiam) (quoting Taylor v. Beckham, 178 U.S. 548, 570–71 (1900)).

rules for selecting presidential electors, similarly empowers state enforcement of Section Three, notwithstanding Section Five.

Second, the Court recognized the persuasive force of historical practice during the period Section Three was enforced as evidence of its meaning.[36] The most conspicuous instances of enforcement of Section Three with respect to federal officeholders involved members of Congress. Article I designates each House of Congress as "the Judge of the . . . Qualifications of its own Members."[37] After the elections of 1870, both the House and the Senate decided challenges to the qualifications of men elected by Southern states to Congress on the ground that they had engaged in the Confederate insurrection after having taken an oath to support the Constitution of the United States. In some cases, the challenged individuals were seated and in other cases they were disqualified.[38] The jurisdiction of the two Houses to make these determinations was unchallenged—even though no Section Five legislation authorized the proceedings. This is proof positive that the Framers of the Fourteenth Amendment did not think that Section Five was the exclusive vehicle for enforcement of Section Three against federal officeholders.

Third, the per curiam opinion noted that the Confiscation Act of 1862 "effectively provided an additional procedure for enforcing disqualification" and went on to say that a "successor" to this legislation "remains on the books today. See 18 U.S.C. § 2383."[39] Section 2383, a criminal statute, provides that "[w]hoever incites, sets on foot, assists, or 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."[40] It would seem, by its terms, to be a straightforward way to enforce Section Three against an insurrectionist who may seek to hold a federal position, and the per curiam opinion seems to bless that reading. But as the per curiam opinion also notes, the Confiscation Act was not enacted pursuant to Section Five; indeed, it predated the

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[36] *Id.* at 669–70.

[37] U.S. Const. art. I, § 5, cl. 1.

[38] *See infra* notes 82–89 and accompanying text.

[39] *Anderson*, 144 S. Ct. at 670.

[40] 18 U.S.C. § 2383.

Fourteenth Amendment by seven years.[41] If Section 2383 "effectively provided an additional procedure for enforcing disqualification" then it cannot be true that Section Five is the exclusive vehicle for enforcing disqualification.

Supreme Court opinions must be read to mean what they say. But they should not be read to mean more than they say, when that extra-textual meaning is in tension with other propositions in the opinion, and with the underlying evidence. Accordingly, *Trump v. Anderson* should be read to bar states from enforcing Section Three with respect to the presidency, and perhaps with respect to all federal offices, but it should not be read to make Section Five of the Fourteenth Amendment the exclusive vehicle for enforcement at the federal level—even though it was interpreted that way by the concurring Justices.

III. The Ratonale Not Offered: That Section Three Does Not Apply to Running for Office

Before turning to the basis for the Court's holding that states lack power to enforce Section Three for the presidency, we should note the existence of a straightforward, plain-language position that would have disposed of the Colorado case without need for any broader holding of constitutional law: that Section Three by its own terms does not address who can run for office. It addresses only who can "hold" office. The relevant language is: "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 . . . ."[42] The verbs are to "be" and to "hold."

That Section Three was not worded to apply to running for office should not be surprising. During this time, decades before adoption of the Australian ballot in the United States, states did not prepare a ballot for elections. Private entities—the political parties—printed and distributed ballots to the voters, and the voters were free to vote for whomever they wished.[43] It would not have occurred to the

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[41] *Anderson*, 144 S. Ct. at 670.

[42] U.S. Const. amend. XIV, § 3 (emphases added).

[43] *See, e.g.*, Richard Franklin Bensel, The American Ballot Box in the Mid-Nineteenth Century 30 (2004); Erik J. Engstrom & Jason M. Roberts, The Politics of Ballot Design: How States Shape American Democracy 38–43 (2020).

Framers to word the Amendment to exclude insurrectionists from the ballot when there were no official ballots.

Historical experience supports this plain-language interpretation. The Enforcement Act of 1870 established a mechanism for removing oath-breaking insurrectionists from their offices, but it did not apply to mere candidates or to ballot access. Similarly, the Article I power of each House of Congress to judge the qualifications of its members kicks in only when those individuals seek to assume their positions in Congress, which is to say, after the election has taken place. So far as the historical evidence reveals (and our knowledge could be incomplete[44]), authorities enforcing Section Three at the state level did so when malefactors attempted to hold office, not when they ran for office.

Trump v. Anderson did not involve anyone attempting to "hold" an office, but rather exclusion of a candidate from the primary ballot. The Colorado proceeding was not, therefore, a direct enforcement of Section Three. Rather, it arose on the theory that either the Secretary of State or the state courts had legal authority to exclude from the ballot any candidate who would not be eligible to serve if elected.

The Colorado legislature has enacted an Election Code, which applies to presidential elections under the legislature's Article II authority to determine the "manner of choosing Electors." Under that law, candidates for office are required to attest that they "desire[] the office and [are] qualified to perform its duties if elected."[45] Mr. Trump filed the necessary attestation. The Election Code does not permit or require the Secretary of State to question the veracity of the candidate's attestation. As the Colorado Supreme Court put it:

> [I]f the contents of a signed and notarized statement of intent appear facially complete . . . the Secretary has no duty to further investigate the accuracy or validity of the information the prospective candidate has supplied. . . . To that extent, we agree with President Trump that the Secretary has no duty to determine, beyond what is apparent on the face of the required documents, whether a presidential candidate is qualified.[46]

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[44] Evidence about actual enforcement in the Southern states is murky. *See* Magliocca, *supra* note 4, at 110.

[45] Colo. Rev. Stat. § 1-4-1101(1) (2017); *see* Anderson v. Griswold, 543 P.3d 283, 306–07 (Colo. 2023).

[46] *Anderson*, 543 P.3d at 306.

Hassan v. Colorado,[47] the oft-cited Tenth Circuit decision written by then-Circuit Judge Gorsuch, is not to the contrary. In that case, the presidential candidate, who was not a native-born citizen, did not attest that he was eligible for the office and was excluded from the ballot for that reason.[48]

The Colorado Supreme Court nevertheless held that, even though the Secretary of State had no state law duty to exclude Mr. Trump from the ballot, it was "wrongful" for her not to do so, on the *federal constitutional ground* that "President Trump is disqualified from holding the office of President under Section Three; because he is disqualified, it would be a wrongful act under the Election Code for the Secretary to list him as a candidate on the presidential primary ballot."[49] In other words, it is Section Three that compels the exclusion, not any state law enforcing Section Three. But as we have noted, Section Three does not address running for office, but only "holding" office. Whether or not Section Three *permits* states to exclude supposed insurrectionists from the ballot, it plainly does not take legal effect, by its own terms, until they attempt to hold the office. The claim that it was "wrongful" under Section Three for the Colorado Secretary of State not to exclude Mr. Trump from the ballot was therefore a clear error of federal constitutional law.

This would have been a narrow and textually grounded basis for the decision in *Anderson*. To be sure, this narrow holding would not have spoken to the state legislature's *power* to enforce Section Three at the ballot stage, but that question was not genuinely raised by the Colorado law as it exists.

Apart from this issue, there was a related technical complication also not mentioned in any of the opinions. Mr. Trump was not running in Colorado for President of the United States; he was running for the Republican nomination. The authority of states to limit the associational freedom of political parties to choose their candidates is disputed.[50] This is a problem not just of state law but of federal First

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[47] 495 F. App'x 947 (10th Cir. 2012).

[48] *Id.* at 948.

[49] *Anderson*, 543 P.3d at 297.

[50] *See* Cousins v. Wigoda, 419 U.S. 477, 489–90 (1975); Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 108, 121–26 (1981); Derek T. Muller, *Administering Presidential Elections and Counting Electoral Votes After* Trump v. Anderson, 60 Wake Forest L. Rev. (forthcoming 2025) (manuscript at 14–15 & n.43), https://ssrn.com/abstract=4916797.

Amendment law. No matter what the Colorado courts might have said, the Republican Party was entitled to nominate whomever it wished, and nothing would have required the Party to recognize delegate votes from Colorado if Colorado had kept a live candidate from the ballot. Thus, even if the primary-stage litigation had gone against Mr. Trump, it arguably would have had no practical effect.

And there is a further twist. Technically, candidates do not run for President in popular elections. Electors run, and they are the ones who actually elect the President. Section Three explicitly disqualifies oath-breaking insurrectionists from performing the office of elector. Should it be interpreted to disqualify candidates for elector on the ground that they plan to vote for an oath-breaking insurrectionist? That would seem to be the necessary implication of the view that Mr. Trump could be excluded at the election stage.

The Court did not mention any of these technical arguments. Perhaps that was a further product of the rushed character of the proceedings.

IV. What is the Reasoning Behind the Narrow, Unanimous Holding?

The Court unanimously held that states lack power to enforce Section Three against candidates for President. But why? The majority and the concurrences were in agreement about the reason as well as the result: States lack power to enforce Section Three against presidential candidates because this would create a "patchwork" at odds with basic federalism principles. Justices Sotomayor, Kagan, and Jackson put it this way: "Allowing Colorado to do so would, we agree, create a chaotic state-by-state patchwork, at odds with our Nation's federalism principles. That is enough to resolve this case."[51] The per curiam opinion elaborated the point at greater length, noting all the various ways different states might interpret differently the commands of Section Three. "The result could well be that a single candidate would be declared ineligible in some States, but not others, based on the same conduct (and perhaps even the same factual record). The 'patchwork' that would likely result from state enforcement would 'sever the direct link that the Framers found so critical between the National

[51] Trump v. Anderson, 144 S. Ct. 662, 672 (2024) (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

Government and the people of the United States' as a whole . . . Nothing in the Constitution requires that we endure such chaos. . . ."[52]

No doubt that struck many people—maybe most people—as sensible. But is it an accurate account of the federalism principles of the Constitution? The Constitution explicitly and unambiguously provides for different rules for presidential elections in different states. Article II, Section One, Clause Two provides that each state will appoint electors "in such Manner as the Legislature thereof may direct."[53] There is no requirement that rules for presidential elections be uniform. Indeed, for many decades not all states had popular elections at all. Some had popular elections but some allowed the state legislatures to choose the electors, and thus to displace popular election. Today, some states award electoral votes on a winner-take-all basis, and some do it district-by-district.[54] Ballot access requirements vary from state to state (with some constraint arising from the First Amendment[55]), with the "result . . . that a single candidate [is] declared ineligible in some States, but not others"—the very outcome the Court found intolerable in the context of Section Three.[56] In 2024, the year of *Trump v Anderson*, Robert F. Kennedy, Jr. was on the ballot in some states and off the ballot in others (until he withdrew from the race); the same was true of Green Party candidate Jill Stein and Independent candidate Cornel West.[57] Whether a third-party candidate is on the ballot can profoundly affect the outcome of the election—not just for one state but for the country. This is truly a patchwork. But we cannot say the patchwork is at odds with "our Nation's federalism principles."[58] The "state-by-state resolution"[59] of how to select electors is one element of our federalism principles.

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[52] *Id.* at 671 (per curiam) (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 822 (1995)).

[53] U.S. Const. art. II, § 1, cl. 2.

[54] Maine and Nebraska award electoral votes by district, then allocate two votes each to the at-large winner of the state. *See Distribution of Electoral Votes*, Nat'l Archives (June 26, 2023), https://www.archives.gov/electoral-college/allocation.

[55] Anderson v. Celebrezze, 460 U.S. 780, 793–95 (1983).

[56] *Anderson*, 144 S. Ct. at 671.

[57] *See* Alyce McFadden, Taylor Robinson, Leanne Abraham & Rebecca Davis O'Brien, *Where R.F.K. Jr. and Independent Presidential Candidates Are on the Ballot*, N.Y. Times (Oct. 16, 2024), https://www.nytimes.com/interactive/2024/us/politics/presidential-candidates-third-party-independent.html.

[58] *Anderson*, 144 S. Ct. at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

[59] *Id.* at 670 (per curiam).

The per curiam opinion states that "nothing in the Constitution delegates to the States any power to enforce Section 3 against federal officeholders and candidates."[60] It is true, of course, that "the text of the Fourteenth Amendment, on its face, does not affirmatively delegate such a power to the States. The terms of the Amendment speak only to enforcement by Congress, which enjoys power to enforce the Amendment through legislation pursuant to Section 5."[61] But what about Article II, Section One, Clause Two? As already noted, this Clause provides that each state will appoint electors "in such Manner as the Legislature thereof may direct."[62] On its face, that provision would seem to empower the state legislature to decide how to enforce the qualifications and disqualifications for being President, namely age, natural-born citizenship, two-term limit, and non-participation in an insurrection. Suppose that a state legislature enacts a law excluding violators of Section Three from running for President. Why does that not fall within the legislature's delegated power under Article II? (True, the Colorado Supreme Court held that the Colorado legislature has not enacted such a law, but for purposes of examining the authority of states with respect to Section Three it is a plausible hypothetical.)

Oddly, the *Anderson* opinion does not address whether and how states may enforce the other constitutional qualifications for presidential office—age, death, natural-born citizenship, and term limits. That would have been useful background information for the question whether and how they may enforce the disqualification from Section Three. Because of its highly contestable nature, Section Three might well present a different problem, leading to a different answer. But if so, the Court might have said so.

The per curiam opinion deals with the Article II, Section One, Clause Two question in a single laconic paragraph.[63] The concurring Justices, who agree as to the conclusion, say nothing at all. The paragraph begins by noting that "[t]he only . . . plausible constitutional sources of such a delegation [of power to the states to enforce Section Three against federal officeholders or candidates] are the Elections and Electors Clauses, which authorize States to conduct and regulate

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[60] *Id.* at 668.

[61] U.S. Const. amend. XIV, § 5.

[62] *Id.* art. II, § 1, cl. 2.

[63] *Anderson*, 144 S. Ct. at 668.

congressional and Presidential elections, respectively."[64] Yes, but don't these Clauses explicitly delegate all authority to make rules for congressional and presidential elections? The per curiam answers this question in two sentences. The first is empty and unpersuasive: "But there is little reason to think that these Clauses implicitly authorize the States to enforce Section 3 against federal officeholders and candidates."[65] Why not? Textually they seem unlimited as to all questions regarding the manner of choosing members of Congress and electors. States have used these powers to exclude presidential candidates who violate the natural-born citizen restriction. Why not Section Three?

The paragraph's next sentence is more to the point: "Granting the States that authority would invert the Fourteenth Amendment's rebalancing of federal and state power."[66] If this is true, it would be a sound reason to reject the conclusion that state legislatures have the Article II power to make rules for enforcement of Section Three's disqualification provisions with respect to the presidency. This, then, is the most significant question raised by *Trump v. Anderson*: Would state enforcement of Section Three "invert the Fourteenth Amendment's rebalancing of federal and state power"?

V. Is State Power to Enforce Section Three in Presidential Elections Consistent with the Fourteenth Amendment?

If the reasoning in the preceding Part of this Article is correct, "our Nation's federalism principles" provide no support for the unanimous holding in *Trump v. Anderson*, even if all nine Justices said so. But that does not mean the holding is wrong. The per curiam's second rationale, resting squarely on the Fourteenth Amendment itself, has more substance. The Fourteenth Amendment is a nationalizing amendment to its toes: It nationalizes the definition of citizenship; it nationalizes the basic set of constitutional rights ("privileges or immunities") pertaining to citizens; it nationalizes the rule of law principles of due process; it creates for the first time a constitutional requirement of equality, which is national; it protects the national credit and discountenances the Confederate debt; and it gives the national legislature broad power to enforce all of that, with the ability

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[64] *Id.*

[65] *Id.*

[66] *Id.*

to preempt inconsistent state law. Section Three is part and parcel of the Amendment's nationalizing project. Its clear purpose was to limit the ability of the states of the rebellion to re-empower officials who had betrayed their oaths of office. As legal historian Gerard Magliocca expresses it, the Framers of Section Three "embraced a theory that the political and military elites of the South were the only people who should bear constitutional responsibility for the Civil War. In making that judgment, . . . Congress limited a state's ability to choose its leaders and would force some of them to clean house."[67]

The per curiam opinion drew the logical conclusion that "[i]t would be incongruous to read this particular Amendment as granting the States the power—silently no less—to disqualify a candidate for federal office."[68] Imagine the shock if Alabama took upon itself to declare Ulysses Grant or some other Yankee general ineligible to run for President, on the ground that their violent assault on the seat of government in Montgomery amounted to an "insurrection." In no respect did the Fourteenth Amendment *increase* the states' power over the federal government. On this, the concurring Justices were in full agreement. Noting that "[t]he Reconstruction Amendments 'were specifically designed as an expansion of federal power and an intrusion on state sovereignty,'" Justices Sotomayor, Kagan, and Jackson wrote that "it would defy logic for Section 3 to give States new powers to determine who may hold the Presidency."[69]

There were no recorded statements during the time of the framing and enforcement of Section Three regarding the scope of authority of states to enforce, but as the per curiam opinion states, the "pattern of disqualification with respect to state, but not federal offices provides 'persuasive evidence of a general understanding' that the States lacked enforcement power with respect to the latter."[70] That pattern was clear and consistent: Federal and state authorities both were empowered to enforce the Section in the context of state officeholders, but only federal authorities enforced it against federal officials.

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[67] Magliocca, *supra* note 4, at 99.

[68] *Anderson*, 144 S. Ct. at 668.

[69] *Id.* at 673 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment) (quoting City of Rome v. United States, 446 U.S. 156, 179 (1980)). It is not entirely clear whether the concurring Justices extended this principle to federal offices other than the presidency. In the quotation in text, they confine themselves to the presidency, but they then quote approvingly from the per curiam, which spoke of candidates for "federal office." *Id.* at 668 (per curiam).

[70] *Id.* at 669 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 826 (1995)).

Let us first examine the historical practice regarding enforcement at the state level. The First Military Reconstruction Act called for constitutional conventions in the ten rebel states, and provided that "no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States, shall be eligible to election as a member of the convention to frame a constitution for any of said rebel States, nor shall any person vote for members of such convention."[71] The Second Military Reconstruction Act charged the Army with registering voters for those convention elections and required potential voters to swear that they were not subject to Section Three.[72] Congressional statutes readmitting certain of the rebel states required those states to bar officeholding by persons in violation of Section Three (even though it was not yet ratified).[73] Additionally, Congress instructed officers of the Union Army to remove some state officials who failed to take the so-called "Ironclad Oath" of loyalty to the Union, but subject to Congress's Section Three power to lift disabilities.[74] This was not, technically, an enforcement of Section Three, but it was closely related, and demonstrates Congress's intention to use federal power to clean house of former Confederates. Four new state constitutions excluded persons in violation of the terms of Section Three from voting and officeholding.[75] It bears mention that none of these enforcement measures were enacted pursuant to Section Five of the Fourteenth Amendment.

At the federal level, Congress passed the Enforcement Act of 1870, which applied to both state and federal offices.[76] This Act is the best evidence of how the Framers of the Fourteenth Amendment thought

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[71] First Military Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 429 (1867).

[72] Second Military Reconstruction Act, ch. 6, § 1, 15 Stat. 2, 2 (1867).

[73] *See, e.g.*, An Act to Admit States, ch. 70, § 3, 15 Stat. 73, 74 (1868) ("[N]o person prohibited from holding office under the United States, or under any State, by section three of the proposed amendment to the Constitution of the United States, known as article fourteen, shall be deemed eligible to any office in either of said States, unless relieved from disability as provided in said amendment. . . ."). This law appears to require enforcement by the state governments themselves.

[74] *See, e.g.*, S.J. Res. 8, 40th Cong., 15 Stat. 344 (1869).

[75] South Carolina, Texas, Alabama, and Arkansas each disenfranchised individuals in violation of Section Three and barred them from holding office. S.C. Const. of 1868, art. VIII, § 2; Tex. Const. of 1869, art. VI, § 1; Ala. Const. of 1868, art. VII, § 3; Ark. Const. of 1868, art. VIII, § 3; *see also* Magliocca, *supra* note 4, at 97–98.

[76] Enforcement Act of 1870 (First Ku Klux Klan Act), ch. 114, §§ 14–15, 16 Stat. 140, 143–44 (1870).

Section Three should be enforced. Section Fourteen authorized federal district attorneys to bring a *quo warranto*[77] proceeding in federal district court to remove anyone holding non-legislative office in violation of Section Three, and Section Fifteen added criminal penalties for those who refused to step down.[78] Note that these provisions vested authority to bring disqualification proceedings exclusively in the federal executive branch and final authority to decide the disqualification issue exclusively in the federal courts, subject to due process, rules of evidence, and appellate review. These provisions were repealed decades later, on the apparent assumption that Section Three had no more relevance after Congress passed the Amnesty Act in 1872.[79] These provisions applied to judges (and other judicial officers, such as clerks and marshals) and executive branch officers. By their terms, they did not apply to legislative positions. Whether they were understood to apply to the President and Vice President is a surprisingly difficult technical question, but it got almost no attention because it was obvious that neither President Grant nor Vice President Colfax were insurrectionists.[80]

The more important federal-level enforcement actions pertained to members of Congress. As already noted, Article I designates each House of Congress as "the Judge of the . . . Qualifications of its own Members."[81] Sections Fourteen and Fifteen of the Enforcement Act expressly excluded legislative offices from its scope, either on the ground that the Article I power to judge qualifications is exclusive as a constitutional matter or on the basis of a congressional judgment that it should be so. As the per curiam opinion noted, "[i]n the years following ratification, the House and Senate exercised their unique powers under Article I to adjudicate challenges contending that

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[77] *Id.* § 14, 16 Stat. at 143. *Quo warranto* (Latin for "by what warrant?") was a common law writ challenging the right of a putative official to hold office. 2 William Blackstone, Commentaries *262–63.

[78] §§ 14–15, 16 Stat. at 143–44.

[79] Section Fifteen's criminal prohibition was repealed in the 1909 codification of the penal code. Act of Mar. 4, 1909, ch. 15, § 341, 35 Stat. 1088, 1153. The *quo warranto* provision in Section Fourteen was repealed during the 1948 codification of Title 28 of the U.S. Code. *See* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 992–93; *see also* Lynch, *supra* note 4, at 206 n.365; Baude & Paulsen, *supra* note 6, at 626 n.64. Another 1898 act removed Section Three disabilities "heretofore incurred." Act of June 6, 1898, ch. 389, 30 Stat. 432.

[80] For a discussion of the point, see *infra* notes 96–108 and accompanying text.

[81] U.S. Const. art. I, § 5, cl. 1. For historical context, see Magliocca, *supra* note 4, at 109 n.114.

certain prospective or sitting Members could not take or retain their seats due to Section 3."[82]

There were at least six such challenges, one in the Senate and five in the House. Zebulon B. Vance, a former U.S. Representative who had been a colonel in the Confederate Army and wartime governor of North Carolina, was barred from taking the senatorial seat to which he had been elected.[83] Two Representatives-elect were disqualified. John H. Christy of Georgia admitted to giving "aid, countenance, counsel, and encouragement to persons engaged in armed hostility" against the Union.[84] Interestingly, as the per curiam opinion pointed out in a footnote, the Governor had refused to commission Christy on Section Three grounds, which is the only known example of a state authority attempting to enforce Section Three against a federal officeholder. Christy nonetheless presented his credentials to the House in Washington, and the House made the final decision as to his eligibility. Christy's replacement, John A. Wimpy, was also disqualified. Wimpy had taken up arms as a soldier in the Confederate Army and thus was an easy case.[85] Two elected House members were seated despite claims that they had supported the insurrection. A Virginian, Lewis McKenzie, was permitted to take his seat in the House despite voting in favor of secession as a pre-war member of Virginia's House of Delegates and voting to appropriate funds to ready the State for armed hostilities with the Union.[86] The distinction appears to be that he did not take up arms, and thus did not "engage in" the rebellion. Similarly, John M. Rice of Kentucky was permitted to take his seat, despite having voted for secession as a member of his state legislature. Rice also had been a recruiter for the Confederate Army but not

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[82] Trump v. Anderson, 144 S. Ct. 662, 669–70 (2024) (per curiam).

[83] 1 Asher Hinds, Precedents of the House of Representatives 478–86, §§ 459-463 (1907); *see also* Magliocca, *supra* note 4, at 108–11. According to the report in *The Globe*, the debate focused on whether the Senate could seat Zebulon B. Vance's runner-up or if the state legislature needed to re-vote. *See* Cong. Globe, 42d Cong., 2d Sess. 2387–90, 2431–34, 2676 (1872); *see id.* app. at 219–29, 234–67, 272, 79, 328–34; *see also* S. Rep. No. 42-58, at 34 (1872). The Senate Historian has written a helpful summary of the Vance controversy. *See The Election Case of Joseph C. Abbott v. Zebulon B. Vance and Matt W. Ransom of North Carolina (1872)*, U.S. Senate, https://www.senate.gov/about/origins-foundations/electing-appointing-senators/contested-senate-elections/059Abbott_Vance_Ransom.htm.

[84] 1 Hinds, *supra* note 83, at 470–72, § 459.

[85] *Id.*

[86] *Id.* at 440–41, § 446; *see also* Lynch, *supra* note 4, at 207–09 (explaining the House's report on Lewis McKenzie's pre-war conduct in more detail).

himself a participant.[87] While some House members thought these actions were disloyal and qualified as aid and comfort to the enemy, the full House voted to seat him.[88] Perhaps more strangely, the House voted to seat former Confederate Officer Alfred Waddell. Waddell had been the master of chancery in North Carolina before the war, an office which required him to take an oath to support the Constitution. Waddell's supporters argued that the state office was not "judicial in character," because it was a "clerical appointment," and thus that he had not taken an oath covered by Section Three. The House apparently accepted this argument.[89]

In conclusion: The Court's unanimous holding that states may enforce Section Three against their own officeholders but only federal authorities can enforce it against federal officeholders is not supported by "the Nation's federalism principles," but it is supported by the best reading of both the "nationalist spirit of the Fourteenth Amendment" and the historical practice.[90] The per curiam's further hint, short of an explicit holding, that federal enforcement must come in the form of congressional legislation pursuant to Section Five, lacks historical support. But as noted at the beginning of this Article, the *Trump v. Anderson* opinion appears not to be based on a textualist or originalist interpretive method, but on the pragmatic judgment that allowing states to exclude a major party candidate for President based on a debatable interpretation of Section Three would be disruptive to our democratic order. If that pragmatic conclusion contradicted the best evidence of historical meaning and practice, it would be problematic, but it does not. The holding may not truly rest on text and history, but it is consistent with text and history—more consistent with text and history than the opposite conclusion would have been.

Some commentators have criticized the Court's decision on the ground that it nullifies Section Three and insulates Mr. Trump from enforcement.[91] Even the three concurring Justices state that the

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[87] 1 Hinds, *supra* note 83, at 472–73, § 460.

[88] Cong. Globe, 41st Cong., 2d Sess. 5442–47 (1870); H.R. Rep. No. 41-107 (1870).

[89] *See* 1 Hinds, *supra* note 83, at 441, § 447; Cong. Globe, 42d Cong., 1st Sess. 6–7 (1871).

[90] I borrow the term "nationalist spirit of the Fourteenth Amendment" from Gerard Magliocca. *See* Magliocca, *supra* note 4, at 95. The per curiam refers to the "the Fourteenth Amendment's rebalancing of federal and state power," *Trump v. Anderson*, 144 S. Ct. 662, 668 (2024) (per curiam), which is a less pointed way of saying the same thing.

[91] *See, e.g.*, J. Michael Luttig & Laurence H. Tribe, *Supreme Betrayal: A Requiem for Section 3 of the Fourteenth Amendment*, Atlantic (Mar. 14, 2024), https://www.theatlantic.com/ideas

decision"foreclose[s] future efforts to disqualify a Presidential candidate under that provision."[92] This is not entirely accurate. The Court explicitly noted that there is a provision of law that "remains on the books today," which authorizes prosecution for insurrection and bars convicted individuals from future office. This is Section 2383. As the per curiam opinion observes, Congress's enactment of Section 2383 "effectively provided an additional procedure for enforcing disqualification."[93] The House January 6 Commission officially recommended that the Department of Justice prosecute Mr. Trump under this provision,[94] but the Department did not do so, even though it brought a raft of other criminal charges against the former President. It is not known why the Department chose not to employ Section 2383 against Mr. Trump. In any event, the Court did not make Section Three unenforceable. The Biden Administration chose not to use the enforcement tool that was at hand.

VI. Post-Election Enforcement, and Whether Section Three Applies to the Presidency

The unanimous holding in *Trump v. Anderson* thus put an end to efforts to prevent former President Trump from running for President. States have no authority to enforce Section Three against presidential officeholders or candidates, and the Biden Administration chose not to bring a prosecution under the successor statute to the Confiscation Act: Section 2383. That exhausts the alternatives at the election phase. But there remain two possible ways, however unlikely as a practical political matter, that a President-elect's eligibility for office might be tested *after* the election—on the heuristic assumptions that he violated Section Three and that Section Three applies to former and future Presidents. First, it is possible that when Congress meets on January 6 to count electoral votes, it could exercise power under the Twelfth Amendment and the Electoral Count Act (as amended in 2023), to refuse to count electoral votes for a nominee in

/archive/2024/03/supreme-court-trump-v-anderson-fourteenth-amendment/677755; Mark Joseph Stern, *The Supreme Court's "Unanimous" Trump Ballot Ruling Is Actually a 5–4 Disaster*, Slate (Mar. 4, 2024, 11:56 AM), https://slate.com/news-and-politics/2024/03/supreme-court-trump-colorado-ballot-disaster.html.

[92] *Anderson*, 144 S. Ct. at 674 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

[93] *Id.* at 670 (per curiam).

[94] H.R. Rep. No. 117-663, at 690 (2022).

violation of Section Three. Second, it is at least theoretically possible that a person with standing to sue could challenge the legality of an action of an executive officer appointed by a putative President with no right to hold office under Section Three. The concurring Justices Sotomayor, Kagan, and Jackson interpreted the per curiam opinion as foreclosing these avenues for enforcement of Section Three. This is what fueled the anger in their separate opinion.

There is no doubt that the Justices in the majority heartily disapprove of these two possibilities. Toward the end of the per curiam opinion, after bemoaning the prospect of "the 'patchwork' that would likely result from state enforcement" of Section Three, the Court commented that "the disruption would be all the more acute—and could nullify the votes of millions and change the election result—if Section 3 enforcement were attempted after the Nation has voted. Nothing in the Constitution requires that we endure such chaos. . . ."[95] That seems to say that once an election is over, Section Three should not be used to nullify the result.

This comment should not be taken to be part of the holding of the case. First, the statement is *obiter dictum*. The hypothetical possibility of post-election challenges was irrelevant to the case that was before the Justices, which involved disqualification from the ballot in Colorado. More importantly, it is evident from the text of Section Three that post-election enforcement *is* permissible. As discussed above, Section Three disqualifies those who violate the provision from *holding* office, not from running for office, and the Enforcement Act of 1870 provided for *quo warranto* proceedings to expel a violator from office.[96] The plain language of these provisions demonstrates beyond doubt that the Framers and enforcers of Section Three expected that it would be enforced *after* a would-be officeholder was elected or appointed. Moreover, several participants in the rebellion who were elected to Congress in 1870 were disqualified by the House and Senate after they presented their credentials in Washington.[97] If elected officeholders are unseated, it follows that the results of elections are nullified. However disruptive or chaotic the modern Court may think it is to nullify the results of an election, this was the original plan for enforcing Section Three.

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[95] *Anderson*, 144 S. Ct. at 671.

[96] *See supra* notes 76–82 and accompanying text.

[97] *See supra* notes 82–89 and accompanying text.

But it remains to be seen what methods of post-election enforcement may be available under current law, since the Enforcement Act was repealed in relevant part. There are two possibilities: enforcement by Congress during the counting of electoral votes, and challenges to the legality of the actions taken by executive branch officials who are either insurrectionists themselves or were appointed by an insurrectionist President.

Note, however, that the availability of both of these alternatives depends on a prior interpretive point: that Section Three applies to former and future Presidents. That is not as obvious as it may seem. There are oddities in the language of Section Three that cast doubt on whether it applies to the presidency. Both the trial court and dissenting Justice Samour in the Colorado Supreme Court relied on these linguistic peculiarities in rejecting the case for disqualifying President Trump, and they were joined by amici in the Supreme Court including three former attorneys general,[98] and supported by research published by several scholars with expertise in these matters.[99] Their argument is as follows: Section Three bars violators from holding "any office, civil or military, *under* the United States. . . ."[100] They present evidence that the language "under the United States" is a term of art that, in the original Constitution, meant only appointed offices, which would suggest that the Framers of Section Three might not have understood that phrase to apply to future Presidents. Section Three uses different terminology in reference to the violator's past office, when he or she took the oath. There, it says "officer *of* the United States," which is used elsewhere in the Constitution in contexts that exclude the presidency.[101] For example, the Commission Clause provides that "[t]he

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[98] Brief of Edwin Meese, et al. as Amici Curiae Supporting Petitioner at 6–18, *Anderson*, 144 S. Ct. 662 (No. 23-719).

[99] *See, e.g.*, Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part IV: The "Office . . . under the United States" Drafting Convention*, 62 S. Tex. L. Rev. 455, 459 (2023); Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 Harv. J.L. & Pub. Pol'y 309 (2024). Professors Tillman and Blackman leave open the possibility that, due to linguistic drift, the term "office under the United States" might not necessarily have the same meaning in Section Three as it did in the original Constitution. *See* Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 Tex. Rev. L. & Pol. 350, 563 (2024) [hereinafter Blackman & Tillman, *Sweeping and Forcing*].

[100] *See* U.S. Const. amend. XIV, § 3 (emphasis added).

[101] *See* Seth Barrett Tillman & Josh Blackman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment*, 15 N.Y.U. J.L. & Liberty 1, 21–24, 31–34 (2021).

President . . . shall Commission all the Officers of the United States."[102] The President does not commission himself. Similarly, the Appointments Clause provides that the President shall appoint "all . . . Officers of the United States."[103] He does not appoint himself; the electors do that. This suggests that the term "Officers of the United States" might apply only to appointed positions, not to elected ones, and not to the presidency or vice presidency. Finally, the Section applies to persons who took an oath "to support the Constitution of the United States."[104] This language echoes the oath prescribed in Article VI, Section Three,[105] but Article II, Section One, Clause Eight prescribes a different oath for the President: He swears to "protect and defend the Constitution of the United States."[106]

These theories were widely disparaged in academic circles. Detractors rested primarily on the point that constitutional language, which is written by and for the People, should not be read in a hypertechnical fashion counter to its ordinary meaning, and that it makes little sense, in light of the purpose of Section Three, not to regard the presidency as an office "of" and "under" the United States.[107] There was little direct discussion during the time of framing and enforcement of whether Section Three covers past and future Presidents, since the issue had no practical payoff at the time. The only former President who supported the Confederacy, John Tyler, died in 1862, and it was politically inconceivable that a supporter of the rebellion could win a nationwide election. It was logically assumed that Section Three would have its practical effect in elections in Southern states, where the possibility that a participant in the rebellion could prevail in an election was anything but unlikely. Nonetheless, in the one reported discussion of the question in Congress, Senators Lot Morrill

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[102] U.S. Const. art. II, § 3.

[103] *Id.* art. II, § 2, cl. 2.

[104] *Id.* amend. XIV, § 3.

[105] *Id.* art. VI, § 3.

[106] *Id.* art. II, § 1, cl. 8.

[107] *See, e.g.*, Baude & Paulsen, *supra* note 6, at 722–23, 725–27; James A. Heilpern & Michael T. Worley, *Evidence that the President is an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment*, 98 S. Cal. L. Rev. 65, 80–85 (2024); Mark A. Graber, *Of Course Presidents Are Officers of the United States*, Atlantic (Feb. 15, 2024), https://www.theatlantic.com/ideas/archive/2024/02/presidents-officers-supreme-court-case-trump-disqualification/677449; Brief of Akhil Reed Amar and Vikram David Amar as Amicus Curiae in Support of Neither Party, *supra* note 7, at 17.

and Reverdy Johnson agreed Section Three would bar a violator from becoming President.[108]

Although the issue was briefed to the Supreme Court, the Court made no reference to it. One hopes that it does not arise in the future. If it does, the Supreme Court is likely to adopt a non-technical definition, which includes the presidency. The remainder of this Article will assume that both past and future Presidents are covered.

VII. Congressional Enforcement in the Process of Counting Electoral Votes

The Twelfth Amendment, which in these respects exactly repeats the parallel provisions of Article II, Section One, requires electors to cast their votes and to send certificates attesting to those results to the seat of government. On the designated day (January 6 of the year following the election), the President of the Senate, who is the outgoing Vice President of the United States, is required to "open" these results in the presence of the newly elected Senate and House of Representatives, who will have taken office a few days earlier. The Amendment states "the votes shall then be counted."[109] This unhelpful use of the passive voice gave rise to a theory among Trump supporters in 2021 that the Vice President had authority to "count" the votes and hence to determine which putative results were valid. That is not what the Amendment says. The Vice President is instructed to "open" the certificates, but the shift to the passive voice suggests that he or she is not the one to "count" the votes. By default, counting (meaning resolution of which votes are legitimate) must be done by Congress. But the question remains what powers Congress has in connection with the count and which procedures to follow. The Constitution is frustratingly silent or ambiguous on these points.

The contested Hayes-Tilden election of 1876 brought these issues to the fore, leading Congress to enact the Electoral Count Act of 1887. That Act resolved some issues but not all. Ambiguities in the Electoral Count Act led to the confusion over the Trump-Biden election in 2020 and inspired the violence on January 6, 2021, when supporters of Mr. Trump invaded the Capitol, attempted to pressure members of Congress to recognize Trump as the winner (or perhaps to delay long enough to allow Republican legislatures to reverse the

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[108] Cong. Globe, 39th Cong., 1st Sess. 2899 (1866).

[109] U.S. Const. amend. XII.

results in their states), threatened violence against Vice President Pence and members of Congress, assaulted law enforcement officers, and succeeded in delaying the electoral vote count for more than five hours.[110] In 2022, Congress amended the Electoral Count Act to reduce, but probably not eliminate, the opportunities for similar mischief in the counting of electoral votes in future years, including clarifying that the Vice President's role in the count is only "ministerial."[111] The amended Act governed the counting of votes in 2025.

The question of interest after *Trump v. Anderson* is whether Congress has authority to refuse to count the electoral votes cast in favor of a candidate it thinks is in violation of Section Three. As already discussed, there is language in the per curiam opinion that disapproves attempts to enforce Section Three against an elected officeholder after the election has taken place, and other language strongly suggesting (but not explicitly holding) that enforcement of Section Three can only take place via legislation passed pursuant to Section Five of the Fourteenth Amendment. We have already seen why those two propositions are (1) dictum and (2) almost certainly mistaken. We now ask what Congress's power is to enforce Section Three in the course of its electoral vote-counting function under the Twelfth Amendment and the Electoral Count Act.[112]

As required by Article II, each state conducts the selection of presidential electors in the manner directed by its legislature. For more than a century, all states have selected electors by popular vote, but the details vary from state to state. Under the Electoral Count Act, the governor must issue a "certificate of ascertainment" declaring which candidates for elector won the popular vote, unless the governor's determination is overridden by a state or federal court.[113] Congress

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[110] *See* Quinn et al., *supra* note 8.

[111] Electoral Count and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328, § 108, 136 Stat. 5233, 5238.

[112] Readers are urged to read Professor Muller's exploration of this topic in Muller, *supra* note 50; and Derek T. Muller, *Electoral Votes Regularly Given*, 55 Ga. L. Rev. 1529 (2021) [hereinafter Muller, *Electoral Votes*]. *See also* Ned Foley, *Can Congress Disqualify Trump After the Supreme Court's Section 3 Ruling*, Lawfare (Mar. 14, 2024, 12:42 PM), https://www.lawfaremedia.org/article/can-congress-disqualify-trump-after-the-supreme-court-s-section-3-ruling. Interestingly, Professors Baude and Paulsen, whose 2023 article sparked the campaign to disqualify Mr. Trump under Section Three, are skeptical of the power of Congress not to count electoral votes cast for an oath-breaking insurrectionist. *See* Baude & Paulsen, *supra* note 6, at 640–42.

[113] Electoral Count Act, 3 U.S.C. § 5(a)(1) (as amended 2022).

must treat this certificate as conclusive as to which slate of electors was chosen. Because this selection process is governed by state law, and under the unanimous holding of *Trump v. Anderson* states have no role in enforcing Section Three against presidential candidates, allegations of insurrectionism should play no part in this stage of the process (unless electors themselves are insurrectionists).

The next stage of the proceedings is set by the Electoral Count Act, as amended in 2022. After the electors vote and transmit their certificates of election to the seat of government, the Vice President opens the certificate from the state in question in the presence of both the Senate and the House, then hands it to functionaries called "tellers" who announce the result to the assembled solons. The Act explicitly provides that "[t]he President of the Senate shall have no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors, the validity of electors, or the votes of electors."[114] Vice President Pence's admirable refusal to go along with the Trump lawyers' plan to use his authority to nullify Biden's electoral victory is thus now written into statutory law. After the tellers read the electoral votes from the state in question, the Vice President calls for objections. If, but only if, there is a written objection in proper form, signed by one fifth of the Senators and one fifth of the Representatives, the two Houses will separate and debate the objection for a period of no more than two hours. The objection is rejected unless *both* Houses affirmatively sustain the objection as valid, by majority vote. On the perhaps overly cynical assumption that partisan loyalty will typically dominate these determinations, that means that the electoral votes of a state will not be rejected unless the political party opposed to the candidate receiving those votes won majorities in both the House and the Senate.

Significantly, the Act provides that the "only grounds for objections shall be as follows":

> (I). The electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1).
>
> (II). The vote of one or more electors has not been regularly given.[115]

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[114] *Id.* § 15(b)(2).

[115] *Id.* § 15(d)(2)(B)(ii).

The term "regularly given" derives from the original Electoral Count Act of 1887. What does it mean? In particular, does the claim that the vote was in favor of a person not eligible for the presidency, on the basis of age, natural-born citizen status, term limits, death, or engaging in an insurrection after swearing an oath to defend the Constitution, fall within the category of a vote "not regularly given"? There is no authoritative definition of the term "regularly given," and the amendments to the Electoral Count Act in 2022 did not clarify the meaning.

The first attempt in Congress to object to an electoral vote came in 1969, to a vote by a Republican-pledged elector for third-party candidate George Wallace. In this century, there have been objections from Democrats in Congress to electoral votes for every victorious Republican candidate for President, and of course, the objections by Republican members to Biden votes in 2021. With one dubious exception, all of these objections were based on events that allegedly occurred in the course of the election or the counting of the votes, such as long lines at voting places, supposed defects in voting machines, Russian interference, and the like.[116] These objections might be thought to be evidence of congressional interpretation or practice, which would be entitled to at least some interpretive weight, but all of them were roundly rejected—which is evidence of congressional interpretation or practice the other way. In truth there has been a lot of confusion and partisanship.

Most scholarly analyses of the issue, written both before and after the 2020 election, conclude that the term "regularly given" refers to "post-appointment controversies, not pre-appointment ones."[117] Significantly, these writings include one published in 1888, contemporaneous with the passage of the Act in 1887:

> [T]he law authorizes the two Houses by concurrent resolution to reject the votes of the electors for President and Vice-President if they agree that these have not been regularly given; i.e., the two Houses cannot reject the return on account of fraud or defect in the election of the electors or in the

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[116] Professor Muller discusses these objections in Muller, *Electoral Votes*, *supra* note 112, at 1541–44.

[117] Professor Muller provides a helpful review of the literature. *See id.* at 1535–37. In addition to Muller, see Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & Pol'y 665, 729 (1996); and Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541 (2004).

> determination of a controversy thereover, but may do so on account of irregular action on the part of the electors themselves in giving their votes for President and Vice-President.[118]

This interpretation is confirmed by the 2022 amendments to the Act, which as already noted permit objections only on two grounds. The first is that "[t]he electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1)."[119] This kind of objection is confined to whether there was a lawful certificate of ascertainment, not to reconsidering whether that certificate should have been issued. It is like checking for a driver's license; this does not entail re-examining whether the driver really knows how to parallel park. All legal and factual issues bearing on the election results should have been brought and resolved in state or federal court before the certificate of ascertainment was signed, and the Electoral Count Act states unambiguously that the certificate of ascertainment "shall be treated as conclusive in Congress with respect to the determination of electors appointed by the State."[120] Whether the votes of the electors so certified were "regularly given" thus deals with the actions of the electors, not with the choice of electors.

This definition excludes objections based on allegations of fraud and other maladministration of the election, but includes challenges based on an elector's vote for an ineligible candidate.[121] The latter is an objection to the elector's vote, not to who is the elector. If this definition is correct, the objections made by Republicans in 2021 (as well as those made by Democrats in 2002, 2005, and 2017) were improper under the Electoral Count Act, but an objection based on Section Three would be proper (whether or not meritorious).

But how is this definition to be enforced? Individual members of Congress have been known to take a different view. The presiding officer, the Vice President, has no authority to declare an objection out of order. If the objection has the proper number of signatories and is otherwise procedurally proper, it will trigger separate meetings of the House and Senate, and those bodies will decide whether the

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[118] John W. Burgess, *The Law of the Electoral Count*, 3 Pol. Sci. Q. 633, 649 (1888).

[119] 3 U.S.C. § 15(d)(2)(B)(ii) (as amended 2022).

[120] *Id.* § 5(c)(1)(A).

[121] Muller, *Electoral Votes*, *supra* note 112, at 1537–38. Professor Muller's article identifies four other types of objection to votes not "regularly given," in addition to objections based on qualification of the candidate. *Id.* at 1538–40.

objection is proper and meritorious. Whether they pay any attention to scholarly analyses or statutory textual clues is anyone's guess.

If this analysis of the Electoral Count Act is correct, there does exist a procedure by which members of Congress could properly raise the question of a candidate's eligibility to hold the presidency under Section Three, just as they may raise and resolve challenges to the eligibility of persons elected to the House and Senate. To be sure, such a proceeding would run counter to the per curiam's admonition about the "disruption" that would result if "enforcement were attempted after the Nation has voted."[122] Moreover, it would require a majority vote of both the newly elected Senate and the newly elected House to disqualify—and it seems, in general, unlikely as a political matter that a candidate would win the presidential election while his party fails to gain control of either House. This has not happened in more than fifty years.[123] But if both Houses find in favor of an objection to the President-elect's qualifications based on Section Three, that will almost certainly be the final word, whatever the Justices may think. Given the uncertainties in theory and precedent about the political question doctrine,[124] it would be rash to make a strong prediction, but the authority to count the electoral votes and decide disputed questions about qualifications seems to be as constitutionally committed to a coordinate branch of government as impeachment or the qualifications or election results of members of the House or Senate.[125] In *Roudebush v. Hartke*,[126] the Court held that the Senate's determination about who won a Senate election was a political question untouchable by the courts. It is hard to see why a decision by both Houses about who was elected President would be regarded as any more justiciable. Thus, if both Houses of Congress vote that electoral votes cast for a candidate were not "regularly given," the Supreme Court is not likely to say otherwise—no matter how "acute" the "disruption" they think this would entail.

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[122] *See* Trump v. Anderson, 144 S. Ct. 662, 671 (2024) (per curiam).

[123] Richard Nixon, a Republican, was elected in a three-way race in 1968, while the Democrats took both Houses of Congress. Even when he won in a landslide in 1972, the Democrats retained control of both Houses.

[124] For one example among many, see Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597, 600–01 (1976).

[125] Baker v. Carr, 369 U.S. 186, 217 (1962); United States v. Nixon, 418 U.S. 683, 702 (1974); Roudebush v. Hartke, 405 U.S. 15, 19 (1972).

[126] *Roudebush*, 405 U.S. at 19.

Even this may not put an end to a candidate's prospects for election. Votes not counted on the ground that they were not "regularly given" are still electoral votes, and they must be included in the denominator in deciding whether a candidate got a majority of the electoral votes.[127] Discarding electoral votes favoring the candidate who initially got a majority will not increase the number of votes for other candidates; a candidate who did not get a majority before the vote count will still have less than a majority after objections to votes for the alleged insurrectionist have been validated. The result, under Article II, Section One, Clause Three and the Twelfth Amendment, will be to throw the election into the House of Representatives, with the delegations from each state having one vote. Congress's conclusion that some votes were not "regularly given" does not bind the House, operating on a different voting rule. And if the vote in the House is close, and some states split evenly and therefore cannot cast a vote, then the Twelfth Amendment tells us that the Vice President will be acting President. On the hypothesis that the disqualified candidate for President won a majority of the electoral votes and that his or her running mate is not an oath-breaking insurrectionist, that Vice President will be from the same party. The other party might well conclude that the effort is not worth the candle.

VIII. Section Three Challenges to the Legality of Acts by Executive Officials Appointed by an Alleged Oath-Breaking Insurrectionist

There is one final speculative possibility of how Section Three could be enforced, on the assumption that the alleged oath-breaking insurrectionist is elected by a majority of the people in states commanding a majority of the electoral votes and the Congress counts those votes and declares the alleged oath-breaking insurrectionist President. The possibility is this: In a proceeding where the legal rights of a person with standing are at stake, that person could appeal the result on the ground that the relevant official is disqualified under Section Three or that the official's appointment is constitutionally invalid because the appointing President was constitutionally disqualified from office by Section Three. Justices Sotomayor, Kagan,

[127] Muller, *Electoral Votes*, *supra* note 112, at 1551.

and Jackson give the example of "when a party is prosecuted by an insurrectionist and raises a defense on that score."[128] In other contexts—usually separation of powers—parties to administrative proceedings have been permitted to challenge administrative action on the ground that their agency adversary was improperly appointed.[129]

After *Trump v. Anderson*, this form of enforcement is unlikely to succeed. Unlike the electoral-vote-counting scenario, an attempt to enforce Section Three by disqualifying an officer will necessarily take place within the courts, where the case will quickly go to the Supreme Court, which has already expressed its opposition. To be sure, those comments in the per curiam opinion were *obiter dictum*, but if a case involving an actual disqualification issue goes to the Court, there is little doubt how it would be resolved.

Moreover, such a case faces three obstacles not faced by an electoral count challenge. First, the nature of the case presupposes that the alleged oath-breaking insurrectionist won the election, that the results of that election were recognized by Congress in its proceedings under the Twelfth Amendment, and that he or she has been sworn into office. There will be a strong argument that the Section Three issue has already been decided by appropriate political authorities. Even if the legitimacy of the officeholder's appointment is not technically a "political question" outside the jurisdiction of the courts, there will be a powerful judicial impulse to defer to those prior political decisions.

Second, this mode of enforcement would be systemically disruptive. Plaintiffs with standing could challenge every act that insurrectionist Presidents or their appointees take. This would effectively stop the government in its tracks for whatever time it took to sort things out. Even if a few of these proceedings succeed, there is no reason to think that the putative Presidents or their appointees would resign as a result. The courts would have no authority to depose either the Presidents or their appointees, but at most to set aside the particular agency action. (Even then, under the de facto officer doctrine, the courts might well refuse to take that step.) It is much harder to undo the acts of an illegitimate President than it would be to keep him or her out of office in the first place.

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[128] Trump v. Anderson, 144 S. Ct. 662, 674 (2024) (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

[129] *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

Third, there is precedent. *Griffin's Case*,[130] decided by Chief Justice Chase in 1869, contemporaneously with passage of the Fourteenth Amendment, involved almost precisely the scenario that the concurring Justices imagined. A criminal defendant was convicted in a court proceeding where the presiding state judge had been an open Confederate supporter. One federal judge granted the convicted man habeas corpus relief on the ground that the judge was not eligible to preside, based on Section Three. That decision was reversed on appeal, largely on the pragmatic ground that, at least in the context of a collateral challenge to a criminal conviction, "it must be ascertained what particular individuals are embraced by the definition [of engaging in an insurrection], before any sentence of exclusion can be made to operate."[131] The court went on: "To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by congress."[132]

It would overread *Griffin's Case* to think that its logic applies to all possible means of enforcing Section Three. Other avenues of enforcement, including Article I, Section Five and the Twelfth Amendment, have their own inherent procedure, and thus require no additional implementing legislation. We must be cautious about extending *Griffin's Case* beyond its context of challenging exercises of "official authority and power" by an official who is already seated and has never been adjudicated as an insurrectionist.[133] As Chief Justice Chase discussed at length, that particular context poses practical problems, which he termed "inconveniences."[134] It would be most reasonable to read *Griffin's Case* narrowly, as applying only to those circumstances. But the possibility under consideration here, namely a challenge by a litigant to the legitimate appointment status of government official imposing a penalty, is virtually on all fours with *Griffin's Case*.[135]

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[130] 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815).

[131] *Id.* at 26.

[132] *Id.*

[133] *Id.* at 23.

[134] *Id.* at 25, 26.

[135] The only difference of significance is that *Griffin's Case* arose on habeas corpus, while the proposed alternative would likely come up on direct appeal from an order granting or denying a motion to dismiss the proceeding for want of a constitutionally proper tribunal.

As a circuit court decision, *Griffin's Case* is not binding precedent, and the per curiam opinion in *Anderson* did not treat it as such. The opinion quotes the Chief Justice's opinion merely as a description of the problem, not as a holding on a point of law. But the opinion in *Griffin's Case* should not lightly be dismissed. It was written by Chief Justice Chase, a prominent abolitionist who presumably was deeply immersed in the legal questions around Reconstruction and politically allied with the leading players. Chase was in as good a position to know how the new Amendment was expected to work as anyone—certainly better than we are today. Even though some current commentators are critical of the opinion,[136] there is no evidence that it was regarded as surprising or misguided at the time.[137] Moreover, much of the criticism directed at the opinion is predicated on its supposed inconsistency with Chase's opinion in the matter of Jefferson Davis's prosecution for treason[138]—but if there was inconsistency, it is more likely that his view on the law of treason was wrong than that *Griffin's Case* was wrong.

In any event, while this last possible avenue for enforcement may not be completely dismissed, its prospects are dim. Courts tend to be pragmatic, and if executive decisions by every appointee of the new President are illegitimate, government would come to a halt. If an individual has been elected by a majority of the people of states constituting a majority of the Electoral College, recognized by Congress as President, and sworn into the office, and if his or her nominees have been confirmed by the Senate, it seems unlikely that the courts will intervene, in defiance of dictum in *Trump v. Anderson* and contrary to a nearly identical case decided by a distinguished Chief Justice immediately after Section Three was added to the Constitution.

Conclusion

Like Halley's Comet, but with a different timeline, Section Three of the Fourteenth Amendment riveted the nation for a few years after its enactment and disappeared with the enactment of "amnesty" legislation in 1872, only to reappear in 2023 with the publication of

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[136] *E.g.*, Magliocca, *supra* note 4, at 105–08; Baude & Paulsen, *supra* note 6, at 647–59.

[137] Blackman & Tillman, *Sweeping and Forcing*, *supra* note 99, at 426–27; Lash, *supra* note 99, at 72–73 & n.274.

[138] Magliocca, *supra* note 4, at 107; Baude & Paulsen, *supra* note 6, at 654.

an academic article and disappear in 2024 with the Supreme Court's decision in *Trump v. Anderson*. The attempt to disqualify Mr. Trump from running for President in 2024 deeply divided the nation. Was Section Three the hoped-for silver bullet that would rid the nation's political life of this oath-breaking insurrectionist for all time? Or was it yet another legal maneuver to rob the People of their right to choose the leader of their choice? It depended on whom you asked. But the Supreme Court did not divide. Despite its reputation for partisan division, the nine Justices unanimously held that these efforts to use the Constitution to disqualify Mr. Trump were contrary to our federal system and unanimously reversed the state supreme court decision expelling Mr. Trump from the ballot. Unfortunately, however, this unanimity was spoiled by strong hints in the majority's per curiam opinion that Congress is limited in its enforcement of Section Three to statutes passed pursuant to Section Five of the Fourteenth Amendment, and that post-election enforcement is illegitimate. If they were true, this would cut off other avenues for enforcement, including Congress's power to count electoral votes under the Twelfth Amendment. These suggestions, which were unnecessary to decide the case and very likely wrong as a textual and historical matter, angered the three Democrat-appointed Justices, leading them to accuse the majority of trying to insulate "the petitioner" (Mr. Trump) from the constitutional consequences of his actions.

This Article concludes that there was a reasonable basis for the unanimous holding that states lack power to enforce Section Three in connection with the presidency (and probably other federal offices). The reason, however, is not that such power would create a "patchwork" that is inconsistent with "this Nation's federalism," but that it is inconsistent with the nationalist thrust of the Fourteenth Amendment and what we know about the pattern of enforcement at the time—namely, that both federal and state governments would enforce Section Three against state officeholders, but only instrumentalities of the federal government would enforce it against federal officeholders.

In any event, the decision seemed to be driven more by pragmatic considerations than by textual or historical interpretation. Simply put, the Court was unwilling to take the choice of President out of the hands of the voters. While functionalist considerations should not prevail in the face of contrary text and history, the Justices were not wrong to show restraint when text and history are supportive, even if not dispositive.

As the concurring Justices say, the Court should have stopped with its unanimous holding that states lack the power, absent congressional authorization, to enforce Section Three with respect to the presidency. That holding was all that was needed to decide the case. The majority's forays into limitations on congressional enforcement power had nothing to do with the Colorado litigation, and most of what they had to say is questionable on the merits. In particular, the notion that Section Three cannot be enforced at the federal level without Section Five legislation is refuted by the practice of disqualifying would-be members of Congress under Article I, Section Five. And the notion that Section Three can be enforced only before the election flies in the face of the plain text of the provision, which forbids an oath-breaking insurrectionist to "hold" office—something that takes place only after the election. It follows that the *Trump v. Anderson* opinion should not be interpreted as foreclosing the possibility that Congress could, by a vote of both Houses, decide not to recognize electoral votes in favor of a candidate on the ground that he or she is not eligible for the office.

The rushed and uncertain quality of the per curiam opinion could have disruptive consequences in the future. Who knows when another person who supported a violent protest that temporarily shut down the operations of government will be elected President and challenged as an oath-breaking insurrectionist? If Halley's Comet is a portent, we should watch the skies after an election in about seventy-five years. Then, if that happens, we will not only have to argue over what constitutes an insurrection and what it means to engage in it, but we will also dispute what was dictum and what was holding in *Trump v. Anderson*. It could be ugly.