

STRUCTURAL LOGICS OF PRESIDENTIAL DISQUALIFICATION

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INTRODUCTION

On March 4, 2024, a unanimous bench of the U.S. Supreme Court reversed a Colorado Supreme Court ruling removing former President Donald Trump from the state’s Republican primary ballot as an oath-breaking insurrectionist under section three of the Fourteenth Amendment.¹ Foreshadowed by a tendentiously one-sided oral argument and a pervasive prejudgment by the chatting classes,² the actual result of *Trump v. Anderson*³ was a “dog bites man” moment of sorts. Few were surprised that Trump would end up on Colorado’s primary ballot or that the Court would resolve the case in a manner precluding other states from exercising section three in their nominating contests.⁴

The Court’s refusal to upend what at the time had been expected to be a (hardly relished) Trump/Biden rematch was unsurprising. But the actual arguments advanced by the per curiam arrived as if out of left field. Its anonymous pen avoided the modalities of constitutional argumentation that are often thought to be characteristic of the Roberts Court. There was, for example, no totalizing reliance on constitutional text nor any extended exegesis of original public meaning. The per curiam also swerved around the two main arguments tendered by the petitioning former President.⁵ Instead, it gave unanticipated witness to the obdurate prepotency of consequentialism and constitutional structure as instruments of Supreme Court decisionmaking.

While no one is proclaiming the death of originalism, the per curiam’s abrupt and unsought deviation from familiar methodological grooves raises questions about what exactly it held and why it took the path it did. Piercing through the carapace of its result foreshadowed, did the per curiam’s unusual justifications align with the balance of its jurisprudence? What do the reasons it elevates tell us about the role of

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¹ *Trump v. Anderson*, 144 S. Ct. 662, 665–66, 671 (2024) (per curiam) (reviewing *Anderson v. Griswold*, 543 P.3d 283 (Colo. 2023)).

² See, e.g., Erika Ryan et al., *No Good Options for Supreme Court in Trump Ballot Case*, NPR (Feb. 7, 2024, 4:07 PM), <https://www.npr.org/2024/02/07/1229856661/no-good-options-for-supreme-court-in-trump-ballot-case> [https://perma.cc/G6XJ-MFRC].

³ 144 S. Ct. 662 (2024) (per curiam).

⁴ See *id.* at 671.

⁵ See Brief for the Petitioner at 20–38, *Anderson*, 144 S. Ct. 662 (No. 23-719).

the Court in the larger constitutional scheme, and in particular its uneasy democratic processes?

Taking the *Anderson* per curiam on its own terms, this Comment untangles and evaluates three distinct structural logics upon which the Court's holding rests. I begin in Part I with a capsule summary of the case's factual context. I also offer a careful account of its merits arguments. Parts II through IV then closely evaluate three structural arguments underpinning its holding. These are logics of (roughly speaking) federalism, the separation of powers, and democracy. Without offering a gloss on section three, which has already been the subject of extensive, worthwhile historical work,⁶ I isolate specific justifications developed in the *Anderson* per curiam — and then subject them to careful scrutiny.

More briefly than the topic warrants, I also bring the new regime for presidential disqualification into conversation with the companion regime for presidential immunity, newly minted for the same former President less than four months later.⁷ The two opinions are related, not only because they both concern the appropriate mechanism for addressing criminality by “apex” elected officials.⁸ Both judgments notionally rest on a consequential logic of democratic defense — but both judgments inflict serious harms on the project of enduring democratic rule. It is the aim of this Comment to start to measure the bounds of that damage.

I. *ANDERSON* AND THE LAW OF PRESIDENTIAL DISQUALIFICATION

The factual background of the *Anderson* case is both well-trodden and profoundly controverted. I set forth here solely those bare-bones details necessary for a lucid discussion of the Court's reasoning before offering a close reading of the decision.

A. *The Anderson Litigation*

On January 6, 2021, a violent mob of President Donald Trump's supporters attacked the U.S. Capitol, disrupting the counting of Electoral College votes cast in November 2020, and leading to at least five deaths.⁹ Prior to the violence, Trump had urged his supporters to “walk

⁶ The leading recent scholarly treatments include William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605 (2024) and Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87 (2021).

⁷ *Trump v. United States*, 144 S. Ct. 2312, 2347 (2024).

⁸ For that term, see Aziz Z. Huq, *Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design*, 65 UCLA L. REV. 1506, 1508 (2018).

⁹ Lindsay Wise, Catherine Lucey & Andrew Restuccia, “*The Protesters Are in the Building.*” *Inside the Capitol Stormed by a Pro-Trump Mob*, WALL ST. J. (Jan. 6, 2021, 11:53 PM), <https://www.wsj.com/articles/the-protesters-are-in-the-building-inside-the-capitol-stormed-by-a-pro->

down to the Capitol” and to “fight like hell” so as to “take back our country” through “strength.”¹⁰ The President then returned to the White House. Despite being informed that the Capitol was under violent siege, Trump declined to intervene or coordinate federal responses.¹¹ Instead, he continued to tweet messages blaming Vice President Mike Pence for certifying the election as the violence unfolded and threatened Pence’s life.¹²

On September 6, 2023, six Colorado voters filed a complaint under Colorado’s Election Code in Denver district court seeking declaratory relief against Colorado Secretary of State Jena Griswold to the effect that Trump was “not constitutionally eligible” for the presidency under section three of the Fourteenth Amendment.¹³ Colorado election law, argued the complainants, precluded Griswold from including Trump’s name on the Colorado primary ballot.¹⁴ After a five-day trial featuring testimony from fifteen witnesses,¹⁵ district court Judge Wallace made factual findings that “Trump engaged in an insurrection on January 6, 2021 through incitement, and that the First Amendment does not protect Trump’s speech.”¹⁶ Nevertheless, Judge Wallace directed Griswold to include Trump on the Colorado Republican primary ballot on the ground that section three does not apply to former Presidents who violate their oath of office because the presidency is not an “office . . . under the United States.”¹⁷

On direct appeal from Judge Wallace’s order, the Colorado Supreme Court held on December 19, 2023, that Trump was “disqualified from holding the office of President under Section Three,” and “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.”¹⁸ A mere seventeen days later, the U.S. Supreme Court granted Trump’s petition for a writ of certiorari.¹⁹ It promulgated a compressed briefing

trump-mob-111609984654 [https://perma.cc/8Z7N-L7FZ]; Kenya Evelyn, *Capitol Attack: The Five People Who Died*, THE GUARDIAN (Jan. 8, 2021, 2:30 PM), https://www.theguardian.com/us-news/2021/jan/08/capitol-attack-police-officer-five-deaths [https://perma.cc/RFG4-2EQX].

¹⁰ *Anderson v. Griswold* (*Anderson I*), No. 2023CV32577, 2023 WL 8006216, at *19–20 (Colo. Dist. Ct. Nov. 17, 2023) (emphasis omitted).

¹¹ *Id.* at *25.

¹² *Id.* at *24; Joint Appendix at 1412, *Anderson*, 144 S. Ct. 662 (No. 23-719).

¹³ *Anderson I*, 2023 WL 8006216, at *1–2.

¹⁴ *Id.* at *1.

¹⁵ *Id.* at *4, *7–11.

¹⁶ *Id.* at *43.

¹⁷ *Id.* at *43, *45–46 (quoting U.S. CONST. amend. XIV, § 3) (explaining that absent a “clear, unmistakable indication,” the court was unwilling to read section three as reaching a former President, *id.* at *46).

¹⁸ *Anderson v. Griswold*, 543 P.3d 283, 297 (Colo. 2023).

¹⁹ *Trump v. Anderson*, 144 S. Ct. 539 (2024) (mem.) (granting certiorari).

schedule culminating in a February 8, 2024, oral argument.²⁰ Concurrently, and not unrelatedly, the Court declined to grant a parallel expedited schedule in the criminal matter arising from the January 6 violence filed by Special Counsel Jack Smith.²¹

Less than one month after oral argument, the Court issued a per curiam opinion reversing the Colorado Supreme Court's decision.²² The per curiam was appended by two concurrences, one concurring in part and concurring in the judgment and one concurring in the judgment, by Justice Barrett and Justices Sotomayor, Kagan, and Jackson respectively.²³ The outcome's seeming inexorability eclipsed the opacity of its reasoning. To dispel this murkiness, I dissect the per curiam opinion with care to flesh out its structural logics.

B. *The Anderson Per Curiam*

The *Anderson* per curiam reached its holding by drawing on three broad arguments of unusual character and dramatic sweep. That holding was in a sense narrow. It bore mainly on the power (or absence of power) of state institutions to disqualify candidates for federal office-holding. Notably, the per curiam did not adopt more sweeping and categorical decision rules sought by the former President's lawyers, which would have eliminated any section three risk on Trump's part. And its result left open questions of both *how* section three might be levied against Trump in particular (and federal candidates more generally) as well as the basal matter of Trump's eligibility given January 6.

To frame an inquiry into those pivotal justifications, I first take up the narrower "power" question that the per curiam resolved. I then zoom out to map the justifications upon which that holding rested. This Comment's main analytic contribution is an evaluation of those justifications.

1. *Section Three Disqualification in Anderson*. — The basis for disqualifying Trump from the Colorado primary ballot had been section three of the Fourteenth Amendment:

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,

²⁰ Transcript of Oral Argument at 1, *Anderson*, 144 S. Ct. 662 (No. 23-719), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-719_5he6.pdf [https://perma.cc/4JPJ-PBHA].

²¹ *Trump v. United States*, 144 S. Ct. 1027, 1027–28 (2024) (granting a petition for certiorari on February 28, 2024, on the question of former Presidents' immunity from criminal prosecution, and setting a briefing schedule measured out in weeks, and not days).

²² *Anderson*, 144 S. Ct. at 664–65.

²³ *Id.* at 671 (Barrett, J., concurring in part and concurring in the judgment); *id.* at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.²⁴

The central thrust of briefing on Trump's behalf aimed to eliminate any risk that he would be disqualified from competing in or winning the 2024 presidential election not just in Colorado, but more generally. That briefing advanced two main arguments to that end. It proposed, first, that Presidents not fall into the class of oath-breaking "officer[s] of the United States" covered by section three, and second, that, on the facts, Trump's conduct on January 6, 2021, did not trigger disqualification.²⁵ The practical effect of a holding on either of these grounds would have been to eliminate all section three risk in respect to Trump's presidential candidacy.

But the per curiam reversed the Colorado Supreme Court without addressing either of these grounds. Instead, it rested on the premise that section three must be implemented via a very specific kind of "determination."²⁶ Further, the nature of this "determination" turned upon whether the person subject to disqualification seeks a state or a federal office.²⁷ The per curiam's holding focused solely on the case of a candidate for a federal (not a state) office. In that circumstance, it held, "States may disqualify persons holding or attempting to hold *state* office," but "have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency."²⁸

The immediate effects of the per curiam's holding were twofold. First, the ruling directly foreclosed efforts, not just in Colorado but also in states such as Maine and Illinois, to exclude Trump from the 2024 presidential primary under section three for inciting the January 6 violence.²⁹ The Court explicitly recognized states' authority to enforce section three against state officials using state-law mechanisms.³⁰ Indeed, fourteen days after the Court issued the per curiam, it denied a petition for certiorari review by a New Mexico official disqualified by a state court on the basis of his participation in the January 6 violence.³¹ Now, if a person runs simultaneously in a gubernatorial race and the

²⁴ U.S. CONST. amend. XIV, § 3.

²⁵ Brief for the Petitioner, *supra* note 5, at 20–38.

²⁶ *Anderson*, 144 S. Ct. at 667 (quoting Appendix to Petition for Certiorari at 53a, *Anderson*, 144 S. Ct. 662 (No. 23-719)).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Zach Montellaro & Shia Kapos, *Illinois Becomes Third State to Kick Trump Off the Ballot over Jan. 6*, POLITICO (Feb. 28, 2024, 9:08 PM), <https://www.politico.com/news/2024/02/28/illinois-trump-ballot-constitution-00144019> [<https://perma.cc/HB62-PAXN>].

³⁰ *Anderson*, 144 S. Ct. at 667 ("We conclude that States may disqualify persons holding or attempting to hold *state* office.").

³¹ *Griffin v. New Mexico*, 144 S. Ct. 1056 (2024) (mem.); Petition for Writ of Certiorari at 1, *Griffin*, 144 S. Ct. 1056 (No. 23-279).

presidential election, he or she could be disqualified from the former, but not the latter, by a state body.

One implication of this discrepancy is that section three is “self-executing” in the sense that it operates directly on individuals by creating potential legal consequences at least some of the time.³² But those consequences can only materialize through the correct kind of federal or state “determination.” An analogy might be drawn to the criminal law: A person who commits an intentional murder is, colloquially, a murderer. But different legal consequences of their action cannot attach until there has been the correct sort of civil or criminal proceeding.

Second, because the opinion neither clarified the scope of section three’s prohibition nor addressed whether Trump’s January 6 actions count as disqualifying, the per curiam guaranteed that the 2024 presidential race would unfold under a cloud of legal uncertainty as to whether Trump would be qualified to hold federal office under section three. It is important to note that this uncertainty might not be widely perceived. Indeed, it is my own perception as I write this prior to the November 2024 election that few Americans have any sense of this legal uncertainty. But that does not mean it no longer exists.

To bring this unclarity into focus, imagine a candidate simultaneously running for the governor’s mansion and the White House after having participated in the Capitol riot. She could be removed by a state court from the former race but could persist in the latter absent federal action. The ruling hence raises the stakes regarding the appropriate mechanism for making federal disqualification determinations. In the context of the 2024 presidential race, the clearest pre-election path — a vote by supermajorities in Congress to remove a section three disability — is chimerical in practice. In the absence of a congressional waiver, the choice of federal mechanism turns importantly on how such power must be articulated across the three branches of the federal government. That is, it implicates a question of the separation of powers.

My aim in what follows is to examine the per curiam’s deeper justificatory structure. But it is worth observing at this early stage that the per curiam’s demand for a separate “determination” has no clear provenance in the text or history of section three nor is it supported by the authority cited by the per curiam.

The text of section three contains “language of automatic legal effect.”³³ Its text and early applications suggest that a “determination” is needed for the removal, but not imposition, of disqualification.³⁴ The text can be read *in pari materia* with the Birthright Citizenship Clause too: Both automatically impose a status. But text and original public

³² Transcript of Oral Argument, *supra* note 20, at 5–6.

³³ Baude & Paulsen, *supra* note 6, at 623.

³⁴ Indeed, Congress removed disqualifications even before the Fourteenth Amendment had been ratified. *See, e.g.*, Act of July 11, 1868, ch. 139, 15 Stat. 85.

meaning get no attention in the per curiam. Lacking a textual or historical anchor for the proposition that an individualized “determination” is a prerequisite for disqualification, the per curiam cited the controversial *In re Griffin*³⁵ (*Griffin’s Case*).³⁶ The reasoning of *Griffin’s Case* has been extensively and persuasively criticized.³⁷ Of most relevance here is the rather embarrassing fact that *Griffin’s Case* concerns disqualification from a state office (a judgeship), and not a federal one.³⁸ If the per curiam really credited *Griffin’s Case* as authority, it would have had to rule that federal action was a predicate to disqualification from *either* state *or* federal office. Applying the per curiam’s rule to the facts of *Griffin’s Case* arguably yields a result at odds with Chief Justice Chase’s reasoning. Even when it did cite precedential authority, therefore, the per curiam stands on fragile ground.

2. *Anderson and the Choice of Constitutional Modalities*. — The outcome in *Anderson* concerns the needful locus of a (newly minted) “determination” of section three disqualification for presidential hopefuls. The ruling presented three distinct arguments for why these “determinations” for national office-seekers must be made at the federal level, rather than by individual states.³⁹

The per curiam’s core holding rested upon two arguments that sound in a “structural” modality and one that is “prudential” in character.⁴⁰ These terms need a bit of gloss. In an influential book, Professor Philip Bobbitt describes an argument as “structural” when it “infer[s] rules from the relationships that the Constitution mandates among the structures it sets up.”⁴¹ A structural argument is one that takes the Constitution as “a coherent whole” that can be sensibly read only by moving “beyond individual clauses to ponder the larger constitutional systems, patterns, structures, and relationships at work.”⁴² Another of the species of modality mapped by Bobbitt is “prudential,” in the sense that it sets out “to balance the costs and benefits of a particular rule”⁴³ through a careful accounting of the “political and economic policies [about] which the Constitution is itself agnostic.”⁴⁴

³⁵ 11 F. Cas. 7 (Chase, Circuit Justice, C.C.D. Va. 1869) (No. 5,815).

³⁶ *Anderson*, 144 S. Ct. at 666–67 (quoting *Griffin’s Case*, 11 F. Cas. at 26).

³⁷ See, e.g., Magliocca, *supra* note 6, at 105–08 (noting “many problems” with its conclusion, *id.* at 105).

³⁸ See *Griffin’s Case*, 11 F. Cas. at 23.

³⁹ *Anderson*, 144 S. Ct. at 668 (federalism); *id.* at 670 (separation of powers and congruence); *id.* at 671 (democratic values).

⁴⁰ See *infra*, section I.B.3, pp. 175–84.

⁴¹ PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) (“A structural argument is one that deduces particular rules as necessary to, and thus implied by, the requirements of the various constitutional structures of federalism, of the various federal branches, of the representative state, among others, and the relationships these structures mandate.” *Id.* at 52.).

⁴² Akhil Reed Amar, *America’s Constitution and the Yale School of Constitutional Interpretation*, 115 *YALE L.J.* 1997, 2001 (2006).

⁴³ BOBBITT, *supra* note 41, at 13.

⁴⁴ *Id.* at 17.

The per curiam’s reliance upon structural and prudential modalities is itself something of a surprise. The Roberts Court is typically characterized as “originalist,”⁴⁵ “textualist,”⁴⁶ or “formalist.”⁴⁷ But the per curiam opinion is largely bereft of close historical or textual analyses. Such adjuring of ordinarily prominent methodological tenants cannot be explained by an absence of relevant textual or historical material. Not only an extensive cluster of amici briefing, but also a bushel of well-regarded legal scholarship mapped historical and textual predicates for the questions aired by the Colorado Supreme Court’s ruling.⁴⁸ Like *Hamlet’s Ghost*, text and history hover uncertainly at the peripheries of the per curiam’s analysis.

Worse, the use of structural and prudential modalities is striking because both are in tension with the Court’s putative fidelity to originalism and textualism. The structural modality’s propensity to transcend textual detail is in “obvious tension”⁴⁹ with more “clause-bound” lines of textualist inquiry.⁵⁰ “[S]tructural reasoning and background assumptions” can push “substantially beyond the Constitution’s words, sometimes in ways that may be surprising to originalist theorists and practitioners.”⁵¹ This consequentialist strand of reasoning abides in tension with the Roberts Court’s disparagement of “raw consequentialist calculation.”⁵² In its recent overruling of due process precedent with respect to abortion, for example, the Court’s majority denied out of hand any possibility that it “could foresee what will happen” upon such a volte-face and insisted instead that it had “no authority to let [any prediction of likely consequences] influence [their] decision.”⁵³ In another decision issued in the 2023 Term, several Justices avowed their persisting and exclusive fealty to originalism, with Justice Kavanaugh penning an extended screed against “highly subjective judicial evaluations of how important a law is”⁵⁴ — that is, precisely the kind of

⁴⁵ Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 223 (2023).

⁴⁶ William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611, 1614 (2023).

⁴⁷ Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 2–3 (2020).

⁴⁸ See, e.g., Brief Amicus Curiae of Edward B. Foley, Benjamin L. Ginsberg & Richard L. Hasen in Support of Neither Party at 8, *Anderson*, 144 S. Ct. 662 (No. 23-719). See generally Baude & Paulsen, *supra* note 6; Magliocca, *supra* note 6.

⁴⁹ Thomas B. Colby, Essay, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1301 (2019) (noting the “obvious tension between original meaning textualism and structural argument”).

⁵⁰ Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1278 n.84 (2001).

⁵¹ Michael D. Ramsey, *Beyond the Text: Justice Scalia’s Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1946 (2017).

⁵² *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021).

⁵³ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2279 (2022).

⁵⁴ *United States v. Rahimi*, 144 S. Ct. 1889, 1921 (2024) (Kavanaugh, J., concurring).

consequentialist reasoning that the *Anderson* judgment rested upon.⁵⁵ The official line at the Court, as Professors David Pozen and Adam Samaha recently explained, is that “*explicitly* predicting, valuing, or quantifying the range of consequences associated with various interpretive options remains essentially unheard of in constitutional law.”⁵⁶ The practice, however, is utterly at odds with its purported dominant methodology.⁵⁷

The balance of this Comment takes for granted that structural and prudential arguments are not *eo ipso* problematic or impermissible. It is nevertheless worth keeping in mind that the use of such functionalist modalities in *Anderson* represents an unexplained departure from the Court’s traditional methodological approach in constitutional cases.⁵⁸ With that in mind, let us turn to the three main lines of argument upon which the per curiam concluded that the Colorado Supreme Court lacked power to disqualify a candidate for federal office.

3. *The Three Grounds of the Anderson Per Curiam.* — The per curiam’s holding rested on three distinct structural or prudential grounds. These are usefully considered seriatim.

Most prominent is a structural argument from federalism principles about the allocation of power between the several states and the national government. On the per curiam’s telling, “the Fourteenth Amendment ‘expand[ed] federal power at the expense of state autonomy’”⁵⁹ and affixed “significant” constraints upon the states.⁶⁰ Central to this architectural change was section five of the Fourteenth Amendment, which assigned Congress authority to enact “appropriate legislation” to “enforce” the Fourteenth Amendment.⁶¹ States, reasoned the per curiam, had preratification sovereign power to regulate access to state office, but “nothing in the Constitution *delegates* to the States any power to enforce Section 3” with respect to federal offices.⁶² Having discerned no

⁵⁵ See *Anderson*, 144 S. Ct. at 670–71 (stating that state-by-state determinations of eligibility under section three would likely produce a nonuniform result contrary with the basic principles of national representation). Of course, Justice Kavanaugh joined the per curiam without comment.

⁵⁶ David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 750 (2021) (emphasis added).

⁵⁷ Compare *Rahimi*, 144 S. Ct. at 1912 (Kavanaugh, J., concurring) (noting that “[h]istory, not policy, is the proper guide” when faced with “vague constitutional text”), with *Anderson*, 144 S. Ct. at 671 (expressing concern that state-by-state determinations of section three disqualifications could swing the election by voiding a dispositive number of votes).

⁵⁸ See Pozen & Samaha, *supra* note 56, at 749 (“Constitutional law is an outlier in the degree to which it denigrates, and purports to cordon off, this style of consequentialist reasoning.”); Cass R. Sunstein, Essay, *From Technocrat to Democrat*, 128 HARV. L. REV. 488, 490 (2014) (noting that Justice Breyer’s work possessed a “distinctive, even unique” quality for its emphasis that doctrine must be understood in light of its consequences).

⁵⁹ *Anderson*, 144 S. Ct. at 666 (alteration in original) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996)).

⁶⁰ *Id.* at 668 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)).

⁶¹ *Id.* at 667 (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

⁶² *Id.* at 668 (emphasis added).

prerogative power vested in states, the per curiam further located no explicit “delegation” to states in either the Fourteenth Amendment or elsewhere in the constitutional text.⁶³ In confirming that putative textual absence, the per curiam pointed to an absence of historical moments in which states had previously attempted to disqualify candidates for federal office.⁶⁴

In the per curiam’s account, this structural logic is entangled with a strand of prudential concern: An alternative structural account premised on concurrency rather than exclusivity perversely permits a single state to shape national officeholders’ identities, thereby inflicting a wave of political externalities on the citizens of coordinate states,⁶⁵ and even allowing single states to interfere with the due and lawful work of sitting federal officeholders.⁶⁶ A federal architecture of concurrency would also impermissibly empower states to “burden” Congress by forcing it to exercise its supermajoritarian waiver power with respect to a federal candidate.⁶⁷

Second, there is an important moment in the opinion where a second structural logic sounding in the separation of powers entered the picture — much to the consternation of the three-Justice concurrence (and perhaps Justice Barrett, too).⁶⁸ This horizontal logic of interbranch relation goes something like this: Section five of the Fourteenth Amendment reposes responsibility for the amendment’s enforcement in Congress.⁶⁹ But in a series of decisions starting with *City of Boerne v.*

⁶³ *Id.* (citing U.S. CONST. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2) (concluding that inferring a delegation to the states from the Elections or Electors Clauses to enforce section three would “invert the Fourteenth Amendment’s rebalancing of federal and state power”).

⁶⁴ *Id.* at 669 (“Nor have the respondents identified any tradition of state enforcement of Section 3 against federal officeholders or candidates . . .”).

⁶⁵ *See id.* at 671 (stating that permitting a “patchwork” system through state enforcement of section three would “dramatically change the behavior of voters . . . and States across the country” (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 (1995))).

⁶⁶ *See id.* at 668 (“[N]ot even the respondents contend that the Constitution authorizes States to somehow remove sitting federal officeholders who may be violating Section 3.”). *But cf. id.* (“States lack even the lesser powers to issue writs of mandamus against federal officials or to grant habeas corpus relief to persons in federal custody.” (citing *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603–05 (1821); *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 405–10 (1872))).

⁶⁷ *Id.* at 669 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819)). The per curiam here again used the rhetoric of structural arguments when it suggested that it is simply “implausible to suppose” states have “authority to impose such a burden on congressional power.” *Id.* (citing *McCulloch*, 17 U.S. (4 Wheat.) at 436). Resorting to judicial evaluation of the plausibility and desirability of hypothetical scenarios is a signal that textual, historical, or precedential forms of evidence are not in play.

⁶⁸ *See id.* at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment) (accusing the Court of “decid[ing] momentous and difficult issues unnecessarily” by “opin[ing] on which federal actors can enforce Section 3, and how they must do so”); *see id.* at 671 (Barrett, J., concurring in part and concurring in the judgment) (noting that the Court need not “address the complicated question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced”).

⁶⁹ *Id.* at 666; U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

Flores,⁷⁰ the Court has imposed a limiting yoke upon Congress's section five power.⁷¹ Such legislation, those cases teach, must reflect "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁷² The logic of *Boerne* reflected in part a felt need to "maintain[] the traditional separation of powers between Congress and the Judiciary."⁷³ For absent a constraint on congressional authority under section five, the *Boerne* Court implied, the judiciary would lose its "power to interpret the Constitution in a case or controversy" concerning the scope of substantive rights conferred by the Fourteenth Amendment.⁷⁴ *Anderson* extended this separation-of-powers logic to the states: Given that Congress's reach is limited under section five by horizontal structural principles, it would be "simply implausible" to suggest that states had "freer rein."⁷⁵ In effect, limits derived from the proper equilibrium between the branches necessarily bleed over into the federal-state relationship lest they lose their purchase as horizontal struts of interbranch relations.

It is worth noting here that the line of cases precipitated by *Boerne* also rests on a "federalism concern[]"⁷⁶ with the "burden" that national legislation might place on states' "traditional general regulatory power."⁷⁷ I will have more to say in Part II about the relation of *Boerne*'s federalism argument with the per curiam's reasoning.⁷⁸ It suffices here to say that I do not think that it is sensible to invoke *Boerne*'s defense of state autonomy⁷⁹ as a reason for denying states' power to regulate presidential elections. Hence the need to focus on *Boerne*'s separation-of-powers rationale.

Another element of separation-of-powers logic can be discerned in the per curiam, albeit more faintly and under the shadow of more intense intermural debate. There is language in the per curiam suggesting that Congress must not only "prescribe how [section three disqualification] determinations should be made,"⁸⁰ but also that it needs to do so through a "law"⁸¹ subject to bicameralism and presentment. In Justice Barrett's words, the opinion may also have "address[ed] the complicated

⁷⁰ 521 U.S. 507 (1997).

⁷¹ See *Anderson*, 144 S. Ct. at 670 (citing *Boerne*, 521 U.S. at 520).

⁷² *Boerne*, 521 U.S. at 520.

⁷³ *Id.* at 523–24.

⁷⁴ *Id.* at 524.

⁷⁵ *Anderson*, 144 S. Ct. at 670.

⁷⁶ *E.g.*, *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1468–69 n.5 (2023) (Thomas, J., dissenting).

⁷⁷ *Boerne*, 521 U.S. at 534. For a discussion of the Court's section five decisions and the federalism principles they implicate, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2048–58 (2003).

⁷⁸ See *infra* Part II, pp. 185–202.

⁷⁹ See *Boerne*, 521 U.S. at 522–23, 527, 534–35.

⁸⁰ *Anderson*, 144 S. Ct. at 667.

⁸¹ See *id.* at 669–70.

question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced.”⁸² On this view, the per curiam spoke directly to the separation of powers by establishing the priority of congressional action to give section three practical effect.

Picking up on the possibility, the separate concurrence by Justices Sotomayor, Kagan, and Jackson criticized the per curiam’s “musings” (not, it is worth observing, its bottom-line holding) to the effect that “Congress . . . must enact legislation under Section 5” in order to give effect to section three disqualification for federal offices.⁸³ Worse, the concurrence suggested, the Justices of the per curiam reached this conclusion in bad faith, so as “to insulate all alleged insurrectionists from future challenges to their holding federal office.”⁸⁴ A single, conclusory sentence toward the close of a relatively brief concurrence, this phrase contains a striking accusation. Gesturing toward a judicial abuse of power, it suggests there is a separation-of-powers violation woven into the *Anderson* per curiam. Five Justices, all appointed by Republican Presidents (including two appointed by Trump himself), deliberately misapplied the power of judgment in order to advance the interest of a presidential candidate on their side of the aisle. Whatever historical inquiries later reveal about the merits of this charge, it is a forceful charge to make, almost casually, on the way to a different, quite technical point about the proper scope of Supreme Court opinions.⁸⁵

Interrogating the per curiam’s separation-of-powers logic, I further address this choice-of-federal-pathway question below. It suffices here to observe that the per curiam both rested upon, and arguably initiated, a horizontal separation-of-powers logic as much as a vertical federalism one.

The third and final logic of the *Anderson* per curiam is a “prudential” one concerning the costs of permitting Colorado, or other states, to disqualify candidates based on section three.⁸⁶ This argument focused on the decision’s effect upon the quality of national democratic processes and can therefore be usefully labeled an *argument from democracy*. Rather obviously, it rests on precisely the sort of macropolitical prediction that four of the five Justices who joined the per curiam in full eschewed in *Dobbs v. Jackson Women’s Health Organization*.⁸⁷

And while I treat this argument as prudential, it can also be reframed as yet a third structural argument. As such, it would proceed from the observation that the institutional design posited by the Constitution’s

⁸² *Id.* at 671 (Barrett, J., concurring in part and concurring in the judgment).

⁸³ *Id.* at 673 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

⁸⁴ *Id.* at 674.

⁸⁵ *See id.* (“The Court today needed to resolve only a single question: whether an individual State may keep a Presidential candidate found to have engaged in insurrection off its ballot.”).

⁸⁶ *See id.* at 671 (per curiam); BOBBITT, *supra* note 41, at 13 (describing the “prudential” constitutional modality as one that “seek[s] to balance the costs and benefits of a particular rule”).

⁸⁷ *See* 142 S. Ct. 2228, 2279 (2022).

text centers democratic contestation through a range of elective and appointive mechanisms. Without specifying a distinct right to vote as such, the text further underscores the centrality of the franchise through the Fifteenth, Nineteenth, and Twenty-Fifth Amendments.⁸⁸ Given the aggregate of these textual commitments, it is plausible to infer that “representative democracy” is “fundamental” to the Constitution’s design.⁸⁹ As such, it is recognized as a structural trait on par with federalism and the separation of powers. This is not quite the argument that the *per curiam* made — but it closely aligns with it.

The argument from democracy posited that “disruption” to the presidential election process “could nullify the votes of millions and change the election result.”⁹⁰ This is an outcome to be categorically abjured, suggested the *per curiam*.⁹¹ A “delegation” (to use the Court’s terms)⁹² of disqualification power for federal offices to state institutions would set into motion a bevy of different judicial or administrative processes. “The result could well be that a single candidate would be declared ineligible in some States, but not others, based on the same conduct.”⁹³ Such disuniformity, coupled with “an evolving electoral map,” could shape voter behavior in unpredictable and unstable ways.⁹⁴ So deferral to state disqualification procedures could yield “chaos.”⁹⁵ The use of such emotionally charged rhetoric leaves no doubt as to the strength of the (plainly consequentialist) judicial commitment to eliminating disorderly or otherwise aberrational electoral procedures.

C. *Accounting for Anderson*

At first blush, and despite the protestations of the concurring trio of Justices, the *Anderson per curiam* seemed to aim at a narrowly crafted ruling. It distinguished the section three mechanism (“determination”) questions from fractious and fraught questions of how it applies to former Presidents, and to Trump in particular. It then offered a resolution — federal determinations for federal office seekers that purport to bracket other permutations of oath-breakers and the offices being sought. In these ways, the opinion is “narrow rather than wide” insofar as it does “not venture far beyond the problem at hand, and attempt[s] to focus on the particulars of the dispute before the Court.”⁹⁶ At the

⁸⁸ U.S. CONST. amends. XV, XIX, XXV.

⁸⁹ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

⁹⁰ *Anderson*, 144 S. Ct. at 671.

⁹¹ See *id.*

⁹² *Id.* at 668.

⁹³ *Id.* at 671.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 362 (2006) (emphasis omitted) (defining “narrowness” as one of the two elements of Burkean minimalism).

same time, the per curiam is characterized by a certain ambition. Rather than pivoting off a closed set of precedent or a careful parsing of an isolated fragment of constitutional text, it rested on three sweeping justificatory logics concerning the nature of federalism, the separation of powers, and democracy. Stated at a sufficiently high level of generality, these might be “rationales and outcomes on which diverse people can agree.”⁹⁷ But the per curiam is not an exercise in mere rhetoric. Its structural and prudential grounds are “theoretically ambitious” in ways less amenable to overlapping consensus.⁹⁸

The question, then, is whether these ambitious visions of the structural Constitution, trimmed by prudential caution, rest on firm ground — or whether they harbor the seeds of their own undoing.

* * *

The balance of this Comment closely scrutinizes the three structural arguments offered in the per curiam. It asks whether each coheres with text, history (relevant insofar as it offers a “gloss” in respect to textual ambiguities), and Supreme Court precedent. This mode of inquiry takes for granted that structural and prudential arguments are valid. A different reader of *Anderson*, bearing their own, distinct methodological commitments, might take a different approach. For instance, in-vogue modes of originalism likely lead to the conclusion that the per curiam errs in several ways. A reader committed to those views might measure the per curiam opinion solely against the corpus of relevant originalist evidence. Finding it wanting, they might simply end by repudiating it. Perhaps the same reader might acknowledge that the per curiam is legitimately a part of constitutional law’s fabric and then confront the more interesting question of how to move forward given that obdurate error. Addressing the questions left open presents what might be characterized as a dilemma of the second best.

I am not an originalist, at least as that term is presently and variously used, and so I offer no answer to that question. Rather, the point is that the *Anderson* per curiam invites a gamut of inquiries — and those that follow are hardly exhaustive.

II. THE VERTICAL LOGIC OF PRESIDENTIAL DISQUALIFICATION

The *Anderson* per curiam bifurcated responsibility for section three disqualification: The federal government is responsible for determining eligibility for federal office under section three, while the states handle responsibility for state offices.⁹⁹ This logic does not reflect a textual or

⁹⁷ *Id.* at 364 (defining “shallowness” as the second of two elements of Burkean minimalism).

⁹⁸ *Id.* at 365.

⁹⁹ *Anderson*, 144 S. Ct. at 667. This brackets the (dubious) assumption that a separate “determination” is needed for disqualification to be effective.

precedential settlement of how disqualification works. Instead, it is rooted in the familiar juridical idiom of federalism.

But of what flavor? There is, of course, no “Federalism Clause” in the Constitution.¹⁰⁰ Here, as elsewhere in the modern jurisprudence of constitutional structure, the Court employed a hermeneutic technique called “structural inference,” by which a judge “identifies numerous discrete provisions that, in particular ways, divide sovereign power between state and federal governments” and then derives a broad principle from their sum.¹⁰¹ Specifically, the *Anderson* per curiam inferred an institutional division of disqualification primarily from the Fourteenth Amendment and from the absence of a “delegation” in the Constitution’s text.¹⁰²

But is this a necessary, or even a correct, structural inference? In the absence of precise constitutional text setting forth the federalism logic of disqualification, numerous permutations of intersovereign authority can be imagined. Given the national color of any “insurrection or rebellion” covered by section three,¹⁰³ for example, shouldn’t disqualification be an exclusive matter to be determined by the sovereign that was initially threatened? Why shouldn’t the national government’s interest in disqualification, that is, be indexed by the enforcement of section three against potential federal officeholders, as opposed to enforcement against federal oath-breakers? Parents of young children through the ages have been familiar with the maxim of “clean your own messes.” Why shouldn’t a reading channeling disqualification responsibilities to the body that empowered a disloyal official in the first place be preferred? Alternatively, consider that many of those originally covered by section three lived and pursued political careers in the recently seceded states, whose governments were hardly redoubts of nationalist sentiment. Given this, might it not be counterproductive (and at odds with original public meaning) to allocate state authorities any role in the application of section three? Rather, it is surely more sensible to read the textual allocation of the power to *remove* disqualifications to the national legislature as suggesting that the power to *impose* those sanctions originally rested with those same national bodies.

In short, there are a plurality of possible federalism logics immanent even in the text of section three alone. The existence of this plurality of inferences raises the question of whether the specific inference drawn by the per curiam from the Fourteenth Amendment and the absence of a delegation is a convincing one.

¹⁰⁰ *E.g.*, Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 35–36 (2000).

¹⁰¹ John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2006 (2009).

¹⁰² *Anderson*, 144 S. Ct. at 667–68.

¹⁰³ U.S. CONST. amend. XIV, § 3.

I think it is not. Each point in the per curiam’s logic is at least contestable as a structural inference. To see why, it is worth taking each element of the Court’s reasoning in sequence — first, the idea that the Fourteenth Amendment impels a preference for (or even exclusivity of) federal action, and second, the absence of a delegation of power to states to enforce section three. Neither of these positions withstand scrutiny.

A. The Federalism Logic(s) of the Fourteenth Amendment

The Fourteenth Amendment is not solely an expansion of “federal power at the expense of state autonomy”¹⁰⁴ in a way that supports broad structural inferences about mechanism choice for section three. Both text and precedent illustrate a more complex effect upon the distribution of authority between the federal government and the several states.

The Fourteenth Amendment does not simply expand federal power vis-à-vis the states. Section one, in its very first turn of phrase, directs that “[a]ll persons born or naturalized in the United States” be treated as “citizens of the United States and of the State wherein they reside.”¹⁰⁵ This provision binds the federal government as much as the states. As the Court recognized in 1873, the Birthright Citizenship Clause “establish[es] a clear and comprehensive definition of citizenship” by “overturn[ing] the *Dred Scott* decision.”¹⁰⁶ It was thus iniquitous *federal* action that prompted the ratification of section one — not an action by a state official.

After 1868, section one bound the national government in consequential ways. In 1898, for example, the Court applied section one’s birthright citizenship language against a federal official who had detained an American-born man called Wong Kim Ark on the ground that his Chinese parentage vitiated any claim to American citizenship.¹⁰⁷ However settled the race-neutral application of birthright citizenship claims might seem today, the twentieth-century history of congressional efforts to exclude racial minorities from the polity, albeit through laws that aimed to “restrict[] immigration and naturalization on the basis of race,”¹⁰⁸ is evidence of the practical significance of section one as a constraint on federal power.

The companion elements of section one concerning due process, equal protection, and privileges and immunities apply by their strict terms only to the states.¹⁰⁹ In that respect, the Fourteenth Amendment

¹⁰⁴ *Anderson*, 144 S. Ct. at 666 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996)).

¹⁰⁵ U.S. CONST. amend. XIV, § 1.

¹⁰⁶ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873) (discussing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV).

¹⁰⁷ *United States v. Wong Kim Ark*, 169 U.S. 649, 704 (1898).

¹⁰⁸ Amy McMeeking, Comment, *Citizenship, Self-Determination, and Cultural Preservation in American Samoa*, 70 UCLA L. REV. 840, 849 (2023).

¹⁰⁹ U.S. CONST. amend. XIV, § 1.

may appear to constrain subnational entities while leaving the federal government's hands untied. Yet this asymmetry is a weak and implausible ground for the per curiam's inference of federal exclusivity. Most obviously, components of section one that initially bound only the states, such as the Equal Protection Clause,¹¹⁰ have now been applied to the federal government through the doctrine of reverse incorporation.¹¹¹ Despite some early hesitation, the Court has also held that "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable."¹¹² Having aligned the Fourteenth Amendment obligations of the states and the national government, the Court cannot credibly point to section one as a justification for glossing the Fourteenth Amendment as constraining the states alone.

Other elements of the Fourteenth Amendment constrain federal action while also shaping the constitutional options available to state officials. Section two directs how representation in Congress "shall be apportioned among the several States."¹¹³ That provision imposes no direct prohibition upon state legislators or constitutionmakers.¹¹⁴ It "apportions on the basis of total population and calls for a penalty to punish wrongful disenfranchisement of adult male citizens" by diminishing federal representation.¹¹⁵ At best, this imposes a form of "soft pressure" on the states that stands in striking contrast to the Fifteenth Amendment's "direct command"¹¹⁶: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."¹¹⁷ In practice, such "soft" suasion has had a rather limited effect. Southern political leaders "were more concerned with retaining local political control . . . than with gaining national control."¹¹⁸ As a result, "Section 2 enabled violent voter suppression in the South to flourish."¹¹⁹

¹¹⁰ See *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (upholding a military curfew for persons of Japanese descent because the "Fifth Amendment contains no equal protection clause").

¹¹¹ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (recognizing that "[t]he Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment," but still holding that federal racial "discrimination may be so unjustifiable as to be violative of due process" (citing *Detroit Bank v. United States*, 317 U.S. 329 (1943); *Currin v. Wallace*, 306 U.S. 1, 13-14 (1939); *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937))).

¹¹² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995).

¹¹³ U.S. CONST. amend. XIV, § 2.

¹¹⁴ Lisset Marie Pino & John Fabian Witt, *The Fourteenth Amendment as an Ending: Constitutional Beginnings and the Demise of the War Power*, 10 J. CIV. WAR ERA 5, 14 (2020) ("Section 2 tasked Congress with sanctioning states that did not enfranchise black men by reducing their representation.").

¹¹⁵ Ethan Herenstein & Yuriy Rudensky, *The Penalty Clause and the Fourteenth Amendment's Consistency on Universal Representation*, 96 N.Y.U. L. REV. 1021, 1033 (2021).

¹¹⁶ Katherine Shaw, Comment, *Invoking the Penalty: How Florida's Felon Disenfranchisement Law Violates the Constitutional Requirement of Population Equality in Congressional Representation, And What to Do About It*, 100 NW. U. L. REV. 1439, 1445 (2006).

¹¹⁷ U.S. CONST. amend. XV, § 1.

¹¹⁸ Pino & Witt, *supra* note 114, at 14.

¹¹⁹ *Id.*

Likewise, section four explicitly bars the United States from defraying “any debt or obligation incurred in aid of insurrection or rebellion.”¹²⁰ Another element of that provision prohibits any “question[ing]” of the “public debt of the United States, authorized by law.”¹²¹ That language was proposed by Republican Senator Benjamin Wade, who explained it as a way to “put[] the debt incurred in the civil war on our part under the guardianship of the Constitution of the United States, *so that a Congress cannot repudiate it.*”¹²² Consistent with Senator Wade’s framing, some have contended that section four prohibits Congress from enacting legislation that “causes the public reasonably to question whether the federal government will soon choose not to honor its debt commitments.”¹²³ Consistent with this reading, the Court in 1935 pointed to section four in striking down a Joint Resolution of Congress, issued on June 5, 1933, that suspended contract clauses requiring payments of debt obligations in gold.¹²⁴ In contrast to the historical use of section four to invalidate federal action, there is no reported case (to the best of my knowledge) relying upon that clause to strike down a state law, regulation, or executive action.

The final textual element of the Fourteenth Amendment, of course, is the clause assigning to Congress the authority to enact “appropriate” implementing legislation.¹²⁵ It is certainly the case that this clause vests Congress with previously unavailable power “to provide modes of relief against State legislation, or State action.”¹²⁶ The *per curiam* identified section five as “the relevant provision” and authority for the proposition that “[t]he Constitution empowers Congress to prescribe how those determinations [that is, section three’s application to federal candidates] should be made.”¹²⁷

But how plausible is this reading of the clause?¹²⁸ On its face, section five makes no distinction between the enforcement of the Fourteenth Amendment against state as opposed to federal actors.¹²⁹ Instead, it vests authority in Congress with respect to *all* such obligations without differentiating between the federal government and the states.¹³⁰ It is

¹²⁰ U.S. CONST. amend. XIV, § 4.

¹²¹ *Id.*

¹²² CONG. GLOBE, 39th Cong., 1st Sess. 2769 (1866) (statement of Sen. Benjamin Wade) (emphasis added).

¹²³ Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1190 (2012).

¹²⁴ *Perry v. United States*, 294 U.S. 330, 354 (1935) (suggesting that section four “embrac[es] whatever concerns the integrity of the public obligations”).

¹²⁵ U.S. CONST. amend. XIV, § 5.

¹²⁶ *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

¹²⁷ *Anderson*, 144 S. Ct. at 667 (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

¹²⁸ For a different argument that reaches the same conclusion as the main text, see Baude & Paulsen, *supra* note 6, at 655.

¹²⁹ See U.S. CONST. amend. XIV, § 5.

¹³⁰ *Id.*

thus unclear how section five could be read to make the federal government's obligation to enforce section three against presidential candidates exclusive, while preserving states' power, and indeed duty, to act under sections one and two. There is neither textual nor precedential warrant for the per curiam's carveout of this eccentric little pocket of federal exclusivity.

Nor is there a clear reason to find *any* preemptive effect hidden in section five's folds. It is certainly true that the Court has crafted doctrines of implied preemption directly under the Constitution, such as the dormant commerce clause¹³¹ and (in one instance) the dormant foreign affairs doctrine.¹³² It is far from clear, however, why the shadow of implied constitutional preemption should be extended to section five writ large. It would run counter to the Fourteenth Amendment's design to suggest, for example, that states' legislators or governors were disabled from taking steps to promote equal protection or due process unless Congress licensed them to do so. Rather, such a reading seems *prima facie* implausible as an originalist or as a purposivist reading of the clause. It is more plausible to read section five to mean just and only what it says: Congress can enforce the balance of the Fourteenth Amendment, even as the states exercise concurrent authority in respect to matters within their jurisdiction.

Applications of the Fourteenth Amendment in Supreme Court precedent also offer no support for the per curiam's claim of federal exclusivity in respect to section three disqualifications from federal office. To the contrary, the Court has often appealed to the states' autonomous role in American federalism to narrow the scope of federal action under the Fourteenth Amendment.

At three crucial junctions in the Reconstruction Amendments' history, the Supreme Court pointed to a concern with the preservation of state autonomy to read the new amendments narrowly. First, early and pathmarking interpretations of the Fourteenth Amendment resisted broad accounts of federal power given a need to preserve states' antebellum sovereignty. In one of the first major judicial interpretations of the Fourteenth Amendment, the Court took a narrow view of the Privileges and Immunities Clause, lest its interpretation inadvertently provoke a "serious, . . . far-reaching and pervading . . . departure from the

¹³¹ See *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1152–53 (2023) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 (1824); *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 317–21 (1852); *Guy v. Baltimore*, 100 U.S. 434, 443 (1880); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997)).

¹³² In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court blocked "state involvement in foreign affairs and international relations — matters which the Constitution entrusts solely to the Federal Government." *Id.* at 436. But *Zschernig* is an outlier, even in the foreign affairs domain. See Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 GEO. L.J. 1825, 1832 (2018) (observing that *Zschernig* is "the only Supreme Court case which has applied the doctrine").

structure and spirit of our institutions” with “the effect . . . to fetter and degrade the State governments by subjecting them to the control of Congress.”¹³³ Narrow construction was compelled to avoid “radical[] changes [to] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.”¹³⁴ Ten years later, the Court installed a narrowly drawn requirement of state action as a predicate to any claim under section one’s individual entitlements.¹³⁵ It thus invalidated the Civil Rights Act of 1875¹³⁶ as an effort by Congress to arrogate “power to legislate upon subjects which are within the domain of State legislation.”¹³⁷ This would “make Congress take the place of the State legislatures and to supersede them” — a manifestly “absurd” proposition.¹³⁸

Second, the Court adopted a more robust account of the Fourteenth Amendment’s shadow upon state action in the mid-twentieth century in the school desegregation cases precipitated by *Brown v. Board of Education*.¹³⁹ However, within two decades of *Brown*, remedies for historical de jure race segregation in secondary schools were constrained by a “deeply rooted” principle of “local control,” which enforced robust geographic boundaries on federal-court injunctive remedies.¹⁴⁰ The Justices’ decision to impose this localism constraint on injunctive relief in desegregation cases was “a crushing blow to urban desegregation in the North and West, where school district lines separated urban and suburban schools, and where urban schools were increasingly dominated by minority students.”¹⁴¹ That same localism interest weighed against federal action to remedy economic disparities in education.¹⁴² But when school districts attempted to use race-conscious means to mitigate the educational effects of residential segregation, local control was quietly dispensed with as a matter of constitutional concern.¹⁴³ In short, local control was an interest of constitutional moment only when it restricted efforts to equalize the distribution of educational resources.

¹³³ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1873).

¹³⁴ *Id.*

¹³⁵ *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

¹³⁶ Ch. 114, 18 Stat. 335, *invalidated in part by The Civil Rights Cases*, 109 U.S. 3.

¹³⁷ *The Civil Rights Cases*, 109 U.S. at 11 (drawing the scope of Fourteenth Amendment prohibitions narrowly lest it be read to “authorize Congress to create a code of municipal law for the regulation of private rights”).

¹³⁸ *Id.* at 13.

¹³⁹ 347 U.S. 483 (1954).

¹⁴⁰ *Milliken v. Bradley*, 418 U.S. 717, 741, 744–45 (1974).

¹⁴¹ James E. Ryan, Brown, *School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635, 1645 (2004).

¹⁴² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973).

¹⁴³ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744–45 (2007). And, indeed, arguments for local control were ridiculed as the sort of arguments that Jim Crow school districts would proffer. *See id.* at 775–76 (Thomas, J., concurring) (comparing arguments for local control as a justification for race-conscious integration to arguments “segregationists” would make).

Finally, there is a recent series of cases in which concerns with states' regulatory autonomy are invoked explicitly to limit Congress's powers under section five. In *City of Boerne v. Flores*, as I noted above, the Court demanded "congruence and proportionality" in measures enacted pursuant to section five.¹⁴⁴ The *Boerne* Court reasoned that legislation to enforce the Fourteenth Amendment could impose "substantial costs . . . both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power."¹⁴⁵ Unless a federal measure tracks and "respond[s] to a history of 'widespread and persisting deprivation of constitutional rights'" by the states, section five legislation fails to pass constitutional muster.¹⁴⁶ In practice, the "congruence and proportionality" rule imposes a heavy evidentiary burden on Congress.¹⁴⁷ In order for it to invoke section five, Congress must create a legislative record testifying to the extent of unconstitutional state action.

These three lines of cases — initial constraints on federal power, midcentury bounds on school integration injunctions, and the congruence and proportionality test — show that the Court has consistently invoked "federalism" as a reason for limiting federal power. Consistency in the treatment of "federalism" thus ought to have led the *Anderson* per curiam to give states wide regulatory berth with respect to section three. Yet the per curiam adduced no reason to think that federalism should constrain national power when it comes to enforcing Reconstruction, promoting school integration, and enforcing the Bill of Rights — and then take on a different valence when it comes to presidential disqualification. Indeed, in a concurrently issued decision on voting rights, a majority of the Court (conservative Justices) went out of their way to underscore the need for deference to state legislatures on questions of how national political institutions operated.¹⁴⁸ No explanation was forthcoming for why state officials should receive extraordinary deference when they were involved in one aspect of national political decisionmaking but evince a positive distrust when engaged in another

¹⁴⁴ 521 U.S. 507, 520 (1997).

¹⁴⁵ *Id.* at 534.

¹⁴⁶ Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645 (1999) (quoting *Boerne*, 521 U.S. at 526) (striking down a challenged law lest "[a]n unlimited range of state conduct" might trigger liability for "direct, induced, or contributory patent infringement," *id.* at 646); *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (holding provision of the ADA authorizing money damages against states unconstitutional for not responding to "a pattern of discrimination . . . which violates the Fourteenth Amendment").

¹⁴⁷ *Cf.* Post & Siegel, *supra* note 77, at 1973 (explaining that the Court "asks about the nexus between past constitutional violations and [a challenged law]," rather than the fiscal burden directly imposed by that law).

¹⁴⁸ *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1236 (2024) (underscoring the need for "respect for the judgment of state legislators, who are similarly bound by an oath to follow the Constitution," in a context where such respect made constitutional challenges effectively impossible to succeed).

element of the national political process.¹⁴⁹ This kind of striking dissonance in the treatment of federal-state relations as they pertain to national elections provides powerful reasons for skepticism of the Court’s proffered reasons.

The inconsistency with which the Court wielded the rhetoric of federalism is even more acute than this allows: Recall that the per curiam cited the “congruence and proportionality” limitations on congressional authority installed by *Boerne* as a reason to deny the states’ power to disqualify federal candidates.¹⁵⁰ Specifically, the per curiam expressed a worry that “state enforcement might be argued to sweep more broadly than congressional enforcement could under [their] precedents.”¹⁵¹ Set aside the odd and evasive subjunctive tense at work in this argument.¹⁵² If constitutional limits on federal authority to enforce section three primarily stem from a concern with preserving states’ “general regulatory power,”¹⁵³ then it is perverse and self-defeating to expand these restrictions to states’ “general regulatory powers” in one particular domain. In other words, states’ indefeasible authority is conjured to justify a limit on Congress’s power — and then this limit is bounced back to lash tight the states.

There is, in short, a Möbius-strip quality to the per curiam’s argument from the *Boerne* line of cases: The Fourteenth Amendment reserves powers to Congress out of concern with states’ misuse of autonomy, but then caps this power to preserve states’ autonomy. Its circular reasoning is not immediately apparent simply because the *Anderson* per curiam cited *Boerne* without acknowledging that the rationale behind *Boerne*’s “congruence and proportionality” principle contradicts the per curiam’s decision. Citing a bare holding shorn of reasoning, the per curiam wove the doctrine into pretzel-like twists. Its inconstancy merely reinforces the caution, expressed some fifteen years ago by Professor John Manning, against the lazy and foggy supposition that the Founders had “adopted federalism in the abstract”¹⁵⁴ as opposed to settling upon “a number of particular provisions prescribing varied means of allocating governmental power” in reasonably precise ways.¹⁵⁵

* * *

If the structural logic of the per curiam were extended beyond the specific case of presidential disqualification, it would wreak havoc with

¹⁴⁹ See *id.* at 1235–36.

¹⁵⁰ *Anderson*, 144 S. Ct. at 670 (quoting *Boerne*, 521 U.S. at 520).

¹⁵¹ *Id.*

¹⁵² To the extent that the per curiam’s argument from *Boerne* is credited, why isn’t it sufficient to say that any scheme for federal-office disqualification, whether state or federal, must be congruent and proportional?

¹⁵³ *Boerne*, 521 U.S. at 534.

¹⁵⁴ Manning, *supra* note 101, at 2007.

¹⁵⁵ *Id.* at 2052.

well-established and now uncontroversial elements of the federal-state relationship. Rather than building on text or precedent, the *per curiam* was a dramatic and seemingly arbitrary rupture. To be sure, this leaves open the question of whether considerations distinctive to the presidential selection process — be they formal or pragmatic — warrant such a departure. It is thus to those questions I now turn.

B. States' Delegated Authority to Disqualify Federal Officials

The *Anderson* *per curiam*'s federalism argument rested on a second plank: It also contended that nothing in the Constitution “affirmatively delegate[s] . . . to the States” the disqualification power with respect to candidates for federal office.¹⁵⁶ That is, even if the Fourteenth Amendment anticipates a distribution of duties to both the states and the federal government, there is no *textual* basis for states' exercise of authority with respect to presidential selection.

The claim that no textual warrant exists for states' exercise of section three power is not persuasive. To the contrary, the weight of textual, historical, and precedential evidence leans strongly in favor of assigning the states a large role in the mechanisms used for presidential selection, including Colorado's design of primary ballots for its voting public.

1. The Electors Clause. — The Constitution is not entirely silent as to how presidential selection happens. Article II's Electors Clause provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.”¹⁵⁷ Citing this language in the margin, the *per curiam* posited peremptorily that there is “little reason to think . . . [it] implicitly authorize[s] the States to enforce Section 3.”¹⁵⁸ Strikingly, the *per curiam* then offered nothing by way of reasoning to warrant this conclusion.¹⁵⁹

Text, history, and precedent uniformly suggest a different result. To begin with, Article II's language directly vests states with authority over presidential appointments. Specifically, the inclusion of “in such Manner as the Legislature thereof may direct” is an unequivocal and expansive allocation of power to subnational actors.¹⁶⁰ The text then limits Congress to determining “the Time of chusing the Electors.”¹⁶¹ This narrow federal power over timing is in striking contrast with Congress's broader power to enact preempting legislation concerning the “Times,

¹⁵⁶ *Anderson*, 144 S. Ct. at 668. The Court added that “[i]t would be incongruous to read [the Fourteenth Amendment] as granting the States the power — silently no less — to disqualify a candidate for federal office.” *Id.*

¹⁵⁷ U.S. CONST. art. II, § 1, cl. 2.

¹⁵⁸ *Anderson*, 144 S. Ct. at 668.

¹⁵⁹ The following sentence in the opinion appealed to a concern about “rebalancing . . . federal and state power.” *Id.* But for the reasons canvassed in section II.A, this structural argument has no merit.

¹⁶⁰ U.S. CONST. art. II, § 1, cl. 2.

¹⁶¹ *Id.* art. II, § 1, cl. 4.

Places, and Manner of holding Elections for Senators and Representatives.”¹⁶² Reading the two “nonadjoining clauses alongside each other . . . because they use the same (or very similar) words and phrases”¹⁶³ underscores states’ broad control over the “Manner” of appointing electors. And reading the Constitution’s election-related clauses *in pari materia* begs the question of why the drafters of the Constitution would have expressly limited Congress’s power when it came to presidential elections, but not legislative elections, if they had intended to give plenary power over chief executive selection to Congress.¹⁶⁴

Historical practice and judicial precedent concerning Article II’s Electors Clause affirm its plain meaning: They show that states have broad powers to determine how to “appoint” electors. Indeed, states have alternated among a wide variety of selection mechanisms over time, including congressional caucuses, national party conventions, direct primaries coupled with a party-driven delegate selection mechanism, and nonpartisan primaries in which almost the whole electorate votes.¹⁶⁵ For example, states can dispense entirely with a primary ballot of the kind from which the Colorado court found Trump to be excluded.¹⁶⁶ Indeed, about half of all states did so when they opted for direct legislative selection of electors in the very first presidential contest.¹⁶⁷ States’ legislatures continued to flex their Electors Clause power to engage in direct selection of electors until 1830, and Florida threatened to do so as late as 2000.¹⁶⁸ States opted between statewide and districted elections.¹⁶⁹ The direct primary system familiar today first came into use at the beginning of the twentieth century.¹⁷⁰ If states have broad power to opt among these different mechanisms, why would they

¹⁶² *Id.* art. I, § 4, cl. 1. Such regulations are issued in the first instance by the states, but then can be wholly displaced by congressional action. *See id.* Paradoxically, Trump’s argument to the Court in part turned on the Electors Clause as a source of state authority. *See* Brief for the Petitioner, *supra* note 5, at 46–48.

¹⁶³ Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 793 (1999).

¹⁶⁴ *See* Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 54 (2021) (“As a textual matter, the Electors Clause is plainly narrower than the Elections Clause.”).

¹⁶⁵ *See* Stephen Gardbaum & Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 N.Y.U. L. REV. 647, 652–61 (2018) (documenting this history).

¹⁶⁶ *See* ALEXANDER KEYSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 4 (2020) (“[T]he Constitution permits state legislatures to choose electors by itself, without holding popular elections . . .”).

¹⁶⁷ *See* Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 856 (2002).

¹⁶⁸ *See* KEYSAR, *supra* note 166, at 4.

¹⁶⁹ *See* *Chiafalo v. Washington*, 140 S. Ct. 2316, 2321 (2020).

¹⁷⁰ *Compare* ROBERT G. BOATRIGHT, CONGRESSIONAL PRIMARY ELECTIONS 27 (2014) (Minnesota in 1899), *with* SETH E. MASKET, THE INEVITABLE PARTY: WHY ATTEMPTS TO KILL THE PARTY SYSTEM FAIL AND HOW THEY WEAKEN DEMOCRACY 127–28 (2016) (Wisconsin in 1904).

be prohibited from applying a section three bar? Rather, the historically exercised breadth of discretionary state authority under the Electors Clause demonstrates states' ample power pursuant to that clause to shape presidential elections.

Congress and commentators alike have recognized states' broad authority over elector appointments. In 1874, for example, a Senate report on a proposed constitutional amendment to the system of presidential electors observed that "appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States . . . and [this power] cannot be taken from them [without a constitutional amendment]."¹⁷¹ When, in 1954, Professor Herbert Wechsler wrote that "with the President . . . the crucial instrument of the selection — whether through electors or, in the event of failure of majority, by the House voting as state units — is . . . the states," he was thus simply expressing a well-worn constitutional truth.¹⁷²

Nor has the Court, in its diverse disquisitions on the Electors Clause, ever hinted at federal exclusivity in respect to the applications of the Constitution's qualifications for office.¹⁷³ Rather, any state regulatory structure for the selection of electors sensibly accounts for federal-law limits on electors' selection.¹⁷⁴ It is hard to see any justification for reading the Electors Clause to create a two-step selection process in which states select electors, and then the federal government checks their constitutional homework. Certainly, history gives no warrant for any such thought. Nor, for this reason, is it sensible to think of election regulation as categorically divided into zones of federal and state control.

To be sure, the twentieth-century Court glossed congressional power under the Electors Clause as sweeping. In 1934, it thus stated that Congress has authority under the Electors Clause to enact "appropriate legislation to safeguard . . . [a presidential] election . . . from impairment or destruction."¹⁷⁵ Judicial recognition of congressional authority, however, runs concurrently with judicial acknowledgement of an equally sweeping state power over mechanism design for Article II ends.

In 1890, for example, the Court unanimously reversed the grant of federal habeas corpus relief to a man convicted in state court of "unlawfully . . . voting" for a presidential elector despite the man having a prior

¹⁷¹ S. REP. NO. 43-395, at 9 (1874).

¹⁷² Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954).

¹⁷³ See, e.g., *Chiafalo*, 140 S. Ct. at 2324–25 (acknowledging that "Article II, § 1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint" without going on to assert whether the federal government has exclusive enforcement authority of those "constitutional constraint[s]," *id.* at 2324).

¹⁷⁴ See NAT'L ASS'N OF SEC'YS OF STATE, SUMMARY: STATE LAWS REGARDING PRESIDENTIAL ELECTORS 1 (2016) (summarizing that state laws generally "reflect" the requirements for electors found in both the U.S. Constitution and federal statutes).

¹⁷⁵ *Burroughs v. United States*, 290 U.S. 534, 545 (1934).

conviction for larceny.¹⁷⁶ Electors, explained the Court, “are no more officers or agents of the United States than are the members of the state legislatures.”¹⁷⁷ For this reason, Congress did not “interfere with the manner of appointing electors, or, where (according to the now general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election.”¹⁷⁸ The Court explicitly rejected the possibility of exclusive federal control over the process of selecting presidential electors, instead endorsing a state court’s authority to regulate the matter.¹⁷⁹

Just two years later, a group of elector candidates in Michigan challenged the state’s statutory scheme for determining presidential electors.¹⁸⁰ Again, a unanimous Court deflected the challenge by citing the “plenary” state authority over the appointment process.¹⁸¹ It explained that “the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States.”¹⁸² The term “appoint,” explained Chief Justice Fuller, “was manifestly used as conveying the broadest power of determination.”¹⁸³

About a century later, the Court issued two decisions that underscored states’ broad authority under the Electors Clause. In the first, the Court characterized the Electors Clause as one of several “express delegations of power to the States to act with respect to federal elections,”¹⁸⁴ directly contradicting the *per curiam*’s construction. In the second, the Court endorsed the states’ powers to punish so-called “faithless elector[s].”¹⁸⁵ Its conclusion was premised on the Electors Clause’s assignment to states of “far-reaching authority over presidential electors, absent some other constitutional constraint.”¹⁸⁶ As a result, a state can

¹⁷⁶ *In re Green*, 134 U.S. 377, 377 (1890).

¹⁷⁷ *Id.* at 379.

¹⁷⁸ *Id.* at 380.

¹⁷⁹ *See id.* Accordingly, *In re Green*, 134 U.S. 377 (1890), demonstrates the irrelevance of cases barring state-court injunctive relief against federal officials. *See Anderson*, 144 S. Ct. at 669. Rather, the Colorado court decisions at issue in *Anderson* did not directly interfere with a federal official’s performance of his or her duties but were exercising a delegated Article II power, affirmed by *Green*, to manage the appointment of presidential electors. *See id.* at 668 (arguing that the Elections and Electors Clauses do not implicitly delegate power to states to enforce section three against federal officials).

¹⁸⁰ *McPherson v. Blacker*, 146 U.S. 1, 24–25 (1892).

¹⁸¹ *Id.* at 25.

¹⁸² *Id.* at 35.

¹⁸³ *Id.* at 27. Primaries have since been ranked as state action, *see Nixon v. Condon*, 286 U.S. 73, 89 (1932), and the right to vote in a congressional primary has been found to be protected by the Federal Constitution, *see United States v. Classic*, 313 U.S. 299, 325 (1941).

¹⁸⁴ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995).

¹⁸⁵ *Chiafalo v. Washington*, 140 S. Ct. 2316, 2322, 2328 (2020); *see also id.* at 2322 n.2 (listing fifteen states’ faithless electors statutes).

¹⁸⁶ *Id.* at 2324.

appoint electors “in whatever way it likes.”¹⁸⁷ Even on the narrower view articulated by Justices Thomas and Gorsuch in a concurrence in the judgment to that opinion, Article II affirms states’ broad authority over “the mode of appointing electors.”¹⁸⁸

This body of authority is uniformly at odds with the *Anderson* per curiam’s offhand treatment of the Electors Clause. The standard view avoids some curious and illogical results that follow from the per curiam’s position. For example, under the per curiam’s rule, state legislators engaged in the direct selection of electors cannot consider whether the latter will cast their vote for a candidate disqualified under section three.¹⁸⁹ Apparently, they are to shut their eyes to rebellion and insurrection. In effect, the per curiam erected an arbitrary breakwater around the otherwise unfettered discretion of these state legislators.

This stance of the per curiam becomes odder once one recalls that section three is but one of several provisions stipulating criteria for presidential candidates. Candidates must also be “a natural born Citizen,” at least thirty-five years of age, and “fourteen Years a Resident within the United States.”¹⁹⁰ They cannot have been impeached and disqualified from office.¹⁹¹ They cannot be a resident of the same state as the vice-presidential candidate for whom that state’s electors will vote.¹⁹² Finally, they must be excluded from office if term-limited under the Twenty-Second Amendment.¹⁹³

Does the per curiam’s argument extend to these other provisions? At least on its face, its rule concerns only section three.¹⁹⁴ The alternative would be a general prohibition on states’ enforcement of disqualification rules in the Constitution. This seems quite implausible: A reading of the Constitution that disbarred states from checking whether presidential candidates were thirty-five rather than thirty-three, durable residents, or from a different state than their vice-presidential pick, would seem facially implausible.

But this only deepens the puzzle: Why should one read the Constitution to allow states to enforce all other disqualification provisions in the Constitution except one hinging on past participation in insurrection

¹⁸⁷ *Id.*; see also *Moore v. Harper*, 143 S. Ct. 2065, 2083–84 (2023) (concluding that “the Federal Constitution gives state legislatures the power to regulate congressional elections” within the bounds of the federal and state constitutions).

¹⁸⁸ *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring in the judgment).

¹⁸⁹ *Anderson*, 144 S. Ct. at 667.

¹⁹⁰ U.S. CONST. art. II, § 1, cl. 5.

¹⁹¹ *Id.* art. I, § 3, cl. 7.

¹⁹² *Id.* art. II, § 1, cl. 3 (“The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves.”), amended by *id.* amend. XII (“The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves . . .”).

¹⁹³ *Id.* amend. XXII, § 1.

¹⁹⁴ See *Anderson*, 144 S. Ct. at 665.

or rebellion? Nothing in the text or structure of either Article II or the Fourteenth Amendment points toward that conclusion. It is also not that the other qualifications involve straightforward factual questions, whereas section three impels more nuanced empirical judgments that must be reserved for Congress. Indeed, at least one other presidential qualification has catalyzed litigation.¹⁹⁵ Alternatively, it seems quite implausible to postulate that the Framers intended a distinction between all the *important* federal constitutional qualifications that states could enforce (for example, age and residence) and the *unimportant* ones that they had to be blind to (for example, oath breaking). It is more plausible to think that a concern with ensuring that those who broke their oath could not return to power should benefit from a wider array of enforcement mechanisms than a prohibition on naturalized citizens and early thirtysomethings. Surely, allowing an oath breaker to seize power is more serious a matter than permitting a Gen Zer into the White House.

Reflection on how a prohibition on state enforcement of section three would work — along with considerations of text, history, and precedent — suggests that the per curiam decision signaled an unprincipled and unwarranted carveout of state authority. This represents a move away from American federalism in the election context, rather than an act of fealty to that ideal.

2. *Other Relevant Constitutional Texts: The Tenth Amendment and the Supremacy Clause.* — Two other elements of the Constitution’s text support, to varying degrees, an inference in favor of states’ enforcement of section three disqualification. These are the Supremacy Clause and the Tenth Amendment.

First, the second clause of the Supremacy Clause shoulders state judges, and just state judges, with an express obligation to hew loyally to federal law and the Constitution.¹⁹⁶ Many states, including Colorado, include state-court review as an element of a process for selecting presidential electors.¹⁹⁷ The per curiam’s ruling created a weird gap in that obligation: State judges, it taught, read the Constitution as supreme — but not when asked whether an alleged oath breaker can be a presidential candidate. Certainly, this odd result can be explained in terms of institutional choice and the exclusive nature of federal *enforcement* of section three. But why should there be such an exception? We have already seen that there is no good reason to find any such preference for federal enforcement (let alone federal exclusivity) in the Fourteenth Amendment. Hence, the per curiam created the odd result that state-court judges who are swept under the Supremacy Clause’s command

¹⁹⁵ See, e.g., *Booth v. Cruz*, No. 15-cv-518, 2016 WL 403153 (D.N.H. Jan. 20, 2016) (dismissing challenge to Senator Ted Cruz’s presidential candidacy under the “natural born Citizen” qualification, U.S. Const. art. II, § 1).

¹⁹⁶ U.S. CONST. art. VI, cl. 2.

¹⁹⁷ *Anderson*, 144 S. Ct. at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment) (noting state role in selecting electors).

can honor all but one of the provisions of the Constitution governing states *qua* states. So when Judge Wallace was asked whether Trump was qualified to stand as a candidate in the 2024 presidential race,¹⁹⁸ she was obligated to shut her eyes to section three (and hence to the risk of an oath breaker taking office). The oddity of this arbitrary Supremacy Clause carveout is grounds to suspect that the per curiam’s logic was unsound.

Second, the Tenth Amendment “reserve[s] to the States respectively, or to the people,” “powers not delegated to the United States by the Constitution.”¹⁹⁹ Striking down federal legislation regulating both federal and state legislative elections, the Court has cited the Tenth Amendment for the point that “powers not specifically granted to the Federal Government are reserved to the States or citizens.”²⁰⁰ In other cases, however, the Court has suggested that the Tenth Amendment’s default rule does not apply to powers that “spring out of the existence of the national government.”²⁰¹ At most, this suggests that the Tenth Amendment’s default rule has no relevance to the section three context. To the extent the Tenth Amendment applies, though, its default rule should kick in for both Article I, section 4, and Article II, section 1. Indeed, in 2020, Justices Thomas and Gorsuch issued an opinion explicitly applying the Tenth Amendment–backed assumption that a presidential election–related power not delegated to the national government remains with “the people of each State.”²⁰² It is very hard to imagine how this sort of strong clear statement rule can be squared with a decision to sign the *Anderson* per curiam.

3. *The Absence of Historical Practice.* — Against the accumulating weight of text, historical practice, and judicial precedent concerning the Electors Clause, the per curiam offered curiously little. However, there is one argument in the opinion so far unaddressed. This is the notion that there is an absence of “any tradition of state enforcement of Section 3 against federal officeholders or candidates.”²⁰³ Such a lacuna, opined the per curiam, offers “persuasive evidence of a general understanding” that states lack such power.²⁰⁴

Yet, this antinovelty argument is an exceptionally weak reed. A threshold problem is that it asks one to ignore the large body of textual, historical, and precedential evidence that states have “plenary”²⁰⁵

¹⁹⁸ *Anderson I*, No. 2023CV32577, 2023 WL 8006216, at *1 (Colo. Dist. Ct. Nov. 17, 2023).

¹⁹⁹ U.S. CONST. amend. X.

²⁰⁰ *Shelby County v. Holder*, 570 U.S. 529, 543 (2013) (citing U.S. CONST. amend. X).

²⁰¹ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (Boston, Little, Brown & Co. 3d ed. 1858)).

²⁰² *Chiafalo v. Washington*, 140 S. Ct. 2316, 2329 (2020) (Thomas, J., concurring in the judgment) (quoting *U.S. Term Limits*, 514 U.S. at 848 (Thomas, J., dissenting)).

²⁰³ *Anderson*, 144 S. Ct. at 669.

²⁰⁴ *Id.* (citing *U.S. Term Limits*, 514 U.S. at 826).

²⁰⁵ *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

authority over elector appointments. Even putting that concern aside, the *per curiam* still leaned upon a flawed inferential logic. An absence of historical exemplars, in my view, can be evidence of a “general understanding” only if the states had opportunities to take the challenged action in the past.

It is trivial to observe that the absence of historical examples of states authorizing online voter registration, say, is not evidence that states lack such power. Absence can be evidence only if there were opportunities in the past to take a given action. States have not had opportunities to exercise section three disqualification authority in the past. Disqualifications flowing from the Civil War were addressed either by private bill²⁰⁶ or by the 1872 General Amnesty Act²⁰⁷ — that is, just four years after the Fourteenth Amendment’s ratification.²⁰⁸ Beyond that four-year period, the United States has experienced no insurrections or rebellions of note and also none that have thrown up credible candidates for the House, Senate, or presidency. There was no reason for either the states or Congress to expend valuable political time and effort erecting a durable scheme for section three disqualification. While it may be valuable for courts to lean upon “conventions” that emerge through legislative political-branch settlements over time,²⁰⁹ it makes little sense to search for conventional understandings when the background circumstances of politics have rarely or never offered incentives to create such settlements in legislative or regulatory form. Accordingly, the inference from absence upon which the *per curiam* lied rests on the false assumption that states had an opportunity to disqualify under section three but decided not to.²¹⁰

More generally, there is good reason to think that “[i]naction . . . is not as powerful a gloss as action” in constitutional interpretation.²¹¹ Inaction, after all, may have a plurality of causes.²¹² When specific legislation is absent, untangling which cause of action is decisive is likely to be systematically more difficult than in cases where legislation was enacted. It is perhaps for this reason that courts relying on historical practice tend to seek policies pursued “openly and by affirmative state action, not covertly or by state inaction.”²¹³

²⁰⁶ On the use of private bills, see Magliocca, *supra* note 6, at 112.

²⁰⁷ Act of May 22, 1872, ch. 193, 17 Stat. 142.

²⁰⁸ *Id.*

²⁰⁹ Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913, 1922 (2020).

²¹⁰ For other reasons to doubt what the inference can support, see Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1428 (2017) (noting that a past failure to legislate can arise for many different reasons).

²¹¹ Aziz Z. Huq, *Fourth Amendment Gloss*, 113 NW. U. L. REV. 701, 711 (2019).

²¹² Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 72 (2017).

²¹³ *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970).

* * *

The structural argument from federalism purports to do load-bearing work in *Anderson*.²¹⁴ It is a task that the specific version of federalism tendered by the per curiam cannot perform. Whether viewing through a wide-angle lens sweeping across the Constitution as a whole or looking narrowly at specific elements such as the Electors Clause or the Supremacy Clause, the overwhelming weight of evidence leans against the conclusion that Judge Wallace lacked power to keep insurrectionists off the Colorado ballot.

III. THE HORIZONTAL LOGIC OF PRESIDENTIAL DISQUALIFICATION

There is a second logic in the *Anderson* per curiam, albeit one that plays a more minor role than the federalism logic examined in Part II. This second logic sounds in the register of horizontal, interbranch relations, rather than in the vertical interactions between sovereigns. We can be confident that it is a distinct strand of argument because it elicited a targeted disagreement from the three concurring Justices.²¹⁵ That does not mean the separation-of-powers argument is clear. Rather, it has to be reconstructed from a somewhat gap-filled text.

Here is how I think that argument goes: The per curiam cited *City of Boerne v. Flores*'s "congruence and proportionality" test for the validity of section five legislation.²¹⁶ As I will explain below, it is incoherent to proffer *Boerne* — a decision that protects states' authority — as a reason to limit states' powers.²¹⁷ If *Boerne* is relevant to the question presented in *Anderson*, therefore, it must be because its separation-of-powers logic "between Congress and the Judiciary"²¹⁸ has traction: In effect, states must be constrained because they are stepping into Congress's shoes. The national legislature is constrained under our separation of powers,²¹⁹ and so it would be "implausible" to read the Constitution to "grant[] the States freer rein than Congress" to enforce section three.²²⁰

It is not clear why it would be "incongruous"²²¹ to give the states this authority in light of *Boerne*. After all, states have jurisdiction over many matters that the federal government cannot regulate. So far as I can tell, the per curiam implicitly rested on two premises here: (1) States'

²¹⁴ See *Anderson*, 144 S. Ct. at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment) ("Federalism principles embedded in that constitutional structure decide this case.").

²¹⁵ See *supra* notes 83–85 and accompanying text (discussing concurrence).

²¹⁶ *Anderson*, 144 S. Ct. at 670 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

²¹⁷ See *infra* section III.B, pp. 205–06.

²¹⁸ *Boerne*, 521 U.S. at 524.

²¹⁹ See *Anderson*, 144 S. Ct. at 670.

²²⁰ *Id.*

²²¹ *Id.* at 668.

efforts to enforce section three pose the same threat to the judiciary's role in the constitutional order as congressional overreaching pursuant to section five; and (2) the *Boerne* congruence and proportionality test operates as a meaningful check upon that threat — and indeed conduces to an absolute bar on state enforcement of section three against federal officials.²²²

Consider, therefore, each of these steps in turn to see whether they can bear the per curiam's separation-of-powers logic.

A. *Section Three Disqualification and Federal Judicial Power*

The idea that states' judgments on constitutional questions might impinge on federal judicial prerogatives has, of course, a pedigree tracing back at least to *Cooper v. Aaron*.²²³ At first blush, *Cooper* provides a warrant for the per curiam's horizontal ruling. But notice that the facts of *Anderson* are very different from those of *Cooper*: The latter concerned a state's deliberate defiance of a specific federal judicial order to desegregate.²²⁴ In contrast, *Anderson* involved a state supreme court's good faith and deliberative ruling as to how that state's presidential primary ballot should be composed.²²⁵ Unlike the Arkansas authorities in *Cooper*, the Colorado judges did not have any dispositive federal guidance (let alone a binding judicial order) in hand.²²⁶ And rather than defying federal power, the Colorado Supreme Court stayed its order to facilitate judicial review.²²⁷

Given these factual differences, the per curiam's initial premise can only be understood as another *structural* argument: The Colorado Supreme Court's exercise of jurisdiction over section three questions, regardless of how such power was exercised, cast an impermissible shadow on the federal judiciary's primacy over constitutional interpretation. By ranking the state court's ruling as ultra vires, rather than by reviewing that decision on the merits,²²⁸ the per curiam directed that *any* state exercise of section three authority posed an intractable threat to the federal judiciary's role.²²⁹ Its reasoning hence does not turn on pragmatic concerns about orderly presidential elections.²³⁰ It is instead a direct inference from constitutional structure.

²²² See *id.* at 670.

²²³ 358 U.S. 1, 18 (1958) (stating that “the federal judiciary is supreme in the exposition of the law of the Constitution”).

²²⁴ See *id.* at 4.

²²⁵ See *Anderson*, 144 S. Ct. at 664–65.

²²⁶ See *id.* at 674 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

²²⁷ See *id.* at 666 (per curiam).

²²⁸ I bracket the (actually quite difficult) questions here as to whether the Court had appellate jurisdiction or whether its order properly applied beyond the context of the Colorado presidential primary.

²²⁹ See *Anderson*, 144 S. Ct. at 668–71.

²³⁰ See *infra* section IV.A, pp. 207–11 (discussing those concerns).

It is hard to extend *Cooper* to reach this conclusion, although there are arguments in both directions. On the one hand, state courts adjudicate questions of constitutional law as a matter of course as a function of the Supremacy Clause.²³¹ These decisions are ordinarily subject to revision by the Supreme Court.²³² Bracketing, for now, pragmatic concerns, it is hard to see why structural concerns rooted in the Court's theory of judicial supremacy compel an ouster of states' authority.

On the other hand, the distinct idea of a preemptive ouster of state jurisdiction as a matter of federal-court primacy is not without precedent. In *Martin v. Hunter's Lessee*,²³³ for example, Justice Story opined that "the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others, may be made so at the election of congress."²³⁴ Both *Martin* and later opinions by the Court have suggested, albeit in dicta, that federal criminal jurisdiction cannot be assigned to state tribunals.²³⁵ Perhaps this principle can be extended to civil cases involving "a preventive and severe penalty,"²³⁶ such as section three disqualification.

The per curiam did not *make* this argument for federal jurisdictional primacy in so many words, so it is difficult to evaluate fairly. But, at a minimum, the argument has the virtue of not being at war with text, history, and precedent.²³⁷ In the end, however, I am not persuaded. As explained in Part II, the Colorado courts exercised authority explicitly granted to the states by Article II, section 1's Electors Clause. Further, there is no doubt that states can enact legislation to supplement the (oft-meager) rights of action granted by federal law to enforce Fourteenth Amendment rights more generally.²³⁸ If state courts can enforce other Fourteenth Amendment provisions, and if states have a heightened role in presidential elections, it is hard to see how federal jurisdictional primacy can be justified. Finally, there is also authority for the proposition that state courts can exercise jurisdiction respecting federal penalties where there is a relevant state regulatory structure (as is surely the case with electors' selection).²³⁹

²³¹ See *Testa v. Katt*, 330 U.S. 386, 391 (1947) (citing *Claflin v. Houseman*, 93 U.S. 130 (1876)).

²³² See 28 U.S.C. § 1257(a) (assigning the Supreme Court jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had").

²³³ 14 U.S. (1 Wheat.) 304 (1816).

²³⁴ *Id.* at 336–37.

²³⁵ *Id.* at 337; see also *Pickett v. United States*, 216 U.S. 456, 459 (1910) (suggesting that "the court of the State could not be empowered to prosecute crimes against the laws of another sovereignty").

²³⁶ *Anderson*, 144 S. Ct. at 666.

²³⁷ See *supra* section II.A, pp. 187–94, for arguments that fit that description.

²³⁸ See, e.g., *United States v. Morrison*, 529 U.S. 598, 627 (2000) (discussing state remedies for gender-based violence while holding that Congress lacked section five power to supplement them).

²³⁹ See *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 28 (1820) (finding that a state law "confer[red] authority upon a state court-martial to enforce the laws of the United States against delinquent militia-men, who had disobeyed the call of the president to enter into the service of the United States").

In sum, supernumerary state-law mechanisms to enforce the Fourteenth Amendment have never been thought to impugn the *Cooper* principle of judicial supremacy. Given states' explicit Article II power over presidential elector selections, and their general authority to supplement section five enforcement tools, it is not plausible to single out section three as a zone of federal jurisdictional exclusivity.

*B. The Congruence and Proportionality of
Disqualification Legislation*

The second step of the per curiam's argument exported the *Boerne* "congruence and proportionality" test²⁴⁰ to the section three context to avoid the "serious questions about the scope of [the disqualification] power" that would result if states have "freer rein than Congress to decide how Section 3 should be enforced."²⁴¹ There are two serious problems with this doctrinal migration.

First, the per curiam's concern about states' potential overreach can be addressed completely by limiting subnational disqualification mechanisms to whatever boundaries circumscribe Congress's exercise of the disqualification power. There is no warrant for extinguishing *all* such state power. In so doing, the per curiam leaned upon a non sequitur.

Second, the *Boerne* test cannot be sensibly or coherently exported beyond the context of federal legislation. The "congruence and proportionality" test involves a weighing of two variables. On the one side of the scale, there is an estimate of "the evil presented" in the form of state violations of the Fourteenth Amendment.²⁴² The Court here has looked at the congressional record for evidence of the frequency of Fourteenth Amendment violations by the states.²⁴³ On the other side of the scale are any burdens "impose[d] on state and local governments."²⁴⁴ If those costs "are disproportionate to any unconstitutional conduct"²⁴⁵ by states, section five power does not exist. So, in effect, *Boerne* asks whether the costs of diminished state regulatory autonomy are roughly proportional to the benefits to constitutional rights holders.

It is hard to see how this comparative evaluative exercise can be transposed into the section three context. Neither side of the *Boerne* cost-benefit analysis exists for section three: The latter creates no individual rights. Therefore, there is no empirical pattern of state violations. Section three instead imposes disabilities on individuals; it does not rob states of powers. On the other side of the ledger, section three's enforcement by state courts imposes no burden on "state and local

²⁴⁰ *Anderson*, 144 S. Ct. at 670 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

²⁴¹ *Id.*

²⁴² *Boerne*, 521 U.S. at 530 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

²⁴³ *Id.* at 530–32; *see also* *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) (looking to "[t]he record assembled by Congress").

²⁴⁴ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000).

²⁴⁵ *Id.*

governments.”²⁴⁶ To the contrary, taking *Boerne*’s concern with states’ regulatory authority seriously would direct us toward an embrace of state court power to enforce disqualification mandates.

Since section three does not generate patterns of unconstitutional state action that can be compared against a burden on a state’s regulatory power, the per curiam’s transposition of “congruence and proportionality” to the section three context makes little sense.²⁴⁷ Without major surgery, *Boerne* cannot be coherently applied to section three.

* * *

To recap briefly, there is at least some authority for federal jurisdictional exclusivity over section three enforcement, but it is likely outweighed by the authority for states’ primacy in managing presidential elections. If the per curiam is understood as founded upon the judicial supremacy logic of *Boerne*, both its categorical bar on state enforcement of section three and its imposition of the “congruence and proportionality” test become incoherent. The separation of powers, then, provides no alternative basis for its ruling.

IV. DEMOCRACY AS A CONSTITUTIONAL PRINCIPLE

I turn now to the consequentialist arguments that have shuttled in and out of the structural arguments aired in Parts II and III. I have bracketed these considerations until now because “structural” and “prudential” arguments, while often overlapping in practice, nonetheless turn on different kinds of evidence and criteria.²⁴⁸ While structural arguments “infer[] rules from the relationships that the Constitution mandates among the structures it sets up,” prudential arguments rest on forward-looking predictions of empirical consequences that “seek[] to balance the costs and benefits of a particular rule.”²⁴⁹ Of course, different kinds of considerations can be used to reinforce each other, but these arguments are usefully evaluated separately.

The *Anderson* per curiam appealed in broad terms to the structural value of democracy as a consequentialist lodestar guiding its result. This sounded primarily in a concern with uniformity in presidential elections.²⁵⁰ This would be undermined by allowing states to enforce section three. Doing so would invite “[c]onflicting state outcomes” as a consequence of “variations in state law governing [section three] proceedings.”²⁵¹ As a result, different states would simultaneously use different

²⁴⁶ *Id.*; see also *Anderson*, 144 S. Ct. at 666–67 (noting that section three imposes burdens on individuals rather than states).

²⁴⁷ See *Boerne*, 521 U.S. at 520.

²⁴⁸ See BOBBITT, *supra* note 41, at 12–13.

²⁴⁹ *Id.*

²⁵⁰ See *Anderson*, 144 S. Ct. at 670–71.

²⁵¹ *Id.* at 670.

slates of presidential candidates. This synchronic heterogeneity would engender a second problem: Instability over time would induce “[a]n evolving electoral map [that] could dramatically change the behavior of voters, parties, and States across the country,” potentially “nullify[ing] the votes of millions.”²⁵² This profoundly undesirable “chaos” could last “perhaps beyond the Inauguration.”²⁵³ These predictions of what, in fact, will happen offer a separate and distinct justification for the Court’s ruling, quite apart from the more formalist structural arguments evaluated in Parts II and III.

The per curiam’s consequential grounds, however, fall short on their terms. Its predictions of disorder are implausible, while its lodestar of electoral uniformity finds no home in the Constitution’s scheme for presidential selection. Worse, rather than abating uncertainty, the per curiam’s ruling engenders a new and serious form of uncertainty that could endure well past the day most voters go to the polls. Instead of inducing order, the per curiam has strewn its own “chaos”²⁵⁴-inducing landmine when electoral college votes are counted on Capitol Hill. Such concerns of instability are exacerbated, and extended in time, by the Court’s subsequent decision concerning presidential immunity from criminal prosecution,²⁵⁵ which deepens the concern about “a Lawless Presidency.”²⁵⁶ Finally, and perhaps most damning to my mind, the per curiam’s consequentialist arguments rested upon a deeply flawed and partial view of democracy. Its view of democracy is again at odds with the Constitution’s democratic scheme writ large, and also with the specific choices embodied in section three.

I begin with the question of how section three disqualification interacts with the orderly management of presidential elections. Then, I turn to the question of what conception of democracy the Constitution, as opposed to the per curiam, embraces.

A. *Does Anderson Promote the Orderly Administration of Presidential Elections?*

The per curiam’s prediction of “chaos” from state-by-state enforcement of section three²⁵⁷ needs to be evaluated against the backdrop of existing levers of state influence over the presidential election process.

²⁵² *Id.* at 671. It is not quite clear how an “evolving” electoral map leads to votes being nullified. If I vote for, say, Nikki Haley in the South Carolina primary, and she later withdraws, has my vote been “nullified” by that later change? I think we would ordinarily say not.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See *Trump v. United States*, 144 S. Ct. 1027 (2024) (mem.) (granting certiorari); *Trump v. United States*, 144 S. Ct. 2312 (2024) (addressing presidential immunity).

²⁵⁶ Kate Shaw, Opinion, *The Supreme Court Creates a Lawless Presidency*, N.Y. TIMES (July 2, 2024), <https://www.nytimes.com/2024/07/02/opinion/supreme-court-immunity-trump.html> [https://perma.cc/A9AS-UHJN].

²⁵⁷ *Anderson*, 144 S. Ct. at 671.

That is, predictions of the destabilizing effect of decentralized section three enforcement depend on how much discretion states already possess.

It is hard to credit the *per curiam*'s view of the marginal effect of state section three enforcement, however, given states' expansive power to shape the presidential election campaign under the Elections and Electors Clauses of Articles I and II.²⁵⁸ This power can be exercised through wholesale changes to the timing and structure of presidential selection.²⁵⁹ It can also be exercised through targeted removals of specific candidates.²⁶⁰

States already have both power and incentives to modulate the presidential nomination process for one or both major parties in ways that powerfully shape political strategies. As discussed above, states have historically shifted between different mechanisms for picking electors, ranging from congressional caucuses to national nominating conventions to direct primaries.²⁶¹ These different nomination processes strike different balances between parties' elites and their rank and file.²⁶² The Court has also recognized that spillover effects from run-of-the-mill state election regulations are inevitable, and may yet be problematic.²⁶³ In decisions concerning the fundamental right to vote, for example, the Court has affirmed states' broad power over the primary process, including their authority to create "barriers . . . tending to limit the field of candidates from which voters might choose . . . [, which] does not of itself compel close scrutiny."²⁶⁴ The Court has consistently affirmed states' authority to regulate presidential election contests based on "a

²⁵⁸ U.S. CONST. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2.

²⁵⁹ *Id.* art. I, § 4, cl. 1.

²⁶⁰ *Cf.* *Citizens for Legis. Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) (citing *Miyazawa v. City of Cincinnati*, 45 F.3d 126, 128 (6th Cir. 1995); *Zielasko v. Ohio*, 873 F.2d 957, 961 (6th Cir. 1989)).

²⁶¹ *Gardbaum & Pildes*, *supra* note 165, at 652–55.

²⁶² See Travis N. Ridout et al., *Following the Rules? Candidate Strategy in Presidential Primaries*, 90 SOC. SCI. Q. 777, 778 (2009).

²⁶³ See *Anderson v. Celebrezze*, 460 U.S. 780, 790 (1983) (assessing the constitutionality of a state's filing deadline for presidential candidates and noting that "[i]n election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time. Various candidates rise and fall in popularity"). It is true that the Court has said that the Equal Protection Clause precludes states from "plac[ing] . . . unequal burdens on minority groups where rights of this kind are at stake." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). It nevertheless insisted that "the State is left with broad powers to regulate voting, which may include laws relating to the qualification and functions of electors." *Id.* at 34. Perhaps the best precedent for the *Anderson* Court's ruling is an earlier decision called *Anderson v. Celebrezze*, which underscored that the "'extent and nature' of the burdens [a state] has placed on the voters' freedom of choice and freedom of association, in an election of nationwide importance," can be enough to "outweigh" a countervailing state measure. 460 U.S. at 806.

²⁶⁴ *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (first and second alterations in the original) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)) (citing *Anderson*, 460 U.S. at 788; *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969)). States' interests, however, are weaker in the presidential context, where the outcome is "largely determined by voters beyond the State's boundaries." *Celebrezze*, 460 U.S. at 795.

substantial interest in the manner in which [their] elections are conducted.”²⁶⁵ Nor does this authority expire once a party’s candidate is selected or when the national election has run its course. As the Court confirmed in 2020, states retain power to strip electors of their offices or to fine them if they act inconsistently with expectations even after a presidential election.²⁶⁶ These precedents and practices reflect a deep-seated, structural “principle of broad state control over selecting electors.”²⁶⁷ As Justice Story observed in his *Commentaries*, that principle of state control was already “firmly established” by the early nineteenth century.²⁶⁸ Justice Story noted that many desired a constitutional amendment to provide for a “uniform mode of choice by the people.”²⁶⁹

Perhaps most evident to contemporary eyes, states set the timing of their presidential primaries to significant political effect.²⁷⁰ In 2023, for example, the Democratic Party altered their primary calendar to move South Carolina’s forward (and hence aided their incumbent candidate).²⁷¹ Such changes to the timing and pace of primaries are deeply consequential. The sequencing of primaries enables some (but not all) candidates to leverage “strategic possibilities” immanent in the timing of different states’ votes.²⁷² For example, lengthy and contentious primary seasons tend to harm candidates.²⁷³

States even make discrete decisions as to the eligibility of particular candidates, barring particular individuals from competing even without section three powers.²⁷⁴ For example, a deadline in the Ohio statutory election code initially barred the then-presumptive Democratic nominee

²⁶⁵ *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 126 (1981).

²⁶⁶ *Chiafalo v. Washington*, 140 S. Ct. 2316, 2323 (2020) (holding that “a State may enforce its pledge law against an elector”). States can require electors to pledge to vote for specific presidential and vice-presidential candidates. *Ray v. Blair*, 343 U.S. 214, 227–30 (1952). They can also appoint replacement electors to fill vacancies after election day. See 3 U.S.C. § 4.

²⁶⁷ Coenen & Larson, *supra* note 167, at 857.

²⁶⁸ 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 752, at 537 (Carolina Acad. Press 1987) (1833).

²⁶⁹ *Id.*

²⁷⁰ See, e.g., Leonard P. Stark, Note, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 *YALE L. & POL’Y REV.* 331, 334 (1996) (discussing the “disproportionate influence” states like Iowa and New Hampshire have in presidential elections due to conducting early primaries).

²⁷¹ *Why Have the Democrats Changed Their Primary Calendar?*, *THE ECONOMIST* (Jan. 23, 2024), <https://www.economist.com/the-economist-explains/2024/01/23/why-have-the-democrats-changed-their-primary-calendar> [<https://perma.cc/VHU9-4N66>].

²⁷² LARRY M. BARTELS, *PRESIDENTIAL PRIMARIES AND THE DYNAMICS OF PUBLIC CHOICE* 24 (1988).

²⁷³ Thomas Kelly, *Electoral Effect of Protracted Presidential Primaries*, 52 *PRESIDENTIAL STUD. Q.* 936, 936–37 (2022).

²⁷⁴ Brief of Professor Derek T. Muller as Amicus Curiae in Support of Neither Party at 6–8, *Anderson*, 144 S. Ct. 662 (No. 23-719).

Joseph Biden from appearing on the November 2024 ballot.²⁷⁵ The Democratic National Committee developed a work-around to this obstacle.²⁷⁶ But the important fact here is that Ohio could, without apparent constitutional objection, use its statutory control over ballots to throw up a potentially conclusive barrier to a major-party candidate. Or consider the erratic and unpredictable path to the ballot of third-party candidates such as Robert F. Kennedy, Jr. As late as May 2024, Kennedy was on track (but not certain) to appear on the Texas and California ballots — with unpredictable effects not just on the presidential but also on the Senate races.²⁷⁷ That is, on the day in May 2024 when the Court handed down *Anderson*, there was meaningful uncertainty about the list of names that would appear on different states' November 2024 presidential ballots. The *Anderson* per curiam's assumption about stability in the presidential ballot access regime, in other words, did not even hold true in the election cycle at issue.

In any event, there is little reason to think that the decision by Colorado to disqualify former President Trump from the ballot would necessarily have precipitated a tit-for-tat response from other states. A ruling from the Supreme Court authorizing state disqualification could have addressed the scope of section three disqualification. It is certainly feasible, and perhaps legally compelled, that such a hypothesized ruling could have drawn the bounds of disqualification narrowly (say, by tethering it to overt violence of the sort that erupted on January 6) in ways that mitigated the possibility of vindictive, bad-faith uses of section three. It is far from clear, moreover, that capitulation to the anticipated threat of tit-for-tat disqualification is the best way to dial down the threat of bad faith deployments of section three. Such acquiescence is more likely to embolden bad behavior.

Paradoxically, *Anderson* will likely have a dynamic effect on the incentives of partisan actors involved in states' construction of presidential ballots. While this effect might not arise in the 2024 election cycle, it is reasonable to anticipate that the decision, by withholding the explicit power to screen candidates, will create incentives for states in subsequent election cycles to deploy their existing authorities over presidential selections in compensatory ways. This predictable "hydraulic" effect diminishes further the marginal importance of states' section

²⁷⁵ "Ohio law require[d] all candidates to be legally certified by Aug. 7" — twelve days before the Democratic National Convention. Michael Wines, *Democrats Adopt Nomination Plan to Allow Biden on the Ohio Ballot*, N.Y. TIMES (May 28, 2024), <https://www.nytimes.com/2024/05/28/us/democrats-biden-ohio-ballot.html> [https://perma.cc/4BW6-N8ZC].

²⁷⁶ *Id.*

²⁷⁷ See, e.g., J. David Goodman, *Why Having Kennedy on the Ballot in Texas May Worry Ted Cruz*, N.Y. TIMES (May 8, 2024), <https://www.nytimes.com/2024/05/08/us/robert-kennedy-texas-cruz.html> [https://perma.cc/5MWT-MA3U]; Rebecca Davis O'Brien, *R.F.K. Jr.'s Campaign Says He Will Be on California Ballot*, N.Y. TIMES (Apr. 30, 2024), <https://www.nytimes.com/2024/04/30/us/politics/rfk-jr-california-ballot.html> [https://perma.cc/CZ8V-4D38].

three powers in light of their existing suite of regulatory powers.²⁷⁸ It thus saps the per curiam’s reasoning of force.

To summarize, the breadth of states’ existing influence over the primary process means that it is difficult to see why the addition of section three disqualification power to their regulatory arsenal would have a significant marginal effect on their discretion. So it is hard to see how a practical concern about uniformity might justify *Anderson*’s exceptional carveout of section three disqualification from states’ purview.

*B. Does Anderson Undermine the Orderly
Administration of Presidential Elections?*

If *Anderson* does not mitigate a meaningful risk of election disorder, might it create or amplify such a risk? There is good reason to conclude, I think, that the per curiam exacerbates the very problem it purports to cure.

i. Procedural Ambiguity After Anderson. — To see why, recall first that the per curiam left unresolved several important questions. For example, it did not say whether Trump is disqualified under section three because it left the scope of disqualifying conduct undefined.²⁷⁹ As importantly, it was ambiguous as to whether and *how* such disqualification can occur. On the one hand, the per curiam suggested that disqualification can be pursued only through previously enacted legislation.²⁸⁰ As the concurrence paraphrased the decision’s holding, “Congress . . . must enact legislation”²⁸¹ for section three to take effect on the ground. On this view, section three requires a specifically designed federal statutory vehicle to be effectuated.²⁸² Yet, on the other hand, the per curiam explicitly recognized ways in which section three can be effectuated without bicameralism and presentment. For example, it cited historical examples where one house of Congress disqualified a candidate using its Article I power “to adjudicate challenges contending that certain prospective or sitting Members could not take or retain their seats.”²⁸³ In explaining that the holding “forecloses judicial enforcement” of section three, the concurrence singled out only proceedings in federal

²⁷⁸ See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1718 (1999).

²⁷⁹ See *supra* p. 176.

²⁸⁰ See, e.g., *Anderson*, 144 S. Ct. at 667 (“The Constitution empowers Congress to prescribe how [section three] determinations should be made . . . [by] pass[ing] ‘appropriate legislation.’” (quoting U.S. CONST. amend. XIV, § 5) (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997))).

²⁸¹ *Id.* at 673 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

²⁸² An example of a federal statute that provides a vehicle for disqualification is 18 U.S.C. § 2383 (“Whoever 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.”).

²⁸³ *Anderson*, 144 S. Ct. at 669–70.

court.²⁸⁴ A negative inference from its enumeration may be that non-judicial pathways for section three enforcement remain. For example, the per curiam made no mention of impeachment, and it would be odd to read the per curiam to rule out impeachment for rebellion or insurrection.

The sheer fact of this ambiguity is relevant: For all its talk of avoiding “chaos”²⁸⁵ and minimizing the potential for conflicting, and hence confusing, disqualification rules, the per curiam intentionally left unsettled the precise pathways of section three disqualification. It thereby engendered the kind of political uncertainty in the 2024 presidential race (and perhaps beyond) that it purported not to countenance.

2. *How Procedural Ambiguity Seeds Election Turbulence.* — The effect of this fresh uncertainty is acute because there are institutional junctures in the 2024 presidential selection process at which section three might be invoked — and at these junctures, the per curiam has seeded meaningful uncertainty about who can act, whether judicial review would avail, and what the effect of such action would be. The most important point where uncertainty festers is the counting of electoral college votes by joint session of the Senate and the House of Representatives, potentially followed by a contingent election in the House.²⁸⁶ Understanding why this point is neuralgic, however, requires some background detail about the statutory and constitutional context for those processes.

The Electoral Count Reform Act of 2022²⁸⁷ (ECRA), enacted in response to violent efforts in January 2021 to thwart orderly counting of the votes, defines the kinds of challenges that can be made to electoral college votes. Under legislatively specified conditions, section five of ECRA treats a state’s “certificate of ascertainment of appointment of electors . . . as conclusive in Congress with respect to the determination of electors appointed by the State.”²⁸⁸ Section fifteen of ECRA then prescribes the joint session’s sequence of actions, identifying two grounds for “objections” by representatives or senators.²⁸⁹ An objection can be made first because a vote was “not lawfully certified” under pre-election day state law, or second, if it “has not been regularly given.”²⁹⁰ Only the second pathway is relevant here. The phrase “regularly given” is a term of art. It was first used in the precursor 1887 Electoral Count

²⁸⁴ *Id.* at 674 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment) (referring to “enforcement”).

²⁸⁵ *Id.* at 671 (per curiam).

²⁸⁶ U.S. CONST. amend. XII.

²⁸⁷ Pub. L. No. 117-328, 136 Stat. 5233 (2022) (codified at 3 U.S.C. §§ 1, 22).

²⁸⁸ 3 U.S.C. § 5(c)(1)(A).

²⁸⁹ *Id.* § 15(d)(2)(B)(ii); *see also id.* § 15(d)(2)(B)(i)(II) (requiring that an objection be “signed by at least one-fifth of the Senators duly chosen and sworn and one-fifth of the Members of the House of Representatives duly chosen and sworn”).

²⁹⁰ *Id.* § 15(d)(2)(B)(ii).

Act.²⁹¹ Its converse, *not* “regularly given,” has been standardly glossed to include “votes for people who could not constitutionally become President.”²⁹² There would, indeed, be historical precedent for refusing to count electoral votes based on ineligibility. In 1873, Congress refused to count the votes cast by three presidential electors for a candidate, Horace Greeley, who had died after the election but before the convening of the Electoral College.²⁹³ It is unclear whether there would be judicial review of a congressional decision to discard votes as “not . . . regularly given.”²⁹⁴ Although ECRA makes judicial review available in respect to challenges to states’ “issuance” and “transmission” of certifications,²⁹⁵ it is silent as to whether a candidate can obtain judicial review of a successful objection to electoral votes “not . . . regularly given.”

Now consider the possibility that an alleged oath breaker appears to obtain a majority of electoral college votes, but then an objection is successfully brought under section fifteen of ECRA based on section three grounds. Does the *Anderson* per curiam preclude such an objection? Could there be judicial review of the objection’s grounds (noting the concurrence’s view that judicial consideration of section three’s application absent a specific congressional license is not out-of-bounds²⁹⁶)? If so, in what tribunal and by what procedural mechanism? And assuming the objection is sustained, and the choice of president devolves to the House of Representatives,²⁹⁷ would the latter be bound by the joint session’s (or a court’s) section three finding?²⁹⁸ Denounced by Thomas Jefferson in 1823 as “the most dangerous blot in our constitution,” the fallback mechanism of contingent election of Presidents is already capable of producing outcomes dramatically out of line with national popular preferences.²⁹⁹ And how would it operate under the shadow of a disqualification by the joint session? Would its disqualification judgment be binding? Or could it be second guessed?

²⁹¹ Pub. L. No. 49-90, § 4, 24 Stat. 373, 374 (1887) (codified as amended at 3 U.S.C. §§ 5-7, 15-18); Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1532 (2021).

²⁹² Cass R. Sunstein, *The Rule of Law v. “Party Nature”: Presidential Elections, The Constitution, The Electoral Count Act of 1887, The Horror of January 6, and the Electoral Count Reform Act of 2022*, 103 B.U. L. REV. 1171, 1181 (2023); see also Muller, *supra* note 291, at 1537-38.

²⁹³ Brian C. Kalt, *Of Death and Deadlocks: Section 4 of the Twentieth Amendment*, 54 HARV. J. ON LEGIS. 101, 111 (2017).

²⁹⁴ 3 U.S.C. § 15(d)(2)(B)(ii)(II).

²⁹⁵ *Id.* § 5(d)(1).

²⁹⁶ *Anderson*, 144 S. Ct. at 673-74 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

²⁹⁷ See U.S. CONST. amend. XII (“[F]rom the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately [with] . . . votes . . . taken by states . . .”).

²⁹⁸ The only contingent presidential election in the House occurred in 1824 after a four-way race. William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597, 626 (2009). It was resolved on the first ballot in John Quincy Adams’ favor. *Id.*

²⁹⁹ KEYSSAR, *supra* note 166, at 3.

However one concludes these questions should be resolved, one point is beyond doubt: A direct effect of the per curiam's deferral of questions about how section three is to be enforced is the very real possibility of profound constitutional questions arising in the midst of a politically heated moment of post-election transition — that is, the very moment that spurred the January 6 violence. These questions would course through untested intermittent bodies, such as the joint session and the House voting by states, which work untethered by historical practice of meaningful duration. The per curiam, in this way, has written a recipe for electoral confrontation — even violent crisis.

That the per curiam would usher in this possibility is all the more striking insofar as the Court has otherwise stressed the risks of eleventh-hour flux in election procedures. In other election law cases, the Court routinely appeals to the need for stable and predictable election administration.³⁰⁰ In particular, in a series of cases involving requests for stays to lower-court orders, it has dramatically curbed the authority of lower federal courts to issue orders close in time to an election in ways that can (on the Court's view) "result in voter confusion and consequent incentive to remain away from the polls."³⁰¹ In the run-up to the 2020 election, for example, the Court relied on this "*Purcell*³⁰² principle"³⁰³ to stay lower-court orders maintaining the availability of curbside voting in Alabama³⁰⁴ and suspending a witness requirement for absentee ballots in South Carolina.³⁰⁵

Purcell focuses on lower courts and applies before an election, but it reflects a broader principle that judges should avoid midstream changes to election law that create distorting uncertainty for voters.³⁰⁶ Yet this is what the *Anderson* per curiam has done. By creating a risk of unraveling post-election uncertainty, it has impinged in predictable and perhaps severe ways on voters' confidence in an orderly and predictable election process as much as any of the injunctions stayed by *Purcell*'s application.

The per curiam, in short, has teed up an extremely complex, novel, and politically charged constitutional dispute for resolution in the interim between a presidential election and an inauguration. Whether that dispute arises in any given election cycle cannot be known in advance. But it is a risk that cannot be extinguished without congressional action that, at least in divided government, seems unlikely. What

³⁰⁰ See, e.g., *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006) (per curiam).

³⁰¹ *Id.* at 4–5.

³⁰² *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

³⁰³ Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016) (coining the term "*Purcell* principle").

³⁰⁴ *Merrill v. People First of Ala.*, 141 S. Ct. 25, 25 (2020) (mem.).

³⁰⁵ *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (mem.).

³⁰⁶ See *Purcell*, 549 U.S. at 4–5 ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.").

follows is in no small measure paradoxical: With no discernable irony, the *Anderson* per curiam reasoned from the need to avoid “chaos”³⁰⁷ to a result that slips a “loaded weapon”³⁰⁸ into a neuralgic joint in the American political calendar.³⁰⁹ Rather than alleviating the specter of January 6 for American democracy, the Court has added ink to its penumbra.

C. *The Interaction of Disqualification and Immunity*

Less than four months after the disqualification decision, the Supreme Court, sharply divided on partisan lines, issued a ruling on presidential immunity from criminal liability for “official” acts. *Trump v. United States*,³¹⁰ or the immunity ruling as I will call it in this section, is a remarkable judgment that warrants closer treatment than I can offer here. I draw out just a thumbnail sketch of its holding, and then draw out a limited number of observations concerning the interaction of newly minted regimes for disqualification and immunity.

Although the Constitution is silent on presidential immunity from criminal responsibility, and history offers no practice or gloss from which such a privilege might be reconstructed, a six-Justice, Republican-appointed majority of the Court discerned two flavors of immunity for Presidents. First, Chief Justice Roberts’ majority crafted an absolute immunity for “core constitutional powers.”³¹¹ The majority did not define what counts as “core.” Its limited enumeration included presidential actions, such as the exercise of removal authority, that are not found in the constitutional text.³¹² Doing so arrogates to the Justices the power to define “core” presidential powers — at the cost of denying the priority of the textual choices made by the Framers. Second, the Court identified “a *presumptive* immunity from criminal prosecution for a President’s acts within the outer perimeter of his official responsibility.”³¹³ The Court, however, provided no clear definition of the scope of this “outer perimeter.” Instead, it suggested that “a close analysis” of an indictment’s “allegations” would be needed, and the Court remanded for that purpose.³¹⁴ Despite the fact that previous decisions had permitted the President to be subject to compulsory process,³¹⁵ the Court further held that evidence of “official acts” could not be used for the purpose of

³⁰⁷ *Anderson*, 144 S. Ct. at 671.

³⁰⁸ *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

³⁰⁹ For a Trump-specific version of this argument (albeit one not focused on the joint session), see Brief Amicus Curiae of Edward B. Foley, Benjamin L. Ginsberg, & Richard L. Hasen in Support of Neither Party, *supra* note 48, at 2.

³¹⁰ 144 S. Ct. 2312 (2024).

³¹¹ *Id.* at 2327.

³¹² *Id.* at 2328.

³¹³ *Id.* at 2331. Note that it is not at all clear what can overcome the presumption, making the adjectival modifier potentially illusory.

³¹⁴ *Id.* at 2339.

³¹⁵ *Id.* at 2330.

prosecuting an unofficial act.³¹⁶ While the opinion contains many more important details, this thumbnail sketch must suffice for present purposes.

There are four points of immediately apparent contact between the immunity and disqualification decisions. These are not, to be clear, the only or even most important points to be made about the immunity decision. But they are the most relevant here.

First, and most importantly, the immunity ruling is akin to the disqualification ruling in resting primarily upon — and indeed being inexplicable in terms other than — consequentialist considerations. The immunity opinion expressed concern about the risk that “the President would be chilled from taking the ‘bold and unhesitating action’ required of an independent Executive.”³¹⁷ Such burdens are characterized as “counterproductive” and hence inimical to “[t]he Framers’ design.”³¹⁸ In truth, there is little structural logic at work here: There is no careful reasoning from text, precedent, or history; there is simply the fiat determination that a state of affairs would be so undesirable that it is constitutionally intolerable.³¹⁹

Second, the consequential argument for broad “official act” immunity is just as unpersuasive as the consequential argument for federalizing disqualification. The majority pointed to no evidence that Presidents have been, or would be, chilled in the performance of official duties by a specter of criminal liability. It also offered no persuasive argument for why such a chill (even if it existed) would not be a public good. Demanding that the President act in ways that comport with the morally charged commands of the criminal law seems a *sine qua non* of an Executive that “take[s] Care”³²⁰ that the law is duly enforced. Further, the immediate and utterly foreseeable consequence of the immunity ruling was to ensure that a President could walk away from his efforts to prevent a fair national election without any legal consequence.³²¹ It is hard to see how the unknown expected value of minimizing deterrence of beneficial acts could outweigh the immediate cost of licensing de facto election fraud.

Third, and relatedly, the disqualification and immunity decisions both concerned efforts to impose legal accountability of one sort or another for former President Trump’s efforts to prevent the lawful and accurate counting of 2020 Electoral College votes. Their whole, as a result, is more than the sum of their parts. The immediate effect of the two opinions was to preclude the most significant and plausible channels

³¹⁶ *Id.* at 2340–41.

³¹⁷ *Id.* at 2330–31 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982)).

³¹⁸ *Id.* at 2331.

³¹⁹ This is precisely the kind of reasoning one member of the majority had just days before decried. See *United States v. Rahimi*, 144 S. Ct. 1889, 1920–21 (2024) (Kavanaugh, J., concurring).

³²⁰ U.S. CONST. art. II, § 3.

³²¹ See *Trump v. United States*, 144 S. Ct. at 2371 (Sotomayor, J., dissenting).

for such accountability. Given the failure of an earlier impeachment attempt, those decisions amount in practice to a legal shield for Presidents seeking to use fraud and violence to steal an election. Not surprisingly, the majority had to respond to a similar concern raised by dissent.³²² Surprisingly, its response was a non sequitur: Don't worry about our ruling on "official act" immunity, since the President can always be prosecuted for unofficial acts.³²³ Since it is the presidency's "official" powers that make it a peculiar risk to individual rights and democratic rule, this answer borders on the frivolous.

Fourth, the immunity decision created a trade-off between the interests of Trump, the former President whose conduct was at issue in the case, and those of subsequent Presidents. Rather strikingly, the majority struck that balance in favor of Trump — in a way that undermines its (bad) consequentialist arguments about chilling future Presidents. Recall that the Court remanded for an intensely fact-bound inquiry into whether many of Trump's actions were unofficial or official.³²⁴ Coupled with the Court's extraordinary delay in issuing the immunity ruling (waiting until July 2024 and the last day of the Term), this had the effect of essentially guaranteeing that Trump would not be put on trial for election interference before the November 2024 election. In so doing, it can be argued that the Court dramatically advanced Trump's electoral interests. At the same time, the intensely fact-bound nature of the ruling means that future Presidents will necessarily be uncertain as to whether many of their actions outside the constitutional core (wherever that lies) are protected by a "presumptive" (in whatever sense that word eventually takes) form of immunity. In effect, the Court here traded Trump's political gain for the very certainty it claimed to prize for future Presidents.

In sum, the immunity ruling is kindred to the disqualification ruling: Both cases eschewed the Court's putative originalist and textualist commitments in favor of a raw consequentialism. In both cases, the Court's consequentialism is unpersuasive. And in both cases, the real beneficiary is a partisan-aligned presidential candidate. It would take a mind glaciated by ideological fervor not to see these rulings as animated by a very different consequentialist game — one that does not strive toward democracy as such, but rather to the maximization of gains within politics not just for a particular set of policy preferences, but a defense, at the cost of legality, of a specific candidate for presidential office.

³²² *Id.* at 2376 (Jackson, J., dissenting).

³²³ *Id.* at 2345–46 (majority opinion).

³²⁴ *Id.* at 2339.

D. Discerning Democratic Perils

Taking a cue from the petitioner's brief,³²⁵ the *Trump v. Anderson* per curiam styled itself as a defense of democracy when it appealed to the President's capacity to "represent[] all the voters in the Nation"³²⁶ and when it inveighed against the risk of a chaos that could disenfranchise "millions."³²⁷ In this regard, the per curiam is no outlier: Democracy talk adorns many of the Court's opinions.³²⁸ Of course, mere genuflection to the abstract goal of democracy does not guarantee that a judicial opinion in fact advances that value. Evaluating the strength of that justification requires, first, a definition of democracy, and second, an inquiry into whether the Court's interventions around recent presidential races have advanced democracy.

The Constitution does not use the word "democracy." Nevertheless, it plainly anticipates a sequence of competitive state and national elections, leading to potential transitions in political power. The nation's organic document is at least consistent with a very common, minimalist definition of democracy as a system in which there is an election in which non-incumbents have "some chance of winning."³²⁹ Even this thin definition of democracy can be construed in one of two ways. It can be applied to one election (a static conception), or it can be used as a litmus test to determine preconditions of repeated competitive elections (a dynamic understanding). That is, a minimalist desideratum of democracy can pivot on one election alone or on the persistence of electoral competition. The *Anderson* Court implicitly adopted a static view of democracy.³³⁰ Nevertheless, both conceptions of democracy, as static or dynamic, can usefully be considered in turn.

I. *Democracy as "One and Done."* — The per curiam's argument adopted a static view of democracy. It focused on the goal of a fair November 2024 poll and underscored the ability of voters in Republican primaries, as well as Republican-leaning voters in the general election, to opt for the candidate of their choosing.³³¹ At a minimum, its argument reflects the indubitable depth of support for Trump, particularly among the Republican base, and the sense of aggrievement and disen-

³²⁵ Brief for the Petitioner, *supra* note 5, at 1 (appealing to a "fundamental principle" of democracy).

³²⁶ *Anderson*, 144 S. Ct. at 670 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983)).

³²⁷ *Id.* at 671.

³²⁸ See cases cited in Aziz Z. Huq, *The Counterdemocratic Difficulty*, 117 NW. U. L. REV. 1099, 1102 n.10 (2023).

³²⁹ Adam Przeworski et al., *What Makes Democracies Endure?*, J. DEMOCRACY, Jan. 1996, at 39, 39.

³³⁰ See *Anderson*, 144 S. Ct. at 667–68.

³³¹ See *id.* at 671.

franchisement that would follow from a section three disqualification.³³² The *per curiam*'s reversal of the Colorado Supreme Court does account for those strong, democratic preferences. In this regard, it honors democracy.

At the same time, there are reasons for skepticism about the *per curiam*'s effect on the democratic quality of the 2024 election. It is not just that, as sections IV.A and B have explained, the decision's arguments for uniformity and worry about chaos are unfounded, and its intervention is more likely to create electoral confusion.³³³ It is also that, as a matter of both constitutional doctrine and democratic theory, voters have no right to cast a vote for a specific candidate.³³⁴ When a voter's choices at the ballot box are constrained by established (rather than *ad hoc*) regulation excluding their ideal candidate, they have no claim from democracy.³³⁵ As the Court explained while rejecting a voter's 1992 challenge to Hawaii's onerous restrictions on write-in candidates, elections are durable regulatory structures designed "to winnow out and finally reject all but the chosen candidates."³³⁶ In so doing, they necessarily entail "reasonable, politically neutral regulations" that limit or channel a voter's choices on the primary or general ballot.³³⁷ Democracy at a national scale would break down without stable rules that channeled political competition by limiting the range of qualified candidates in orderly ways. Indeed, American democracy is already replete with such rules. For instance, the winner-takes-all character of presidential primaries already dichotomizes voters' choices, making votes for third-party candidates less valuable and leaving millions without an effectual voice.³³⁸

Applying that principle here, voters in Colorado's Republican primary certainly have a democracy-based claim to a meaningful choice of candidates. They do not have a right to pick someone simply because

³³² See Alan I. Abramowitz, *Explaining Republican Loyalty to Trump: The Crucial Role of Negative Partisanship*, CTR. FOR POLS. (Aug. 22, 2023), <https://centerforpolitics.org/crystalball/explaining-republican-loyalty-to-trump-the-crucial-role-of-negative-partisanship> [<https://perma.cc/39CF-HYPD>] (mapping "intense loyalty from Republican voters" to Trump and explaining it in terms of negative partisanship).

³³³ See *supra* sections IV.A and B, pp. 207–15.

³³⁴ *Citizens for Legis. Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) ("A voter has no right to vote for a specific candidate or even a particular class of candidates." (citing *Miyazawa v. City of Cincinnati*, 45 F.3d 126, 128 (6th Cir. 1995); *Zielasko v. Ohio*, 873 F.2d 957, 961 (6th Cir. 1989))).

³³⁵ In contrast, voters would have a democratic complaint if an exclusionary rule was applied in an *ad hoc* or viewpoint-discriminatory way to oust their candidate, or if the rules for qualifying candidates were designed to systematically exclude certain voices from the ballot. Section three fits neither of these descriptions.

³³⁶ *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)).

³³⁷ *Id.*

³³⁸ Cf. KEYSSAR, *supra* note 166, at 1–2 (noting that the winner-takes-all system "leaves millions of voters feeling that their votes do not really count," *id.* at 1).

they believe the candidate to be ideal.³³⁹ No one thinks Colorado voters have a plausible democratic complaint because they could not vote for Taylor Swift (born December 13, 1989)³⁴⁰ as the forty-seventh President. To the contrary, it could be argued that voters have an interest in a stable, rule-based election system, instead of one characterized by last-minute legal instability. Section three, like the age threshold of Article II³⁴¹ that excludes the nation's favorite tortured poet, has been one of those rules. By removing the most practicable means of enforcing section three, and by declining to install a substitute, *Anderson* scrambled the nation's established rules for presidential selection — for the benefit of one candidate and one faction. It is hard to see why this is a democratic gain.

Further, even as the per curiam recognized the interests of the Republican base, it also undercut the democratic interests of median “swing” voters, who are capable of defecting from their traditional party to “decisive” effect in a presidential election.³⁴² At least some swing voters seem sensitive to information about candidates' positive and negative traits.³⁴³ *Anderson* deprived voters of information about whether a candidate is constitutionally unfit for office because they have previously failed to keep faith with those who invested them with a public trust.³⁴⁴ By reducing the amount of formal information available to pivotal swing voters, the Court undermined the integrity of the 2024 presidential election.³⁴⁵ Nor can one appeal to the election itself as an effective opportunity for voters to reach a disqualification decision. It

³³⁹ At least one primary competitor polled better than Trump against the incumbent president. See Ingrid Jacques, *Nikki Haley Dominates Biden in Polls. Why Are Republican Primary Voters So Stuck on Trump?*, USA TODAY (Mar. 3, 2024, 12:36 PM), <https://www.usatoday.com/story/opinion/columnist/2024/02/25/haley-trump-gop-south-carolina-primary/72710319007> [https://perma.cc/M2RP-GGRN].

³⁴⁰ Michael Ray, *Taylor Swift*, BRITANNICA (Sept. 15, 2024), <https://www.britannica.com/biography/Taylor-Swift> [https://perma.cc/8ATM-W9MF].

³⁴¹ U.S. CONST. art. II, § 1, cl. 5.

³⁴² Scott Harris, *Not Swinging Together: Partisan Defection in the Age of Political Polarization*, 60 SOC. SCI. J. 179, 179 (2023) (defining “swing voters”). As the 2016 election showed, “in a polarized and roughly evenly divided electorate, small sub-groups switching their votes can be [potentially] decisive.” *Id.*; see also Jon Green, *Floating Policy Voters in the 2016 U.S. Presidential Election*, ELECTORAL STUD., Apr. 2, 2019, art. 102028, at 7.

³⁴³ Demand for accountability in respect to the January 6 violence tends to diminish with negative racial attitudes. Jesse H. Rhodes & Tatishe M. Nteta, *The New Racial Spillover: Donald Trump, Racial Attitudes, and Public Opinion Toward Accountability for Perpetrators and Planners of the January 6 Capitol Attack*, 139 POL. SCI. Q. 159, 161 (2024).

³⁴⁴ On the other hand, these voters had information from Trump's second impeachment. See Aaron Blake, *Trump's Second Impeachment Is the Most Bipartisan One in History*, WASH. POST (Jan. 13, 2021, 6:04 PM), <https://www.washingtonpost.com/politics/2021/01/13/trumps-second-impeachment-is-most-bipartisan-one-history> [https://perma.cc/STM2-EAFB].

³⁴⁵ Polling prior to the May 30 New York conviction suggested that “a conviction or jail time could erode a significant minority of Trump's base.” Clifford Young & Bernard Mendez, *How a (Hypothetical) Conviction in Trump's Criminal Cases May Affect the Election*, IPSOS (Apr. 26, 2024), <https://www.ipsos.com/en-us/how-hypothetical-conviction-trumps-criminal-cases-may-affect-election> [https://perma.cc/MK9U-V8AP].

“requires rather heroic assumptions” to believe that voters will focus on section three rather than the economy, geopolitics, or culture-war questions when they cast their ballots.³⁴⁶

2. *Democracy as a Going Concern.* — All this takes for granted the per curiam’s static view of democracy. But that account of democracy is implausible. Democracy is not “one person, one vote, one time.”³⁴⁷ The Constitution’s scheme of periodic, staggered elections of the House, Senate, and presidency cannot plausibly be understood as a command of only one round of polling. Indeed, after the Twenty-Second Amendment’s ratification, periodic turnover became mandated for the presidency at least every second election.³⁴⁸ With a more dynamic view of democracy in mind, however, the per curiam’s case for a democratic pedigree looks even more shaky.

Section three underscores and supports the extension through time of the Constitution’s democratic order. By identifying past oath breakers as distinctively unfit for federal or state office, it casts a thread between past officeholding and future democratic competition. Ensuring that those who defect from the democratic compact have no further political role and no further opportunity for infidelity, section three shores up the quality of democracy. This prohibitory function is important because an insurrectionist oath breaker capable of regaining office rationally anticipates a lower probability of resistance or sanction. He or she will likely be emboldened when it comes to violating legal norms designed to enable competitive elections.³⁴⁹ Whether or not one believes this description fits Trump, the per curiam’s intervention watered down officials’ incentives to avoid violence rising to insurrection. It increased the expected payoff from the misuse of coercive authority for partisan, entrenching ends. Whatever incremental benefit might have accrued to the democratic quality of the 2024 election, it is surely outweighed by these durably damaging consequences.

Comparative studies show that it is common for constitutions to include disqualification tools like “lustration, party bans, impeachment, and term limits” that “serve the same goal of securing democratic rule not just for the day, but for the longer term.”³⁵⁰ A recent study suggests that politically insulated removal mechanisms work better than legislative ones.³⁵¹ This seems to hold true in the American context. The

³⁴⁶ Huq, *supra* note 8, at 1514 (describing the inadequacies of using retroactive voting as a mechanism to hold corrupt public officials accountable).

³⁴⁷ Justin Curtis, *Reevaluating Islamist Electoral Success and Participation in Government*, 31 DIG. MIDDLE E. STUD. 170, 171 (2022) (tracing this phrase to discussions of Islamist parties’ success in Algerian elections).

³⁴⁸ U.S. CONST. amend. XXII.

³⁴⁹ Cf. Huq, *supra* note 8, at 1514.

³⁵⁰ Tom Ginsburg et al., *Democracy’s Other Boundary Problem: The Law of Disqualification*, 111 CALIF. L. REV. 1633, 1686 (2023).

³⁵¹ *Id.* at 1687.

difficulty of impeachment,³⁵² and judicial resistance to independent prosecutorial offices,³⁵³ makes section three disqualification particularly central as a tool of democratic prophylaxis. To the extent *Anderson* matters on the margin, it is because the per curiam took off the table one of the remaining practicable mechanisms for addressing the abuse of apex political power in the American constitutional system. The immunity decision handed down four months later, as explained above, de facto neutralized the other such mechanism (criminal punishment).³⁵⁴ Their combined effect in destabilizing democratic rule by insulating incumbents from legal constraint is far greater, I think, than the mere sum of their parts.

3. *Democracy in the Roberts Court.* — Finally, the per curiam’s appeal to democracy might be evaluated in light of other Roberts Court jurisprudence bearing on democracy’s quality. That is, one might ask whether the Roberts Court’s interventions in respect to the rules of democratic competition have tended to produce a more or less robustly democratic system. Alternatively, one might look narrowly at decisions temporally proximate to *Anderson* to discern aggregate effects.

It would take us far afield to develop here a comprehensive view of the Roberts Court’s effects on democracy. In other work, however, I have argued that the Court frequently facilitates the “arbitrage [of] different kinds of economic, social, and political capital into durable forms of political entrenchment” in ways that diminish the responsiveness and the competitiveness of American democratic institutions.³⁵⁵ In effect, the Roberts Court’s interventions in political life enable and reinforce the entrenchment of economic and cultural factions aligned with the Republican Party responsible for a supermajority of its appointments.³⁵⁶ *Anderson* does not buck that pattern. Rather, the Court’s track record provides further reason for doubt as to its claims to advance democracy.

A more tailored focus on contemporaneous cases adds no luster to *Anderson*’s democratic credentials. Particularly instructive is the manner in which the Court has handled cases related to Trump’s involvement in the January 6 violence.³⁵⁷ On the one hand, the Court gave

³⁵² See Tom Ginsburg et al., *The Comparative Constitutional Law of Presidential Impeachment*, 88 U. CHI. L. REV. 81, 119 (2021) (explaining why “successful removal by impeachment is a rarity,” both in the United States and globally).

³⁵³ Huq, *supra* note 328, at 1169–70.

³⁵⁴ See *supra* section IV.C, pp. 215–17.

³⁵⁵ Huq, *supra* note 328, at 1132 (emphasis omitted).

³⁵⁶ This arises because of “a general trend towards ideologically driven selection of judges.” Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS. 97, 112 (2021).

³⁵⁷ A couple of months after *Anderson*, the six-Justice conservative majority of the Court reworked the evidentiary burden for challenging racial gerrymanders. See *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1249–50 (2024). The effect of this ruling was to make it easier for states to draw district lines for “partisan gain.” *Id.* at 1270 (Kagan, J., dissenting). The inevitable effect of this ruling is to facilitate the use of partisan gerrymandering to dilute emerging

extraordinarily speedy consideration to Trump's request for review of the Colorado disqualification: Just over four months passed between the Colorado Supreme Court's decision and the *per curiam*'s issuance. In contrast, the same Court declined Special Counsel Jack Smith's request for expedited consideration of Trump's claim to presidential immunity against criminal prosecution.³⁵⁸ This prosecution rests on the same factual allegations related to January 6 that overlap with the grounds considered by the Colorado courts.³⁵⁹ In practical effect, Special Counsel Smith's indictment and the Colorado proceeding were alternative mechanisms for generating an authoritative ruling on Trump's actions that day. By refusing to address the merits in *Anderson*, and by slow-walking Special Counsel Smith's case — with the predictable effect that it would not be capable of adjudication before November 2024 — the Roberts Court ensured that voters would not have a formal determination of whether Trump took actions that could be characterized as insurrection or its aid and comfort. The Court hence blocked not just one, but two, of the pathways available for evaluating violent self-dealing by a federal incumbent, arguably in flagrant abuse of his authority and oath of office.³⁶⁰ Instead, the Court accelerated his restoration to the ballot, acceding to his strategic efforts to delay and avoid a criminal trial. On both counts, the Court thus advanced the interests of a partisan-aligned candidate — at a heavy toll to constitutional mechanisms meant to enable democracy.

If one judges just by the tone of public debate, it can sometimes seem that democracy has only friends. If one looks at actions, though, it is sometimes none too hard to pick out its true enemies.

CONCLUSION

In June 2022, the British political system skirted what might have been a severe democratic crisis. Then-Prime Minister Boris Johnson faced a confidence vote within the Conservative Party. Losing that vote would mean, by convention, that Johnson would have to step down as

concentrations of Black and other political power. This is hardly a testament to the Court's fidelity to democracy.

³⁵⁸ See Mark Sherman & Eric Tucker, *Supreme Court Rejects Prosecutor's Push to Fast-Track Ruling in Trump Election Subversion Case*, AP NEWS (Dec. 22, 2023, 6:14 PM), <https://apnews.com/article/trump-january-6-justice-department-90b93eeb663ebaf67a2e0bc266390fao> [<https://perma.cc/7TNZ-8FAL>]; see also Aziz Huq, Opinion, *Why is Trump Getting Special Treatment from the Supreme Court?*, POLITICO (Feb. 29, 2024, 1:51 PM), <https://www.politico.com/news/magazine/2024/02/29/trump-special-treatment-supreme-court-00144138> [<https://perma.cc/YP8T-C2NE>].

³⁵⁹ See Press Release, U.S. Dep't of Just., Special Counsel Jack Smith Delivers Statement (Aug. 1, 2023), <https://www.justice.gov/sco-smith/speech/special-counsel-jack-smith-delivers-statement> [<https://perma.cc/7UHH-29LP>] (documenting contents of indictment).

³⁶⁰ For a fuller analysis, see Baude & Paulsen, *supra* note 6, at 730–40.

Prime Minister, forcing a snap election.³⁶¹ But rumors swirled that Johnson might ignore convention and instead “use[] the threat of a general election to evade a loss of confidence vote in the House of Commons.”³⁶² In effect, this would mean that “neither parliament nor the electorate would be able to force his departure”³⁶³: He would be beyond democratic rebuke. While Johnson won the confidence vote, his reputation was severely damaged,³⁶⁴ and his allies still used the threat of a snap election to resist calls for Boris’s departure³⁶⁵ — perhaps to stay in office against the will of party and parliament.

Johnson did resign in the end.³⁶⁶ Why did his antidemocratic ploy fail? While no certain answer rises from the placid opacities of British constitutional politics, one possibility stands out: Johnson would have needed to go through the formality of asking for Queen Elizabeth II’s signature to credibly threaten to call a general election.³⁶⁷ According to some news reports, however, Her Majesty would have been “unavailable” if Johnson requested a call to discuss dissolving Parliament.³⁶⁸ Busy with the corgis, one postulates. If the news reports are true, they lend some heft to Alan Bennett’s observation that Her Majesty “was a genuine democrat, perhaps the only one in the country.”³⁶⁹

We tend to think of monarchs as anathema to, or at the very least awkward fits within, a democracy. Yet (again, if reports are true), Queen Elizabeth II defended her nation’s democracy in a moment of imperiling political conflict. The contrast with America is startling. The Supreme Court, unanimous where it mattered, failed to do the same in arguably parallel circumstances — and then, four months later, rubbed salt into the wound it created.

A close reading of *Trump v. Anderson* reveals its conclusion to be unjustified on textual, structural, or prudential grounds. Importantly,

³⁶¹ See David Allen Green, *A Defeat for Boris Johnson Could Test Britain’s Unwritten Constitution*, FIN. TIMES (June 6, 2022), <https://www.ft.com/content/56f74dc1-9c4e-4bf5-8694-7c84142a658b> [<https://perma.cc/A4SW-B7V3>].

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ Bill Chappell & Frank Langfitt, *Boris Johnson Survives No-Confidence Vote in a Victory of Sorts*, NAT’L PUB. RADIO (June 6, 2022, 5:12 PM), <https://www.npr.org/2022/06/06/1103211698/british-prime-minister-boris-johnson-to-face-no-confidence-vote> [<https://perma.cc/N4U2-6B9H>].

³⁶⁵ Oliver Wright et al., *Tories Fear Snap Election in “Trumpian” Survival Attempt*, THE TIMES (July 7, 2022, 12:01 AM), <https://www.thetimes.co.uk/article/tories-fear-snap-election-in-trumpian-survival-attempt-wf3wmsjnk> [<https://perma.cc/Z6EQ-EUQR>].

³⁶⁶ Danica Kirka et al., *One Scandal Too Many: British PM Boris Johnson Resigns*, AP NEWS (July 7, 2022, 3:41 PM), <https://apnews.com/article/boris-johnson-resignation-60da3c4b29a4e9c93c7db9f53034ad0e> [<https://perma.cc/6W5V-YH3U>].

³⁶⁷ Wright et al., *supra* note 365.

³⁶⁸ Dominic Penna, *Queen to Have Been “Unavailable” If Boris Johnson Had Tried to Call Snap Election, Sources Claim*, THE TELEGRAPH (Nov. 20, 2022, 5:54 PM), <https://www.telegraph.co.uk/politics/2022/11/20/queen-have-unavailable-boris-johnson-had-trying-call-snap-election> [<https://perma.cc/2NW7-GVMJ>].

³⁶⁹ ALAN BENNETT, THE UNCOMMON READER 29 (2007). To be clear, Bennett’s version of the Queen is (lightly) fictionalized, but recognizable to those of us who follow the Windsors closely.

its claim to be defending the quality of American democracy is also unfounded. It is closer to the truth to say that the opinion dealt a serious blow to the integrity of the 2024 presidential election and of national democracy moving forward. Coupled with the immunity decision, it creates a presidency far less meaningfully tethered to law — especially laws against personal and professional self-dealing — in ways that will make democratic self-rule far more difficult to sustain.

Does this conclusion imply that the courts cannot plausibly defend democratic self-rule? Many on the political left think so, asserting categorically that judges, like monarchs, do not reliably check entrenchment.³⁷⁰ Yet, despite the analysis developed in this Comment, I remain unconvinced of this sort of wholesale repudiation of the judiciary’s role in democratic life. The example of Her Royal Highness suggests why.

It is a mistake to draw a general conclusion about the prodemocratic potential of unelected bodies, whether courts or monarchies, from a single case, especially when such institutions can be constituted in many different ways and hence take on many different political complexions. It is certainly the case that *this* Court, appointed through the highly partisan channels identified in Article III, has dealt some potential body blows to American democracy. But other unelected bodies in other jurisdictions also play crucial roles in staving off democratic crises. A recent historical and cross-national study of courts in democratic “near misses” picks out courts and other unelected bodies as pivotal actors in resisting authoritarian collapses.³⁷¹ Many other jurisdictions have successfully constitutionalized “guarantor institutions” to protect democratic norms,³⁷² including through the protection of electoral integrity.³⁷³

Of course, it is possible to design these institutions poorly, that is, in ways that facilitate their capture or corruption.³⁷⁴ That may well be true for us, thanks to the Constitution’s election of a politicized judicial appointment process. Nevertheless — and this is the rub — it is an unwarranted counsel of despair to conclude from a local failure that

³⁷⁰ See, e.g., Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 775 (2022) (arguing courts are not only “an unreliable check on entrenchment, [but] plausibly make entrenchment easier”).

³⁷¹ Tom Ginsburg & Aziz Huq, *Democracy’s “Near Misses,”* J. DEMOCRACY, Oct. 2018, at 16, 22.

³⁷² See Tarunabh Khaitan, *Guarantor Institutions*, 16 ASIAN J. COMPAR. L. S40, S54–S55 (2021).

³⁷³ For evidence of the widespread global use of nonelected bodies to protect election integrity, see Aziz Z. Huq, *Courts as Constitutional Rule-Makers for Elections and Parties: Some Comparative Evidence*, in THE ENTRENCHMENT OF DEMOCRACY: THE COMPARATIVE CONSTITUTIONAL DESIGN OF ELECTIONS, PARTIES, AND VOTING 188 (Tom Ginsburg, Aziz Z. Huq & Tarunabh Khaitan eds., forthcoming 2024).

³⁷⁴ See Katarína Sipulová & David Kosař, *Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries*, 24 GERMAN L.J. 1577, 1587 (2023) (noting that “formal institutions can be completely hollowed out,” but “if they work well and embed democratic substance beyond the formal structures, they may close down the window of opportunity for agents of autocratization and provide an additional layer of resistance against them”).

effective guarantor institutions for democracy, including courts, are beyond our reach forever and always. Their design might pose great challenges, involving acute technical choices. But this is no cause to cease trying. It is no cause for thinking that there is no way of doing better — albeit one that must break through the numbing and self-serving pall of unreflective genuflection to the Constitution and the Court that characterizes much so-called academic scholarship in constitutional law today.

Perhaps *this* Court has failed, and will continue to fail, to protect democracy in any meaningful sense. I think we have no cause for optimism on this score. But that does not mean we cannot imagine, against the grain of constitutional habit, a body of judges that does better. This project means abandoning the increasingly untenable pretense that the Court engages in principled decision-making in matters of high partisan color. It means going beyond the profoundly flawed mechanisms for judicial selection contained in the Constitution to ask how best to advance the original goal of an independent federal court system under new political circumstances. And it means recognizing the backward-looking, retrograde faux historicism of much constitutional scholarship for what it is — ideological obfuscation in the Gramscian vein with the primary purpose of falsely universalizing the parochial values of a narrow elite.³⁷⁵

The manifest failure of the bodies intended to safeguard our democracy should thus prompt us to rethink not just our evaluative judgments of those institutions, but also the conformity of constitutional institutions to constitutional first principles. It should cause us to redouble our efforts to understand how their function can in fact be well performed in a complex modern democratic order, and not merely disparage previous efforts as bad faith failures. At the same time, it should push us to pierce the Justices' vapid cant of principled originalism and textualism, and to cease to offer scholarly cover for what in effect is the advancement of partisan goals du jour. Most of all, it demands that we renew our questioning of how we build a Court, not on the basis of the profoundly flawed partisan wellsprings that have yielded up *Trump v. Anderson*, but on the promise of a meaningful commitment to both democracy and the rule of law.

³⁷⁵ Cf. Antonio Gramsci, Some Theoretical and Practical Aspects of "Economism," in SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 158, 161 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971) (writing on hegemony and class structure).