VOLUME 138 JANUARY 2025 NUMBER 3

HARVARD LAW REVIEW

COMMENTARIES

SWEEPING SECTION THREE UNDER THE RUG: A COMMENT ON *TRUMP V. ANDERSON*

William Baude & Michael Stokes Paulsen

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SWEEPING SECTION THREE UNDER THE RUG: A COMMENT ON *TRUMP V. ANDERSON*

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INTRODUCTION

"Great cases," the saying goes, "like hard cases make bad law."[1] The aphorism, from Justice Holmes's dissent in the *Northern Securities*[2] case, came with an explanation:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.[3]

Like so many of Justice Holmes's maxims, this one does not always hold true. Some of the Supreme Court's great successes in constitutional law have also been "great cases" in the Holmesian sense: They concerned an incident "of immediate overwhelming interest" and potentially serious consequence to the life of the nation and were decided under intense public scrutiny and often urgency — and yet they were decided well and soundly.[4] Urgency, high consequence, and public attention at least sometimes combine to concentrate the judicial mind powerfully, to good and memorable effect.

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This Commentary was written and edited before the outcome of the November 2024 presidential election. As this Commentary goes to press, that election has resulted in the selection of Electors a majority of whom are pledged to cast their ballots for Donald Trump. By the time it is published, the Electors will have voted, and Trump will almost certainly have been elected and sworn into office. We have made certain minor stylistic changes to reflect these developments.

Nothing in the *substance* of what we have written, however, is altered by these events. Elections do not repeal, rescind, or supersede provisions of the U.S. Constitution or change their legal meaning. The result of the 2024 election does not erase Trump's constitutional disqualification from office. Only a vote of two-thirds of each house of Congress can do that. The result of the election does, however, magnify the significance of the Supreme Court's errors and failures in *Trump v. Anderson*.

[1] N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

[2] 193 U.S. 197 (1904).

[3] *Id.* at 400–01 (Holmes, J., dissenting).

[4] *Id.* at 400.

We think of *Youngstown Sheet & Tube Co. v. Sawyer*[5] (*The Steel Seizure Case*) as such a case — perhaps the leading example of exemplary judicial performance under severe time and political pressure, where the stakes were high.[6] *Youngstown* raced through the judicial process, bottom to top, at breakneck speed, less than eight weeks' time elapsing from President Truman's executive order seizing the nation's steel mills in April 1952 to the Supreme Court's 6–3 decision on June 2 invalidating that order.[7] The Court rose to the occasion magnificently, producing some of the most important, powerfully reasoned judicial opinions concerning fundamental questions of separation of powers in its history.[8]

New York Times Co. v. United States[9] (*The Pentagon Papers Case*) is another "great case" that seems to defy Justice Holmes's axiom, a prominent First Amendment landmark concerning freedom of the press from prior restraint, decided by the Court on an extraordinarily compressed time schedule that made *Youngstown* look positively leisurely: Two federal appellate courts ruled, differently, on the same day, June 23, 1971, on whether the federal government could obtain an injunction against two newspapers' publishing of classified information. Motions for interim relief and expedited consideration were filed in the Supreme Court the next day, June 24. The Court ordered briefs submitted by June 26, held oral arguments that same day, and issued its judgment and opinions on June 30 — just one week after the lower courts had ruled.[10] Again, the Court rose to the occasion. While there was no single rationale for the judgment — in that sense, the Court did not "make . . . law" at all[11] — the individual opinions of all nine of the Justices combined to form an important 6–3 ruling against the government and for freedom of the press.[12]

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[5] 343 U.S. 579 (1952).

[6] With reason, *Youngstown* is the first Supreme Court case in our co-authored casebook on constitutional law. MICHAEL STOKES PAULSEN, MICHAEL W. MCCONNELL, SAMUEL L. BRAY & WILLIAM BAUDE, THE CONSTITUTION OF THE UNITED STATES 44 (5th ed. 2023). For praise of *Youngstown* on the occasion of its fiftieth anniversary, see Michael Stokes Paulsen, Youngstown *Goes to War*, 19 CONST. COMMENT. 215, 215–20 (2002). For a concise account of the time constraints and extraordinary performance of the Court in *Youngstown*, see MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION 246–51 (2015).

[7] *See Youngstown*, 343 U.S. at 579, 583.

[8] *See* Paulsen, Youngstown *Goes to War*, *supra* note 6, at 224–37.

[9] 403 U.S. 713 (1971) (per curiam).

[10] *Id.* at 753–54 (Harlan, J., dissenting).

[11] N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

[12] *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 516 (2004) ("The decision was a bold, confident, and courageous assertion of judicial independence and authority in the face of emphatic and disingenuous executive claims of national security. It showed the nation what an *independent* federal judiciary can and should do.").

Other cases have debatable, but plausible, claims to greatness under conditions of serious judicial stress. Reasonable people can disagree on the outcomes these cases reached and the reasoning they embraced. *Ex parte Quirin*[13] — the famous "*Nazi Saboteur Case*" upholding President Franklin D. Roosevelt's order authorizing military commissions to try unlawful combatants (including at least one U.S. citizen) for war crimes — was heard by the Court on July 29 and July 30, 1942, with military proceedings underway, and decided by brief per curiam order the very next day, July 31 — the full opinion coming months later.[14] *Cooper v. Aaron*,[15] which forcefully rejected state and local resistance to *Brown v. Board of Education*, was an act of courage and principle in the face of resistance and violence — notwithstanding the opinion's erroneous claim of judicial supremacy extravagantly equating the Court's decisions with the Constitution itself.[16] *United States v. Nixon*,[17] the famous "*Nixon Tapes Case*," was a great case if ever there was one. Decided on a compressed timetable, at a moment of high political drama, "[t]he decision proximately led to the forced resignation of a President of the United States from office."[18] Despite the opinion's analytic flaws, the Court got the result right, courageously confronting a corrupt President and rejecting lawless claims of absolute presidential immunity from the law.[19] The Court in *Nixon* rose to the occasion.

Other Holmesian "great cases" reached yet more questionable results. *Dames & Moore v. Regan*,[20] decided in 1981, would seem to fit Justice Holmes's description of a great case making bad, unprincipled law. Departing from settled principles under the "hydraulic pressure"[21] of circumstances and perceived political necessity, *Dames & Moore* reached a result the Court itself seemed to describe as not worthy of precedential

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[13] 317 U.S. 1 (1942).

[14] *See id.* at 1 (syllabus); *id.* at 18–20. On the merits, compare *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) ("*Quirin* . . . was not this Court's finest hour." (citation omitted)), with Michael Stokes Paulsen, *Drone On: The Commander in Chief Power to Target and Kill Americans*, 38 HARV. J.L. & PUB. POL'Y 43, 53 & n.31 (2015) (critiquing Justice Scalia's opinion).

[15] 358 U.S. 1 (1958).

[16] *See* William Baude, *The Court, or the Constitution?*, *in* MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 260, 260–62 (Heidi M. Hurd ed., 2019) (criticizing *Cooper*'s assertion of judicial supremacy).

[17] 418 U.S. 683 (1974).

[18] Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1337 (1999).

[19] *See id.* at 1343. *See generally* William Van Alstyne, *A Political and Constitutional Review of* United States v. Nixon, 22 UCLA L. REV. 116 (1974).

[20] 453 U.S. 654 (1981).

[21] N. Sec. Co. v. United States, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).

weight.[22] And then there is *Bush v. Gore*.[23] Decided under incredible time constraints (less than three days) and intense public scrutiny, and having enormous immediate political consequences (effectively ending challenges to the outcome of the 2000 presidential election), the Court's decision remains enduringly controversial, with good reason.[24]

Some great cases have produced very good judicial decisions. But at least some support Justice Holmes's claim: Sometimes the magnitude of the stakes; the "immediate overwhelming interest"[25] in the outcome; partisan passions; and a sense of urgency compressing the time for analysis and judgment all come together to irretrievably skew the performance of judicial duty. Sometimes great cases overwhelm judges' capacity to engage in careful and principled legal reasoning.

Trump v. Anderson[26] was such a case.

It was a great and momentous case by any measure. It presented the hugely important constitutional question whether a former President of the United States is constitutionally disqualified from holding that office again — or any significant office — by Section Three of the Fourteenth Amendment. Specifically, it posed the explosive question whether the 45th President of the United States, having sworn an oath to support the Constitution as President, had subsequently "engaged in" conduct constituting "insurrection or rebellion" against the U.S. constitutional order.[27] The facts found at trial showed that then-President Donald Trump engaged in an attempt to overthrow the lawful result of the presidential election of 2020, including by summoning a mob of supporters to Washington, D.C., on January 6, 2021, and inciting them to attack the Capitol, with the goal of preventing the electoral count from certifying Trump's lawful defeat.[28] The Colorado Supreme Court had held, as a matter of federal constitutional law, that Trump — again a

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[22] *See* Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1789–90, 1790 n.63 (2009). The Court in *Dames & Moore* emphasized the narrowness of its ruling, the imperative of expeditious consideration, and the consequent supposed diminished force of the case as precedent. 453 U.S. at 660–61 ("[W]e stress that the expeditious treatment of the issues involved by all of the courts which have considered the President's actions makes us acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case. . . . We attempt to . . . confine the opinion only to the very questions necessary to decision of the case." (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))).

[23] 531 U.S. 98 (2000) (per curiam).

[24] For a brief account, see PAULSEN & PAULSEN, *supra* note 6, at 265. As in *Dames & Moore*, the Court emphasized the narrowness and supposedly less precedential nature of its ruling. *See* Bush v. Gore, 531 U.S. at 109 ("Our consideration is limited to the present circumstances . . . ."). For the record, we find the reasoning of the *Bush v. Gore* per curiam ultimately unpersuasive, while the concurrence was more plausible but also problematic.

[25] *N. Sec. Co.*, 193 U.S. at 400 (Holmes, J., dissenting).

[26] 144 S. Ct. 662 (2024) (per curiam).

[27] U.S. CONST. amend. XIV, § 3.

[28] *See* Anderson v. Griswold, No. 2023CV32577, 2023 WL 8006216, at *11–28 (Colo. Dist. Ct. Nov. 17, 2023), *aff'd in part rev'd in part*, 543 P.3d 283 (Colo. 2023) (per curiam), *rev'd sub nom.* Trump v. Anderson, 144 S. Ct. 662 (2024) (per curiam).

candidate for the presidency in 2024 — was disqualified from that office by Section Three and that this in turn made him legally ineligible to the state's ballot as a matter of Colorado election law.[29] On January 5th, 2024, the U.S. Supreme Court agreed to hear the case and set an expedited briefing schedule with oral arguments to follow on February 8th.[30]

The stakes of the U.S. Supreme Court's decision were high and immediate. If the Court were to agree with the Colorado Supreme Court that Section Three constitutionally barred Trump from the presidency, that would as a practical matter eliminate the leading candidate of one of the two major political parties, upending the nation's political dynamic. Such a holding might have been political dynamite: It could have led to serious domestic political unrest — perhaps even to violence.

The stakes of a decision in the opposite direction were equally enormous. If the Court were to hold, on the merits, that Trump was *not* constitutionally disqualified by Section Three — on the premise that, notwithstanding the facts found at trial and affirmed on appeal, the events of January 6, 2021, did not legally constitute an "insurrection"; or on the premise that Trump had not "engaged in" the insurrection himself; or on the premise that Section Three did not apply to Trump because the President of the United States is not an "officer of the United States"[31] — that might well have been political dynamite too: Such a decision might be seen as politically motivated or lawless. It might even be seen as licensing Trump's conduct around January 6, 2021, and, more generally, his months-long efforts to overturn the result of the election and maintain himself in power. It might be seen to say that there are no legal consequences for an attempted coup d'etat. It might even enable — and ultimately *did* enable — the election of a constitutionally ineligible President who had engaged in insurrection against the United States.

Rarely have the stakes of a constitutional issue been so great. Given the high stakes and political consequences of whatever decision the Court reached, the case had "immediate overwhelming interest" to the public.[32] On the merits, the constitutional questions presented by Section Three were not themselves intractable. *Trump v. Anderson* was a "great case" in terms of importance and urgency, but not a "hard case" in terms of the intrinsic difficulty of the legal questions presented.[33] But

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[29] Anderson v. Griswold, 543 P.3d at 297.

[30] Adam Liptak, *Supreme Court to Decide Whether Trump Is Eligible for Colorado Ballot*, N.Y. TIMES (Mar. 4, 2024), https://www.nytimes.com/2024/01/05/us/trump-supreme-court-colorado-ballot.html [https://perma.cc/6S5S-8239].

[31] U.S. CONST. amend. XIV, § 3.

[32] N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

[33] In prior work, William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605 (2024), we comprehensively addressed the essential legal questions presented by Section Three: Does Section Three continue to be legally operative in accordance with

the case presented several major constitutional questions, one after another, and several of them were fairly novel. Sorting through the issues presented by Section Three — attending carefully to constitutional text, structure, history, logic, and original meaning, and then faithfully applying that meaning — was not an afternoon's work.[34] (And the Court did not believe it had a great many afternoons left in which to do the requisite work: The March 5 date of the Colorado primary loomed before it, less than a month after the date of oral argument.) Moreover, even if the law itself might not have been all that hard, the challenges of *following* the law where it led — of overcoming contrary initial instincts, inclinations, and intuitions; of being willing to displease friends, past allies, and powerful political figures or movements — might remain a difficulty.

All in all, the institutional, political, and personal pressures on the Justices presented by *Trump v. Anderson* were enormous. It is fair to say that *Trump v. Anderson* required the Justices to rise to the demands of the occasion in a way perhaps unrivaled in the Court's history.

They did not do so. Unlike great cases where the press of time and circumstances had the effect of concentrating the judicial mind to produce important landmark constitutional decisions, the Court produced a flimsy decision in a high-stakes, high-profile, high-intensity, tight-

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the meaning of its terms, notwithstanding the provision's age and original historical purposes? (Yes.) *Id.* at 613–22. Is Section Three (like the Constitution's other qualification and disqualification provisions) a "self-executing" constitutional rule of direct operative force in and of itself, and as such binding as law on constitutional actors whose duties or powers involve actions governed by its substantive legal rule(s)? (Yes.) *Id.* at 622–44. Or does Section Three instead require implementing legislation by Congress, pursuant to Section Five's grant of such legislative power, as a prerequisite to possessing any legal force as constitutional law? (No.) *Id.* at 624–26, 655. Does the circuit court decision of Chief Justice Salmon P. Chase in *In re Griffin* (*Griffin's Case*), 11 F. Cas. 7 (Chase, Circuit Justice, C.C.D. Va. 1869) (No. 5,815) alter these conclusions? (No.) Baude & Paulsen, *supra*, at 644–59. Does Section Three change (or satisfy) previous constitutional law to the extent of any inconsistency with such prior law? (Yes.) *Id.* at 660–74. Do Section Three's substantive terms — "engaged in," "insurrection," "rebellion," "aid or comfort," "enemies," "officer," etc. — have principled, discernible constitutional meaning, ascertainable by employing familiar practices for discovering and faithfully applying the original, objective public meaning of constitutional and other legal texts? (Yes.) *Id.* at 674–730. Does the original meaning of Section Three apply to the conduct of former President Trump and others in connection with the attempted overthrow of the constitutional process and results of the presidential election of 2024 and disqualify covered persons from a broad range of offices in the future, unless Congress by two-thirds vote of both houses removes the constitutional disqualification for such persons? (Yes.) *Id.* at 730–42.

[34] The Court did have significant scholarship on the meaning of Section Three available to it. *See generally* Baude & Paulsen, *supra* note 33; Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87 (2021); Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153 (2021); Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350 (2024); Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 HARV. J.L. & PUB. POL'Y 309 (2024). With respect, we believe the Court would have been better served by considering and carefully evaluating the literature, rather than (as we will discuss) seeking to plow its own road, in a direction of its own invention not supported by any previous research, scholarship, or judicial decision, in three or four weeks.

deadline case. *Trump v. Anderson* is, unfortunately, a prime example of exactly what Justice Holmes was concerned about. It was a "great case" that made risible constitutional law.

Attempting to rule narrowly and clearly, the Court ruled incoherently — leaving more fundamental issues unresolved and others in a state of confusion. Attempting to avoid making sweeping proclamations on major points of constitutional law, the Court ended up making a sweeping proclamation on a major point of constitutional law (and a fundamentally incompetent one at that). Attempting to "settle" a major constitutional dispute, the Court simultaneously settled very little and upended much. Attempting to manufacture a false unanimity, the Court succeeded only in fracturing more seriously. Attempting to sacrifice judicial craft for statesmanship, the Court sacrificed both.

In what follows in this Commentary, we explain exactly where, how, and why the Court went so wrong, and what lessons we should draw going forward.

In Part I, we analyze what the Supreme Court did — and, equally important, what it did not — decide in *Trump v. Anderson*. A careful reading of the opinions in the case reveals that, in the end, the Court held only that states lack power to enforce Section Three — or any other federal constitutional disqualifications from office — in state-conducted elections for federal elective office.

That is all that it held. The Court did not hold, on the merits, that Trump was eligible to office under the standards of Section Three — it did not say that the Colorado Supreme Court was wrong on this point. The Court did not hold that the presidency is exempt from Section Three. The Court did not hold that the events leading to and culminating in the January 6 attack on the Capitol failed to satisfy the constitutional standard for an "insurrection." Nor did the Court hold that Trump had not "engaged in" that insurrection. The Court did not confront the factual findings or ultimate legal conclusions of the Colorado courts on these points. Nor did the Court hold — though other readers, including even some of the concurring Justices, exhibited confusion on this point — that Section Three's constitutional ban is not "self-executing"; that is, that Section Three is not a directly operative constitutional rule but instead requires enforcement legislation by Congress as a prerequisite to having legal force.

The Court in *Trump v. Anderson* held none of these things. Nothing in the case contradicts the core conclusion we reached in our prior scholarship: Donald Trump is constitutionally disqualified from the presidency and may not lawfully serve in that office, or any other (unless Congress removes the disqualification by two-thirds majorities of both houses). If Donald Trump was constitutionally ineligible to the presidency on March 3, 2024 — the day before the Court's decision — he remained constitutionally ineligible on March 5, the day after the

decision. *Trump v. Anderson* rejected only a method of enforcing that disqualification — state election law.

In Part II, we evaluate the merits of the Court's one actual holding in *Trump v. Anderson* — the holding that states lack power to enforce or apply the requirements of Section Three in conducting presidential elections. This holding inverts basic principles of constitutional law. It directly contradicts Article II's designedly *state*-centric arrangement for presidential elections. Of all the arguments for reversing the Colorado Supreme Court, the Court somehow settled on the worst.

In Part III we consider the lessons of the Court's decision. We first consider and reflect on the mixture of possible *motivations* of the Justices. What led them to decide the case in this peculiar and unfortunate fashion? We then consider the case's implications for questions of legal interpretive *method*. The decision and opinions in *Trump v. Anderson* plainly are not faithful to principles of "originalism." Yet that is the method to which many of the Justices express adherence. (It is our methodology.[35]) Does *Trump v. Anderson* reveal the bankruptcy, or futility, of originalism as a constitutional interpretive method (as some have charged)? Or does it merely demonstrate the inconsistency, hypocrisy, or error of some of its would-be practitioners?

Finally, we pose questions about the limited scope of *Trump v. Anderson* going forward. Because the Court chose to sweep Section Three under the rug, rather than directly confronting its meaning and application, it left open a shocking range of possibilities. Is Congress bound, in the exercise of its independent constitutional responsibilities, and especially in the exercise of powers not covered by the Court's decision, to treat the Section Three questions as settled? Might states, as their own laws permit, be able to simply circumvent the Court's decision by exercising directly and explicitly their powers under Article II, section 1, clause 2 of the Constitution with respect to the "Manner" of selecting presidential electors — and thereby award their electoral votes on the basis of Section Three after all? Might courts in future cases need to decide whether Trump — even though elected and inaugurated — can lawfully exercise constitutional authority as President? Did the Court merely postpone the true day of constitutional reckoning?

I. Anatomy of a Judicial Train Wreck

What did the Court actually decide — what did it *hold* — in *Trump v. Anderson*? And, equally important, what did the Court *not* hold? What explains the divisions within the Court and what accounts for the confusing and conflicting descriptions given by the various opinions in the case of what the Court did and did not decide and the issues that divided the Justices?

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[35] *See* Baude & Paulsen, *supra* note 33, at 614 n.9.

In answering these questions, it is useful to begin with the case as it was presented to the Court — on a factual record following a five-day trial of disputed questions of fact, and legal analysis from a majority of the Colorado Supreme Court.

A. The Case Presented

Trump v. Anderson arose out of a challenge brought by Colorado Republican voters, under Colorado election law, to former President Donald Trump's eligibility to be a candidate in Colorado's March 5, 2024, presidential primary.[36] The voters alleged that Trump was constitutionally ineligible to the presidency because of Section Three of the Fourteenth Amendment, on the grounds of his "having previously taken an oath . . . as an officer of the United States . . . to support the Constitution of the United States" and then having "engaged in insurrection or rebellion against the same."[37] This in turn, the voters alleged, rendered Trump ineligible for inclusion in the Colorado presidential primary as a matter of state election law.

The state trial court, following a five-day trial, made detailed findings of fact concerning Trump's conduct and state of mind in seeking to overturn the results of the 2020 election, especially including the attack on the Capitol on January 6, 2021.[38]

The trial judge found that then-President Trump engaged in an extended course of conduct of making public assertions of widespread voter fraud in the 2020 presidential election that he knew were false.[39] Trump "knew his claims of voter fraud were false"[40] and knew that he in fact had lost the election.[41] On December 19, 2020, Trump tweeted a call for supporters to come to Washington, D.C., on January 6, saying: "Statistically impossible to have lost the 2020 Election. Big Protest in D.C. on January 6. Be there, will be wild!"[42] The court found that, when he issued that call to supporters, Trump "knew he had lost the election, and he knew there was no basis for Vice President Pence to

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[36] Trump v. Anderson, 144 S. Ct. 662, 665 (2024). The plaintiffs were four Republican and two unaffiliated voters. *Id.*

[37] U.S. CONST. amend. XIV, § 3.

[38] For a fuller summary of the trial court's factual findings and discussion of their importance, see Will Baude & Michael Paulsen, *The Facts Matter, Trials Matter, The Record Matters*, REASON: VOLOKH CONSPIRACY (Feb. 8, 2024, 6:00 AM), https://reason.com/volokh/2024/02/08/the-facts-matter-trials-matter-the-record-matters [https://perma.cc/Y8EZ-EFVV]. The trial court's full opinion is set forth at *Anderson v. Griswold*, No. 2023CV32577, 2023 WL 8006216 (Colo. Dist. Ct. Nov. 17, 2023), *aff'd in part rev'd in part*, 543 P.3d 283 (Colo. 2023) (per curiam), *rev'd sub nom. Trump v. Anderson*, 144 S. Ct. 662 (2024) (per curiam). For a discussion of the standard of review for these facts in the United States Supreme Court, see *infra* notes 158–63 and accompanying text.

[39] *See* Anderson v. Griswold, 2023 WL 8006216, at *14–15.

[40] *Id.* at *15.

[41] *Id.* at *17.

[42] *Id.*

reject the States' lawfully certified electors."[43] The court found that Trump sought to "focus[]" his supporters' "anger" on the January 6, 2021, joint session of Congress specified by the Twelfth Amendment to the Constitution for counting electors' votes: "The message [Trump] sent was that to save democracy, his supporters needed to stop the January 6, 2021 joint session."[44] Leading up to the January 6 rally, "Trump knew that his supporters were angry and prepared to use violence to 'stop the steal' including physically preventing Vice President Pence from certifying the election."[45] He "did everything in his power to fuel that anger with claims he knew were false about having won the election and with claims he knew were false that Vice President Pence could hand him the election."[46]

As to the events of January 6 itself, the trial court made factual findings that many of the attendees at Trump's speech at the Ellipse on January 6 had brought knives, pepper spray, tasers, and body armor; that some of the attendees were armed; that Trump was aware of the risk of violence (and that the crowd was angry and armed); and that Trump's remarks at the Ellipse were deliberately calculated to incite the violent attack on the Capitol that then occurred.[47] The court found that, in the overall context of Trump's false claims of election fraud, his statements concerning the need to save democracy, and his prior encouragement of political violence, "the call to 'fight' and 'fight like hell' was intended as, and was understood by a portion of the crowd as, a call to arms."[48] The court further found, "based on the testimony and documentary evidence presented, that Trump's conduct and words were the factual cause of, and a substantial contributing factor to, the January 6, 2021 attack on the United States Capitol."[49] The court found that, while the attack was in progress, an attack in which parts of the crowd were chanting "[h]ang Mike Pence,"[50] Trump's tweet at 2:24 p.m. stating that "'Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution' . . . caused further violence at the Capitol";[51] that subsequent tweets at 2:38 p.m. and 3:13 p.m. nominally exhorting the mob to "remain peaceful" neither "condemned the ongoing violence or told the mob to retreat."[52] "Trump did nothing between being informed of the attack at 1:21 p.m. and 4:17

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[43] *Id.*
[44] *Id.*
[45] *Id.* at *18.
[46] *Id.*
[47] *See id.* at *18–21.
[48] *Id.* at *21.
[49] *Id.*
[50] *Id.* at *25 (quoting Exhibit 78 at 46–47, Anderson v. Griswold, 2023 WL 8006216).
[51] *Id.* at *24 (quoting Exhibit 148 at 83, Anderson v. Griswold, 2023 WL 8006216).
[52] *Id.* at *25 (quoting Exhibit 148 at 83–84, Anderson v. Griswold, 2023 WL 8006216).

p.m." to intervene to stop the attack, despite pleas from others that he do so, and despite having the power to do so.[53]

With respect to Trump's motive and state of mind, the court found that the evidence further supported the overall conclusion that "Trump endorsed and intended the actions of the mob on January 6, 2021."[54] In setting forth its legal conclusions, the trial court found that "Trump acted with the specific intent to incite political violence and direct it at the Capitol with the purpose of disrupting the electoral certification."[55]

> He convened a large crowd on the date of the certification in Washington, D.C., focused them on the certification process, told them their country was being stolen from them, called for strength and action, and directed them to the Capitol where the certification was about to take place.
>
> When the violence began, he took no effective action, disregarded repeated calls to intervene, and pressured colleagues to delay the certification until roughly three hours had passed, at which point he called for dispersal, but not without praising the mob and again endorsing the use of political violence. The evidence shows that Trump not only knew about the potential for violence, but that he actively promoted it and, on January 6, 2021, incited it. His inaction during the violence and his later endorsement of the violence corroborates the evidence that his intent was to incite violence on January 6, 2021 based on his conduct leading up to and on January 6, 2021.[56]

The trial court concluded as a matter of law that the events on and surrounding January 6, 2021, constituted an "insurrection" within the meaning of Section Three and that Trump had "engaged in" that insurrection through his own deliberate words and actions.[57] However, the trial court concluded that Section Three of the Fourteenth Amendment did not apply to Trump because the President of the United States is not an "officer of the United States" within the meaning of Section Three.[58] (The trial court ruled against the plaintiffs on that ground only.)

The Colorado Supreme Court reversed the trial court on that one issue but affirmed the trial court's decisions on the admission of evidence, its factual findings, and its other conclusions of law. In a comprehensive opinion, the Colorado Supreme Court concluded that Section Three applied to Trump (reversing the trial court); that the events leading up to and culminating in the attack on the Capitol and Congress on

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[53] *Id.* During this time he called members of Congress urging them to delay vote certification, responded to members' concern that the mob wished to "[h]ang Mike Pence" by saying that Pence perhaps deserved to be hanged, and rebuffed the Republican House leader's insistent request that Trump call on his supporters to withdraw from the Capitol by saying, "Well, Kevin, I guess these people are more upset about the election than you are." *Id.* (quoting Exhibit 78 at 46–47, Anderson v. Griswold, 2023 WL 8006216).

[54] *Id.* at *26.

[55] *Id.* at *42.

[56] *Id.*

[57] *Id.* at *33, *43.

[58] *Id.* at *45–46.

January 6, 2021, constituted an "insurrection" within the meaning of Section Three; that Trump had "engaged in" that insurrection; that Trump was thus legally disqualified by Section Three from again becoming President; and that this rendered him ineligible as a matter of state election law to be a candidate in the state's presidential primary.[59]

The Supreme Court granted certiorari to consider a single, broadly worded question: "Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?"[60]

B. What the Supreme Court Did — and Did Not — Hold

1. The Court's Decision. — The Court issued its decision on March 4, 2024, the day before the Colorado primary. The opinion of the Court was unsigned — a thirteen-page per curiam majority, joined in full by five Justices (Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh). Justice Barrett joined part of the per curiam and wrote a two-paragraph concurrence. Justices Sotomayor, Kagan, and Jackson filed a joint concurrence in the judgment only.[61]

Despite the brevity of the per curiam opinion, figuring out what it held is surprisingly tricky. As we have noted, the Court did not address the core questions presented by the case. Instead, it said . . . *something* about the *enforceability* of Section Three. But what exactly?

After a brief recitation of the facts and procedural posture (in Part I), the Court turned to the historical background of Section Three (in Part II-A), quoting sources such as Chief Justice Chase's opinion in *In re Griffin*[62] (*Griffin's Case*) and a floor statement by Senator Lyman Trumbull.[63] It also referred to Section Five of the Fourteenth Amendment, noting that it "empowers Congress to prescribe how . . . determinations [about the applicability of Section Three] should be made" and opining that this power was "critical."[64] These sources have been cited by other scholars as evidence that Section Three lacked any self-executing effect,[65] but the Court stopped well short of saying that in these passages. The sources were just left on the page like breadcrumbs.

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59 Anderson v. Griswold, 543 P.3d 283, 296–97 (Colo. 2023) (per curiam).

60 Petition for Writ of Certiorari at i, Trump v. Anderson, 144 S. Ct. 662 (2024) (mem.) (No. 23-719); Trump v. Anderson, 144 S. Ct. 539, 539 (2024) (mem.).

61 Trump v. Anderson, 144 S. Ct. at 662 (syllabus).

62 11 F. Cas. 7 (Chase, Circuit Justice, C.C.D. Va. 1869) (No. 5,815).

63 Trump v. Anderson, 144 S. Ct. at 665–67 (quoting *Griffin's Case*, 11 F. Cas. at 26; CONG. GLOBE, 41st Cong., 1st Sess. 626 (1869) (statement of Sen. Lyman Trumbull)).

64 *Id.* at 667.

65 In *Griffin's Case*, Chief Justice Chase, riding circuit, denied a habeas petition by a Black man convicted for attempted murder in front of a Virginia judge who had previously served in Virginia's secessionist legislature, because Section Three of the Fourteenth Amendment was not self-executing, but rather "legislation by congress [was] necessary to give effect to the prohibition." 11 F. Cas. at 26. For an extensive refutation of the reasoning of *Griffin's Case*, see Baude & Paulsen, *supra* note 33, at 644–59. For others relying on *Griffin's Case*, see Blackman & Tillman, *supra* note 34, at

The Court then turned (in Part II-B) to "the question whether the States, in addition to Congress, may also enforce Section 3."[66] It answered: partly. "We conclude that States may disqualify persons holding or attempting to hold *state* office. But States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency."[67] After giving its reasons for this conclusion over the course of seven pages, the Court provided a summary paragraph: "For the reasons given, responsibility for enforcing Section 3 against federal officeholders and candidates rests with Congress and not the States. The judgment of the Colorado Supreme Court therefore cannot stand."[68] This characterization echoed a similar passage in the introduction: "Because the Constitution makes Congress, rather than the States, responsible for enforcing Section 3 against federal officeholders and candidates, we reverse."[69]

Taken on its own terms, the opinion seemed to reach a narrow holding: the lack of *state* power to decide the applicability of Section Three where *federal* officers or candidates were at stake. The opinion did contain some language hinting at broader propositions, however, and there were two concurring opinions that seemed to read more into the per curiam opinion.

2. The Concurrences. — Justice Barrett filed a two-paragraph opinion concurring in part and concurring in the judgment.[70] She joined Part I of the per curiam (the factual summary and procedural background) and the discussion of state power in Part II-B. But she did not join Part II-A, which cited Section Five, *Griffin's Case*, and the remarks of Senator Trumbull. (It is also possible that she did not join the concluding paragraphs; it is unclear if those were part of Part II-B.) Justice Barrett agreed that "States lack the power to enforce Section 3 against

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408–85; Noah Feldman, Opinion, *Alas, Trump Is Still Eligible to Run for Office*, BLOOMBERG (Aug. 20, 2023, 8:00 AM), https://www.bloomberg.com/opinion/articles/2023-08-20/14th-amendment-doesn-t-bar-trump-from-presidency-alas [https://perma.cc/87EE-BH5M]. In Senator Lyman Trumbull's speech, supporting legislation to enforce Section Three, he said:

> [T]he fourteenth amendment . . . prevents a person from holding office. It declares certain classes of persons ineligible to office . . . . But notwithstanding that constitutional provision we know that hundreds of men are holding office who are disqualified by the Constitution. The Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution.

CONG. GLOBE, 41st Cong., 1st Sess. 626 (1869). One writer cites this speech as supporting the reasoning of *Griffin's Case*. *See* Lash, *supra* note 34, at 321, 381–82, 388. But in fact it stands for the opposite proposition — that "Section Three was already a self-executing requirement of constitutional law" but "wasn't being obeyed everywhere." Will Baude & Michael Paulsen, *The Use and Misuse of Section Three's "Legislative History:" Part I*, REASON: VOLOKH CONSPIRACY (Feb. 6, 2024, 7:54 AM) (emphasis omitted), https://reason.com/volokh/2024/02/06/the-use-and-misuse-of-section-threes-legislative-history-part-i [https://perma.cc/9F5N-QKXP].

66 Trump v. Anderson, 144 S. Ct. at 667.

67 *Id.*

68 *Id.* at 671.

69 *Id.* at 665.

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

Presidential candidates" and believed that principle "sufficient to resolve this case."[71] "I would decide no more than that," she added, noting that the case "does not require us to address the complicated question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced."[72] Justice Barrett then referred to "[t]he majority's choice of a different path," thus implying that the per curiam opinion had gone further and addressed this "complicated question."[73]

The three remaining Justices (Sotomayor, Kagan, and Jackson) filed a joint opinion concurring in the judgment only.[74] The joint concurrence agreed with the per curiam's conclusion that states may not enforce Section Three in elections for federal offices, but criticized the majority for having decided, in the concurring Justices' view, more than was necessary — for "deciding not just this case, but challenges that might arise in the future"[75] and for having unnecessarily decided these "novel constitutional questions" in order to "insulate this Court *and petitioner* from future controversy."[76] The joint concurrence in effect charged that the majority had gone out of its way to issue an unjustifiably broad ruling in order to benefit Donald Trump in particular. Specifically, the joint concurrence charged the majority with having unnecessarily (and wrongly) held that Section Three *required* congressional legislation under Section Five of the amendment in order to have legal force and that such congressional legislation was the *only* means for enforcing Section Three — "that a disqualification for insurrection can occur only when Congress enacts a particular kind of legislation pursuant to Section 5 of the Fourteenth Amendment."[77] The joint concurrence sharply criticized that proposition, which it took to be an unnecessary and "gratuitous"[78] ground for the per curiam opinion.

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[71] *Id.*

[72] *Id.*

[73] *Id.* The second paragraph of Justice Barrett's concurrence also contained an admonition about "the message Americans should take home." *Id.* at 672. We have more to say about this admonition in the Conclusion.

[74] *Id.* at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

[75] *Id.*

[76] *Id.* (emphasis added).

[77] *Id.*; *see also id.* (stating that "the majority opines on which federal actors can enforce Section 3, and how they must do so"); *id.* (stating that the per curiam "shuts the door on other potential means of federal enforcement"); *id.* at 673 (charging that the per curiam "opines on how federal enforcement of Section 3 must proceed" and "says" that Congress "must enact legislation under Section 5"); *id.* at 673–74 (referring to "the majority's view of how federal disqualification efforts must operate," *id.* at 673, and to "its requirement that a Section 3 disqualification can occur only pursuant to legislation enacted for that purpose," *id.* at 674); *id.* at 674 (stating that "the majority resolves many unsettled questions about Section 3, . . . forecloses judicial enforcement of that provision," and thereby "attempts to insulate all alleged insurrectionists from future challenges to their holding federal office"); *id.* (again stating that "the majority announces novel rules for how [Section Three] enforcement must operate, . . . reaches out to decide Section 3 questions not before us," and "foreclose[s] future efforts to disqualify a Presidential candidate under that provision").

[78] *Id.* at 673 ("These musings are as inadequately supported as they are gratuitous.").

The per curiam opinion responded, in its final two paragraphs, with an ambiguous defense:

> So far as we can tell, they object only to our taking into account the distinctive way Section 3 works and the fact that Section 5 vests *in Congress* the power to enforce it. These are not the only reasons the States lack power to enforce this particular constitutional provision with respect to federal offices. But they are important ones . . . .[79]

It was, the majority said, "the combination of all the reasons" stated in its opinion and not "just one particular rationale" that decided the case.[80] In the majority's view, "each of these reasons" was needed "to provide a complete explanation for the judgment the Court unanimously reache[d]."[81]

3. Deciphering the Holding. — All of which leaves a few puzzles. What exactly *did* the Supreme Court *actually hold* in *Trump v. Anderson*?

On our reading, surprisingly little.

As we read it, the Court held only that "States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency."[82] The concurring opinions notwithstanding, no broader holding can be found in the per curiam opinion. Where, then, other than in the misty atmospherics of the per curiam's vague opinion-writing, did the idea come from that the majority ruled that Section Three requires congressional legislation in order to have legal force?

It comes from the joint concurrence in the judgment. It is the Sotomayor-Kagan-Jackson joint concurrence[83] that made explicit the idea that the per curiam decided more than the lack of power of states to enforce Section Three as to federal officeholders and candidates. Repeatedly, the joint concurrence scorned the per curiam for having said things that it did not explicitly say. The joint concurrence accused the per curiam of "*deciding* not just this case, but challenges that might arise in the future";[84] of saying "how federal enforcement of Section 3 *must* proceed"[85] and "how federal disqualification efforts *must operate*";[86] of "*shut[ting] the door* on other potential means of federal

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[79] *Id.* at 671 (per curiam).

[80] *Id.*

[81] *Id.* Was this phrasing meant to convert these statements, seemingly dicta, into a holding?

[82] *Id.* at 667.

[83] Justice Barrett's opinion is more equivocal about what exactly the per curiam held. In refusing to join parts of that opinion and commenting that the case "does not require us to address the complicated question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced," it is unclear to us whether she saw the per curiam as *resolving* that question, or simply as "*address[ing]*" it in an inconclusive and (in her view) unnecessary way. *Id.* at 671 (Barrett, J., concurring in part and concurring in the judgment) (emphasis added). She did not join the joint concurrence.

[84] *Id.* at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment) (emphasis added).

[85] *Id.* at 673 (emphasis added); *see also id.* ("Congress, the majority says, *must enact* legislation . . . ." (emphasis added)).

[86] *Id.* (emphasis added).

enforcement";[87] of "*foreclos[ing]*" and "*ruling out*" enforcement other than by enactment of new legislation;[88] of holding "that a disqualification for insurrection *can occur only when* Congress enacts a particular kind of legislation pursuant to Section 5 of the Fourteenth Amendment"[89] (and, repeating the charge nearly verbatim, "that a Section 3 disqualification *can occur only* pursuant to legislation enacted for that purpose"[90]); and of thereby "attempt[ing] to insulate all alleged insurrectionists *from future challenges* to their holding federal office."[91]

The puzzle is that the per curiam opinion said none of these things. The words "can occur only when," "must," "must operate," "forecloses," or anything of the sort do not appear in the relevant parts of the per curiam. Indeed, we think that if the joint concurrence hadn't so fervently accused the per curiam of saying and deciding such things, few readers would think that it had done so. Instead, at every point where the per curiam might have gone further and held that Section Three required legislation pursuant to Section Five to be legally operative — or stated explicitly that such congressional legislation was the exclusive means of enforcing Section Three — the opinion pulled back, almost as if deliberately, carefully choosing its words precisely so as *not* to make any such claim.

Return to the per curiam again: While the Court's holding did limit the enforcement of Section Three, it is clear that it did *not* endorse Chief Justice Chase's holding in *Griffin's Case* that Section Three always requires implementing legislation by Congress under Section Five of the amendment in order to have legal force. Indeed, to the contrary, the Court said that states can enforce Section Three, on their own authority, to "disqualify persons holding or attempting to hold *state* office"[92] — a declaration that contradicts many statements in *Griffin's Case* itself, which involved a judge of the state of Virginia.[93] At most, the Court might be thought to have adopted a "Half-*Griffin*," holding that implementing legislation by Congress was necessary to give effect to Section Three where federal offices are concerned, even if not for state offices (as in *Griffin's Case* itself). This novelty is what the concurring opinions, and many commentators, seem to have read into the per curiam.[94] But even the "Half-*Griffin*" is not actually there.

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87 *Id.* at 672 (emphasis added).

88 *Id.* at 674 (emphasis added).

89 *Id.* at 672 (emphasis added).

90 *Id.* at 674 (emphasis added).

91 *Id.* (emphasis added).

92 *Id.* at 667 (per curiam).

93 *See* 11 F. Cas. 7, 22 (Chase, Circuit Justice, C.C.D. Va. 1869) (No. 5,815).

94 *See, e.g.*, Adam Liptak, *Trump Prevails in Supreme Court Challenge to His Eligibility*, N.Y. TIMES (Mar. 4, 2024), https://www.nytimes.com/2024/03/04/us/politics/trump-supreme-court-colorado-ballot.html [https://perma.cc/3VBU-CSRT] ("But the five-justice majority, in an unsigned

The per curiam opinion noted the importance of Section Five: Section Three as a practical matter requires the making of determinations in specific instances that Section Three applies to the person and conduct in question.[95] Congress, the per curiam noted, has power (presumably, that is, within the bounds of Section Three itself) to "prescribe how" such determinations are made.[96] Thus, the per curiam judged Congress's legislative power "critical" to enforcing Section Three.[97] But the Court did not at any point say that legislation under Section Five was constitutionally required in order for Section Three to have legal force. Nor did it say that only Congress could enforce Section Three. All it said was that the Fourteenth Amendment confers enforcement power on Congress, that this power could appropriately be used to specify how Section Three is applied, and that such power was important as a practical matter.

The point bears emphasis. Nowhere does the per curiam say that congressional legislation under Section Five is required or is a condition of Section Three's status as law. And how could it? After all, Section One's guarantees of equal protection, due process, and privileges or immunities also must be applied to particular facts and parties to be given effect, but it has always been understood that state legislatures and courts (state or federal) can do the applying, with or without

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opinion answering questions not directly before the court, ruled that Congress must act to give Section 3 force."); David French, Opinion, *The Supreme Court Just Erased Part of the Constitution*, N.Y. TIMES (Mar. 4, 2024), https://www.nytimes.com/2024/03/04/opinion/supreme-court-trump-colorado-constitution.html [https://perma.cc/V7JX-8JE5] ("But instead of any of these options, the court went with arguably the broadest reasoning available: that Section 3 isn't self-executing, and thus has no force or effect in the absence of congressional action."); Ilya Somin, *A Lost Opportunity to Protect Democracy Against Itself: What the Supreme Court Got Wrong in* Trump v. Anderson, 2023–2024 CATO SUP. CT. REV. 319, 333 (2024); *see also* Ned Foley, *Can Congress Disqualify Trump After the Supreme Court's Section 3 Ruling?*, LAWFARE (Mar. 14, 2024, 12:42 PM), https://www.lawfaremedia.org/article/can-congress-disqualify-trump-after-the-supreme-court-s-section-3-ruling [https://perma.cc/6RP3-XUSM] (describing "two different ways to read the Court's cryptic per curiam opinion"); Aziz Z. Huq, *The Supreme Court, 2023 Term — Comment: Structural Logics of Presidential Disqualification*, 138 HARV. L. REV. 172, 211–12 (2024) (describing problems and ambiguities in the Court's holding). Others did recognize that the Court did not say what the concurring opinions seemed to suggest, and reached conclusions similar to ours here. *See* Marty Lederman, *What's Dividing the Justices (And Other Initial Reactions to the Court's Decision in* Trump v. Anderson*)*, BALKINIZATION (Mar. 5, 2024, 11:13 AM), https://balkin.blogspot.com/2024/03/whats-dividing-justices-and-other.html [https://perma.cc/H4F7-LTKZ]; Derek Muller, *Is the Internal Dispute in* Trump v. Anderson *a Tempest in a Teapot?*, ELECTION LAW BLOG (Mar. 6, 2024, 6:39 AM), https://electionlawblog.org/?p=141778 [https://perma.cc/D4J7-RJ8A]; Derek T. Muller, *Administering Presidential Elections and Counting Electoral Votes After* Trump v. Anderson, 60 WAKE FOREST L. REV. (forthcoming 2025) (manuscript at 39), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4916797 [https://perma.cc/PE2L-EVBQ].

[95] *See* Trump v. Anderson, 144 S. Ct. at 667.

[96] *Id.*

[97] *Id.* We said much the same thing in *The Sweep and Force of Section Three*. *See* Baude & Paulsen, *supra* note 33, at 628–29 ("[E]ven though Section Three is a self-executing, immediately applicable constitutional legal rule, someone needs to do the actual applying of that rule to particular situations where its application is called for. . . . [S]omeone needs to bring that legal rule to bear in a concrete situation as a practical matter."); *id.* at 655 (discussing Section Five).

congressional implementing legislation.[98] Indeed, if it were true that only *Congress*, acting through Section Five, could effectuate Section Three, then it would not be permissible for *a single house* to apply Section Three in refusing to seat a rebel or insurrectionist — yet the per curiam explicitly noted that this was the historical practice.[99] If it were true that only *Congress*, acting through Section Five, could effectuate Section Three, then it would not be permissible for *a single house* to file articles of impeachment based on Section Three — yet of course this is precisely what the House of Representatives did in January 2021,[100] and it would be ludicrous to think this was improper.

It is also true that the opinion twice said that enforcement of Section Three belongs to "Congress, rather than the States" or "rests with Congress and not the States."[101] In referring to "Congress," do these two sentences render Section Three non-self-executing? We do not see it. As just discussed, that would make no sense. Both passages emphasized that Congress *does* have the power to enforce Section Three in emphasizing a counterpoint that the states *do not*. But neither passage went further to say that other federal actors also lack all power to enforce Section Three.

In short, nothing in the per curiam opinion advanced a claim that Section Three is generally inoperative, inapplicable, or insufficient without congressional legislation. It held that states cannot enforce Section Three in elections for federal offices, and that one reason (among others) why this is supposedly true is that Congress has the legislative power under Section Five to enforce Section Three and other provisions of the Fourteenth Amendment. But that's it.

C. So How Did This Happen?

Why, then, were the concurring Justices, so rightly resistant on the merits to what they wrongly said the majority said, so insistent on wrongly saying that the majority had said it?

Our best guess — and of course it is only a guess, but we do think it is the best inference from the evidence — is that at some point in the process (perhaps even until very late in the game) the draft per curiam opinion *had made claims of such a nature and made them explicitly*. That is all we can think of — other than fevers or collective delusions — that can sensibly explain the joint concurrence's characterizations of the per curiam opinion. What would have possessed the concurring Justices

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98 *See* Baude & Paulsen, *supra* note 33, at 624.

99 Trump v. Anderson, 144 S. Ct. at 669–70 ("In the years following ratification, the House and Senate exercised their unique powers under Article I to adjudicate challenges contending that certain prospective or sitting Members could not take or retain their seats due to Section 3.").

100 H.R. Res. 24, 117th Cong. (2021).

101 Trump v. Anderson, 144 S. Ct. at 665, 671.

to so sharply and specifically criticize the per curiam as making such claims if they were not (at one point) there?

Here is our speculation: The author of the draft per curiam — probably Chief Justice Roberts[102] — sought to craft a narrow opinion, eliding potential disagreements among the Justices. From the oral argument, it seemed as though the best shot at a consensus was the "federalism" argument that states may not interpret and apply Section Three so as to interfere with the national election for President.[103]

At some point during the drafting process, however, one or more Justices in the majority wished to rule more broadly. They were not content to rule merely that states lack power to enforce Section Three in elections for federal office. They demanded instead a broader ruling that Section Three's disqualification was unenforceable without specific congressional implementing legislation under Section Five.

These Justices were intent on kiboshing any and all further challenges to Trump's eligibility for office. Some were troubled that, if Section Three of its own force directly and immediately barred Trump from office, that conclusion could produce untoward legal mischief and uncertainty. At oral argument, Justice Alito and Justice Gorsuch both expressed concerns that if Section Three were regarded as a self-executing constitutional command, that might, as a logical matter, mean that some or all of President Trump's executive actions after January 6, 2021, were immediately rendered ultra vires.[104] This prospect rightly concerned Justices Gorsuch and Alito. President Trump granted seventy-four pardons after January 6, 2021, for example.[105] If Section Three is a legally self-executing constitutional disqualification from holding office, were these pardons invalid?[106] If so, what other past executive action might

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[102] Aside from the institutional reasons to suspect that the Chief Justice would assign this opinion to himself, notice the joint concurrence's needling citation of Chief Justice Roberts's lone separate opinion in *Dobbs* for the proposition: "If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Id.* at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment) (quoting Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2311 (2022) (Roberts, C.J., concurring in the judgment)).

[103] *See, e.g.*, Transcript of Oral Argument at 96, Trump v. Anderson, 144 S. Ct. 662 (No. 23-719), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-719_2jf3.pdf [https://perma.cc/4KPT-L9P6]; *id.* at 134.

[104] *See* Collins v. Yellen, 141 S. Ct. 1761, 1788 (2021) (collecting cases for the proposition that where a government actor has exercised "power that the actor did not lawfully possess," the proper remedy is to invalidate such ultra vires action); *id.* at 1795 (Gorsuch, J., concurring in part) (characterizing "governmental action . . . taken by someone erroneously claiming the mantle of executive power" as "thus taken with no authority at all").

[105] *See Pardons Granted by President Donald J. Trump (2017-2021)*, U.S. DEP'T OF JUST.: OFF. OF THE PARDON ATT'Y (Oct. 23, 2024), https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021 [https://perma.cc/3QAU-UJX7].

[106] A strong reading of the "de facto officer" doctrine might be a complete and sufficient response to this problem. To borrow an arresting example, Blackstone wrote that it was still treason to kill the King, even if he was "a king *de facto* and not *de jure*, or, in other words, an usurper that hath

be upended by the application of Section Three? And anticipating the prospect of Trump being elected again in 2024 (as some Justices no doubt were), would all his executive acts as "President" following inauguration be unconstitutional and subject to judicial invalidation? Might there be a "President" with no constitutional power to act as President? Further, Justices Alito and Gorsuch pressed, if Trump was constitutionally disqualified from office by immediate operation of Section Three, wouldn't that mean that military officers might justifiably have refused to obey his commands after January 6, 2021, (and justifiably refuse such orders going forward, were Trump to regain possession of the presidency in 2025)?[107]

An additional problem that Justice Gorsuch specifically might have faced was his own previous opinion as a Tenth Circuit judge in *Hassan v. Colorado*,[108] which had upheld Colorado's power to exclude a naturalized U.S. citizen from the state's presidential ballot on the ground that he was constitutionally disqualified to be President because he was not a natural-born citizen.[109] Because *Hassan* holds that states can enforce constitutional disqualifications, Justice Gorsuch was in a pickle. The logic and language of his Tenth Circuit opinion appear to be in flat contradiction of the states-can't-enforce-constitutional-disqualifications argument that is the centerpiece of *Trump v. Anderson*.[110] Justice

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got possession of the throne." John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 437 (2001) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *77). For legal purposes, what mattered was "the king in possession, without any respect to his title." *Id.* (quoting 4 BLACKSTONE, *supra*, at *77). But Justices Alito and Gorsuch resisted this answer, and this strong reading of the doctrine is certainly far from settled.

107 Transcript of Oral Argument, *supra* note 103, at 91 (statement of Alito, J.) ("Can I ask you again the question that Justice Gorsuch asked, and you — to which you responded by citing the de facto officer doctrine. But suppose we look at that going forward rather than judging the validity of an act committed between the time when a president allegedly engages in an insurrection and the time when the president leaves office. During that interim period, would it be lawful for military commanders and other officers to disobey orders of the — of the — the president in question?"); *see id.* at 92–94 (statement of Gorsuch, J.) ("Now I understand the de facto officer doctrine might be used to prohibit people from seeking judicial remedies for decisions that take place after the date he was disqualified. But, if he is, in fact, disqualified, from that moment, why would anybody have to obey a direction from him? . . . You say he is disqualified from holding office from the moment it happens. . . . He's disqualified from the moment. Self-executing, done. And I would think that a person who would receive a direction from that person — president, former president in your view, would be free to act as he or she wishes without regard to that individual. . . . On your theory, would anything compel a . . . lower official to obey an order from, in your view, the former president?").

108 495 F. App'x 947 (10th Cir. 2012).

109 *Id.* at 948.

110 As then-Judge Gorsuch succinctly put it: "[A] state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Id.* (citing Munro v. Socialist Workers Party, 479 U.S. 189, 193–95 (1986); Bullock v. Carter, 405 U.S. 134, 145 (1972)). That's *Trump v. Anderson* on all fours. *See also* Baude & Paulsen, *supra* note 33, at 639 n.122 (citing *Hassan* and other similar cases). Justice Gorsuch's opinion also rejected Hassan's argument that

Gorsuch thus might have had additional reason to want the opinion to include an additional argument that Section Three is, uniquely among constitutional disqualifications, non-self-executing.

In this scenario, Chief Justice Roberts, who doubtless did not want a fractured majority, sought to stave off the prospect of separate concurrences on his right flank. At some point, the draft's gauge was broadened: Not only could states not enforce Section Three as to federal officers and candidates; *nobody* could enforce Section Three's rule in the absence of congressional implementing legislation. Since the partisan composition of Congress made such legislation exceedingly unlikely, this would effectively kill Section Three enforcement as to the events surrounding January 6, 2021.[111] Not only would it settle questions of state-election-law candidate ballot eligibility for the upcoming election; it would also effectively foreclose any Section Three suits challenging the lawfulness of presidential actions in the last weeks of the Trump Administration or in a future Trump Administration, and it would do so on a seeming legal technicality, leaving someone else to blame (Congress) and without holding, much more controversially and explosively, that January 6 was not an insurrection, or that Trump had not engaged in it.

But the plan backfired. The attempt to shore up the right flank evidently provoked defections by the left flank (and by the characteristically scrupulous Justice Barrett), dashing hopes for a narrow, consensus opinion that might have shielded the Court from criticism or accusations of partisanship. Justice Sotomayor, eventually joined by others, prepared an opinion *dissenting* in substantial part from the Court's reasoning, shattering the illusion of nonpartisan consensus.

Article II only rendered him "ineligible to *assume the office* of president" and that it therefore "was still an unlawful act of discrimination for the state to deny him *a place on the ballot*." *Hassan*, 495 F. App'x at 948.

111 The one possible exception would be proceedings under the Electoral Count Reform Act, Pub. L. No. 117-328, 136 Stat. 5233 (2022) (codified at 3 U.S.C. §§ 1, 22), which would govern the counting of the electoral votes on January 6, 2025. As we have discussed, Baude & Paulsen, *supra* note 33, at 640–42; Will Baude & Michael Paulsen, *Is Congress A "Backstop"?*, REASON: VOLOKH CONSPIRACY (Feb. 9, 2024, 6:03 AM), https://reason.com/volokh/2024/02/09/is-congress-a-backstop [https://perma.cc/4CH9-A25W], this explosive possibility raises several tricky legal difficulties — is the Electoral Count Reform Act constitutional? If so, do its terms permit Congress to strike electoral votes on Section Three grounds? — which the majority might have been unaware of or simply ignored. *See* Muller, *Administering Presidential Elections*, *supra* note 94, at 44; Huq, *supra* note 94, at 212–13. Alternatively, the earlier draft could have said that the Electoral Count Reform Act cannot constitutionally enforce Section Three because only legislation that was specifically adopted under Section Five of the Fourteenth Amendment and passes the Court-made and highly dubious test of *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), can enforce Section Three. *See* Trump v. Anderson, 144 S. Ct. at 670 ("Section 5 limits *congressional* legislation enforcing Section 3, because Section 5 is strictly 'remedial.' . . . Any congressional legislation enforcing Section 3 must, like the Enforcement Act of 1870 and § 2383, reflect 'congruence and proportionality' between preventing or remedying that conduct 'and the means adopted to that end.' Neither we nor the respondents are aware of any other legislation by Congress to enforce Section 3." (citations omitted) (quoting *City of Boerne*, 521 U.S. at 520)).

(The joint opinion eventually became one styled as a concurrence in the judgment, not a dissent, but undeleted metadata detectable in the rushed-to-judgment PDF reveals that at one point the opinion was at least partially a dissent.[112])

What happened next? The Chief Justice scaled it back, eliminating the claim that Section Three's legal force *depends* on such legislation, but retaining in Part II-A some of the surrounding atmospherics. But whether because of those lingering atmospherics or just because of the press of time, the joint concurrence in the judgment continued to characterize the per curiam as if it had retained the non-self-execution holding. The per curiam protested that there was nothing much remaining in its opinion to which the concurrences could legitimately direct their fire. Yet at the same time, it insisted on retaining Part II-A nonetheless, indeed insisting that II-A was "necessary to provide a complete explanation for the judgment the Court unanimously reaches."[113] Unpersuaded that the bomb had truly been defused, the joint concurrence stood pat, until at some point (the Colorado primary looming) the opinions had to go to the printer.

Whatever the specifics of the deliberations and back-and-forth over drafts — we certainly could be wrong on some of the details of persons, arguments, sequence, and timing — the ultimate result was a mess in all directions: an absence of consensus; both the appearance and reality of deep partisan divisions within the Court; a confusing set of opinions in which the principal quasi-dissent mischaracterized the per curiam opinion as saying things it no longer said (while the per curiam and Justice Barrett desperately sought to preserve the fig leaf of unanimity); critical issues left open and unresolved, kicked down the road, and threatening a yet more serious constitutional crisis after election day 2024; and (as we shall see) a ruling that is legally ridiculous on the merits.

II. THE FAUX-FEDERALISM FOLLIES OF *TRUMP V. ANDERSON*

A. Nontextual Federalism Principles

We turn next to evaluating what the Court *did* hold: that states cannot enforce Section Three's constitutional disqualifications in conducting state elections for federal offices. The Court invoked general principles of federalism — the supremacy of the national government over the states and the resulting rule that states cannot interfere with

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112 Mark Joseph Stern, *Supreme Court Inadvertently Reveals Confounding Late Change in Trump Ballot Ruling*, SLATE (Mar. 4, 2024, 4:58 PM), https://slate.com/news-and-politics/2024/03/supreme-court-metadata-sotomayor-trump-dissent.html [https://perma.cc/Y94A-D2UH].

113 Trump v. Anderson, 144 S. Ct. at 671.

lawful operations and officers of the national government.[114] The Court deduced from these premises that allowing states to enforce Section Three in state-conducted elections for federal offices would improperly permit states to interfere with the selection of officers of the national government, contrary to the structure of the Constitution.

This rationale for reversing the decision of the Colorado Supreme Court was one that all of the Justices agreed on. "[F]ederal officers," the majority wrote, "owe their existence and functions to the united voice of the whole, not of a portion, of the people."[115] To allow states to enforce Section Three in elections for such officers would create a state-by-state "patchwork" that would "'sever the direct link that the Framers found so critical between the National Government and the people of the United States' as a whole."[116] This was especially true in the case of elections for the presidency, where states' actions "implicate a uniquely important national interest."[117] To permit different state procedures and conclusions with respect to presidential election eligibility could affect votes cast in other states, "dramatically change the behavior of voters, parties, and States across the country," and possibly affect the outcome of the election for President.[118] This was impermissible, the majority said. States must not through their election-law decisions take actions that affect the national presidential election. "Nothing in the Constitution requires that we endure such chaos . . . ."[119]

The joint concurrence employed the same reasoning. "Federalism principles," the concurring Justices wrote, dictate that "States cannot use their control over the ballot to 'undermine the National Government.'"[120] To permit a state to enforce Section Three "would, we agree, create a chaotic state-by-state patchwork, at odds with our Nation's federalism principles."[121] Thus, "[t]o allow Colorado to take a presidential

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[114] *Id.* at 666–71. See specifically, for example, *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. Such a power would flout the principle that 'the Constitution guarantees "the entire independence of the General Government from any control by the respective States."'" (quoting Trump v. Vance, 140 S. Ct. 2412, 2417 (2020))); *id.* ("Indeed, consistent with that principle, 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))); *id.* at 669 ("States have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress." (omission in original) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819))).

[115] *Id.* at 667–68 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 803 (1995)).

[116] *Id.* at 671 (quoting *Thornton*, 514 U.S. at 822).

[117] *Id.* at 670 (quoting Anderson v. Celebrezze, 460 U.S. 780, 794–95 (1983)). We shall discuss the (ir)relevance of *Thornton* and *Celebrezze* shortly. *Infra* notes 139–52 and accompanying text.

[118] Trump v. Anderson, 144 S. Ct. at 671.

[119] *Id.*

[120] *Id.* at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment) (quoting *Thornton*, 514 U.S. at 810).

[121] *Id.*

candidate off the ballot under Section 3 would imperil the Framers' vision of 'a Federal Government directly responsible to the people.'"[122]

There is, however, a huge problem with this reasoning: It is directly contrary to what the Constitution actually says, and does, with respect to presidential elections. As we will explain presently, it completely inverts the structure of federalism designed by the Framers of the Constitution with respect to such elections, which was explicitly to provide for elections to federal offices through the medium of state laws and procedures. Contrary to the claim that allowing such a state role would "imperil the Framers' vision," the Constitution's state-centric election design *was* the Framers' vision. Thus, though the Court's stated premise was correct — national law and the lawful operations of the national government are supreme over state law — its application of that premise was a complete misfire, for the simple reason that the Constitution itself prescribes that states conduct elections for federal offices.[123]

B. What About the Electoral College?

The gravest mistakes in *Trump v. Anderson* start not with Section Three of the Fourteenth Amendment, but with Section One of Article II of the Constitution. There the Constitution assigns responsibility for conducting presidential elections to the states: "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[124] This power allows states to decide how to conduct a presidential election — technically an election for presidential electors — or even to unilaterally pick the electors of the state legislature's choice.

The one power given to Congress is the power to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."[125] Additionally, the Twelfth Amendment provides for the electoral votes to be counted in joint session in front of both houses of Congress.[126] Other than that, unlike the case for elections of members of Congress, Congress has no legislative power to alter states' arrangements as to the "Manner" in which their electors are chosen — whether by election in some

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[122] *Id.* at 673 (quoting *Thornton*, 514 U.S. at 821). Justice Barrett agreed, too: "I agree that States lack the power to enforce Section 3 against Presidential candidates." *Id.* at 671 (Barrett, J., concurring in part and concurring in the judgment).

[123] In *The Sweep & Force of Section Three* we also argued that states have similar power over congressional elections under Article I, Section 4, but they arguably present a harder case because another provision of Article I makes each house the "Judge of the Elections, Returns, and Qualifications of its own Members." Baude & Paulsen, *supra* note 33, at 636–38 (quoting U.S. CONST. art. I, § 5, cl. 1). There is no parallel provision for presidential elections, and they present an even simpler and obvious case for state power to enforce Section Three.

[124] U.S. CONST. art. II, § 1, cl. 2.

[125] *Id.* cl. 4.

[126] *See id.* amend. XII.

fashion directed by the legislature, direct appointment by act of the legislature, or by some other method chosen by the legislature.[127] Each state chooses its electors, whether by election pursuant to state law or in some other fashion.

Trump v. Anderson's operating premise simply falls apart when confronted with the actual Constitution — Article II, Section 1, Clause 2 in particular. That provision deliberately vested in states, and not any national institution, exclusive power to choose the method and process by which electors are selected. Moreover, this was by deliberate design. The Framers did not want a single unified process, which they believed would be a recipe for cabal and intrigue. Rather, the whole process was crafted to be as decentralized and state focused as possible in order "to afford as little opportunity as possible to tumult and disorder,"[128] as Alexander Hamilton explained in *The Federalist*. "[A]s the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments . . . than if they were all to be convened at one time, in one place."[129] The drafters at the Constitutional Convention at numerous points discussed and emphasized the virtues of avoiding cabals, conspiracies, intrigues, and foreign influence by keeping the voting electors as separate from each other and from the seat of government as possible.[130]

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[127] The Court's precedents have also inferred from the Necessary and Proper Clause a federal power to protect presidential elections from corruption and fraud. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 90 (1976); Burroughs v. United States, 290 U.S. 534, 545 (1934); *Ex Parte* Yarbrough, 110 U.S. 651, 657–58 (1884).

[128] THE FEDERALIST NO. 68, at 410 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[129] *Id.* at 411.

[130] *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 30 (Max Farrand ed., 1911) (statement of Mr. Wilson on July 17) (noting dangers of "electors all assemble[d] in one place" and importance of minimizing potential for "intrigue & cabal"); *id.* at 110–11 (statement of Mr. Madison on July 25) ("As the electors would be chosen for the occasion, would meet at once, & proceed immediately to an appointment, there would be very little opportunity for cabal, or corruption,. As a further precaution, it might be required that they should meet at some place, distinct from the seat of Govt. and even that no person within a certain distance of the place at the time shd. be eligible."); *id.* at 112 (statement of Mr. Butler on July 25) ("The two great evils to be avoided are cabal at home, & influence from abroad."); *id.* at 113 (statement of Mr. Williamson on July 25) (stating that he was "sensible that strong objections lay agst an election of the Executive by the Legislature, and that it opened a door for foreign influence"); *id.* at 500 (statement of Mr. Gouverneur Morris on September 4) (giving both his own and the Committee of Eleven's reasons for favoring the electors method, to mitigate factors such as "the danger of intrigue & faction if the [appointment] should be made by the Legislature," and noting "[a]s the Electors would vote at the same time throughout the U.S. and at so great a distance from each other, the great evil of cabal was avoided. It would be impossible also to corrupt them."); *id.* at 501 ("[T]he principal advantage aimed at was that of taking away the opportunity for cabal."); *id.* (statement of Mr. Wilson on September 4) (speaking in favor of proposed plan: "It gets rid of one great evil, that of cabal & corruption"); *id.* at 525 (Sept. 6) (noting rejection of motion to have electors "meet at the seat of the Genl. Govt."); *id.* at 526 (adopting motion to amend to require that election be on same day throughout the United States).

Thus, the very core of the Court's decision in *Trump v. Anderson* — that principles of "federalism" prevent states from interfering with the nation's presidential election — is an inexcusable inversion of constitutional law. Structural principles of federalism and the like are something to be discerned from studying the text and history of the Constitution itself, never to be used to displace the Constitution.[131] The notion that a state's separate election procedures and determinations might somehow improperly interfere with the national election for President is simply constitutionally incoherent. It is as if the Justices had never heard of "the Electoral College."

Of course, we know that the Justices *had* heard of the Electoral College. Indeed, just four years earlier in *Chiafalo v. Washington*,[132] the Supreme Court held that the plenary power of states over the manner of choosing their electors goes so far as even to include the power to control how electors cast their votes by removing or replacing them if they attempt to vote for the "wrong" candidate.[133] We are not endorsing this decision — indeed, as a matter of constitutional text, structure, and original understanding it is highly dubious at best[134] — but the decision was unanimous as to the result, and 8–1 as to the reasoning. It shows that the Court can recognize the states' broad power over the manner of selecting electors when it wishes to.

And of course, as an original matter, a state's power under Article II also extended to simply appointing the state's electors itself. Indeed, at the Founding and for decades thereafter, many states did not hold presidential elections at all. They certainly were under no obligation to select their electors in a uniform manner. And indeed, while the practice has changed and now every state chooses to select their electors through election, they could do otherwise. If it wished to, a state could simply appoint electors who promised to vote for the Democratic candidate,

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131 *See* William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 653 (2021) ("[T]he most nefarious form of structural reasoning [is] inferring a 'constitutional plan' apart from any actual provisions in the Constitution or any actual plans of those who enacted it."). For similar reasons, we respectfully part ways with Professor Neil Siegel, who relies on a "structural, collective-action principle" rather than the original meaning of the Constitution, to defend the result in *Trump v. Anderson*. Neil S. Siegel, *Narrow But Deep: The* McCulloch *Principle, Collective-Action Theory, and Section Three Enforcement* (Duke L. Sch. Pub. L. & Legal Theory Series, No. 2024-48, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4909114 [https://perma.cc/B5YL-LLPV]; *see also* Huq, *supra* note 94, at 172–73 (arguing that even on nonoriginalist structural grounds the majority opinion is wrong in multiple ways).

132 140 S. Ct. 2316 (2020).

133 *Id.* at 2322.

134 *See* Baude & Paulsen, *supra* note 33, at 640 n.124 (citing Mike Rappaport, *The Originalist Disaster in* Chiafalo, LAW & LIBERTY (Aug. 7, 2020), https://lawliberty.org/the-originalist-disaster-in-chiafalo [https://perma.cc/SJY6-MB6D]; Michael Stokes Paulsen, *The Constitutional Power of the Electoral College*, PUB. DISCOURSE (Nov. 21, 2016), https://www.thepublicdiscourse.com/2016/11/18283 [https://perma.cc/P6GS-8PNG]).

and another state could simply appoint electors who promised to vote for the Republican.[135]

Finally, consider the absurdity of following the Court's logic to its conclusion. If taken seriously and extended beyond Section Three, it would mean that states cannot enforce any other federal constitutional disqualifications from office. They must allow Barack Obama, George W. Bush, and Bill Clinton on the ballot (notwithstanding the Twenty-Second Amendment); they must allow Arnold Schwarzenegger on the ballot (notwithstanding the natural-born-citizenship requirement); they must allow Justin Bieber on the ballot (notwithstanding the thirty-five-year-old age requirement *and* the citizenship requirement).

The Court plainly did not intend any of this, of course. It seems likely that the Court did not intend for its reasoning to be taken seriously, intending instead a ticket-good-for-the-Section-Three-train-only.[136] But there is no plausible justification for this stopping point. It just exposes and emphasizes the lack of principle behind the ruling.

C. The Counterarguments, Such as They Are

The per curiam in *Trump v. Anderson* had *almost* nothing to say in response. The per curiam's one reference to the Electoral College is in the following paragraph:

> The only other plausible constitutional sources of such a delegation are the Elections and Electors Clauses, which authorize States to conduct and regulate congressional and Presidential elections, respectively. See Art. I, § 4, cl. 1; Art. II, § 1, cl. 2. But there is little reason to think that these Clauses implicitly authorize the States to enforce Section 3 against federal officeholders and candidates. Granting the States that authority would invert the Fourteenth Amendment's rebalancing of federal and state power.[137]

With respect, this passage reads to us as a non sequitur, or indeed an attempt at judicial sleight of hand, distracting the reader from looking in the right place. It is not the Fourteenth Amendment that "grants" states authority over presidential elections; it is Article II. So the Court's contention would have to be that the Fourteenth Amendment implicitly *withdraws* that authority, even though it says nothing of the sort. Where the Fourteenth Amendment withdraws state authority, it does so explicitly, as in Section One and Section Four. To say that the amendment

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[135] This remains the doctrine today. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) ("[T]he state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself . . . ."). Of course because Congress sets the *day* on which electors are chosen, a state can do this only before Election Day. It cannot retroactively "undo" or "cancel" an election it has held. *See* William Baude, *The Real Enemies of Democracy*, 109 CALIF. L. REV. 2407, 2418 (2021). We are bracketing questions of *state* constitutional law here, as well as questions about the relationship between the state legislature and the state constitution in exercising Article II authority. *Cf.* Moore v. Harper, 143 S. Ct. 2065, 2086, 2089 (2023).

[136] As noted *supra* note 110 and accompanying text, the courts have in fact repeatedly upheld the power of states to keep such ineligible candidates off the ballot.

[137] Trump v. Anderson, 144 S. Ct. at 668 (footnote omitted).

somehow *withdrew* a state's preexisting authority to avoid supporting insurrection and rebellion — and to avoid elevating to high office those who had engaged in it — is fanciful.[138]

The per curiam also relied on, albeit somewhat obliquely, two twentieth-century election-law precedents that might seem to support the notion that states have diminished power over federal elections generally, and presidential elections specifically — *U.S. Term Limits, Inc. v. Thornton*[139] and *Anderson v. Celebrezze*.[140] Putting aside the obvious point that it is the original meaning of the text of the Constitution — not twentieth-century Supreme Court decisions — that supplies the fundamental law of this country, these decisions still cannot do anything to justify the debacle in *Trump v. Anderson*.

In *Thornton*, the Supreme Court held (by a bare 5–4 majority) that states cannot enact a maximum number of terms for members of Congress, and then enforce that maximum by denying term-limited candidates access to the ballot.[141] By denying ballot access, the Court concluded, the states were effectively imposing additional qualifications on members of Congress.[142] Even putting aside Justice Thomas's forceful dissent from this proposition,[143] this logic does not extend easily to presidential elections. The Constitution requires elections for members of Congress, and they appear (of course) only on one state's ballot. So denying ballot access to a member of Congress is denying the candidate any chance to be elected. But when a state refuses to put a presidential candidate on that state's ballot, it is not adding any qualifications to the candidate; all of the other states are still free to select electors for that candidate. The state is simply exercising its own Article II prerogative over its own electoral votes, no different than if it were to cancel the election and allocate its electors directly.[144]

And even putting aside all of that — even if *Thornton* did extend to states' Article II authority to select electors for President — all it would tell us is that states cannot *add* to the Constitution's list of qualifications for President. But, as we discussed at length in *The Sweep & Force of Section Three*,[145] Section Three is *part* of the Constitution's list of

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138 Indeed, when conceding state power to apply Section Three to its own officers, the per curiam says "Although the Fourteenth Amendment restricts state power, nothing in it plainly withdraws from the States this traditional authority." *Id.* at 667. The same is true for traditional authority under Article II.

139 514 U.S. 779 (1995).

140 460 U.S. 780 (1983).

141 *Thornton*, 514 U.S. at 831.

142 *Id.* at 829–30.

143 *See id.* at 845–926 (Thomas, J., dissenting).

144 To be clear, all of the Justices in *Thornton* agreed in dicta that states could not prescribe qualifications for the office of President. *Id.* at 803–04 (majority opinion); *id.* at 861 (Thomas, J., dissenting). But it is not clear what that has to do with eligibility or ballot-access decisions made by a single state.

145 Baude & Paulsen, *supra* note 33, at 623–28.

qualifications for President. If Donald Trump was an oath-breaking insurrectionist disqualified from the presidency by Section Three — a premise of the Colorado Supreme Court that the Supreme Court never took issue with — then the state was simply tracking the Constitution's disqualification, not adding to it.[146]

Anderson v. Celebrezze was at least a case about presidential elections. In that case another 5–4 majority of the Court held that Ohio's deadline for getting an independent presidential candidate (John Anderson) on the ballot violated the Constitution.[147] The Court's logic was that enforcing the rules against Anderson would burden supporters of both the candidate and his ideas, and that these burdens somehow implicated the Fourteenth Amendment and the freedom of speech.[148] The Court would then decide if these burdens were justified through a balancing test — a balancing test that "cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions," and in which "there is 'no substitute for the hard judgments that must be made.'"[149] Excluding Trump from the ballot might therefore be said to burden the constitutional rights of Trump supporters, and the *Trump v. Anderson* per curiam cited *Anderson v. Celebrezze* as an additional reason for concern about the Colorado decision.[150]

Again putting aside our doubts about the constitutional logic of the whole *Celebrezze* enterprise,[151] *Anderson* (1983) does not support *Anderson* (2024). However this balancing test might work in other cases, surely the argument for a First Amendment right to vote for *disqualified* candidates is very weak — as the Court recognized in a subsequent case denying the constitutional right to write-in a protest candidate.[152] So this argument inevitably returns us to the question the Court was so

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146 *Id.* at 623–28 and (especially) 636–38.

147 Anderson v. Celebrezze, 460 U.S. 780, 806 (1983).

148 *Id.* at 792–94.

149 *Id.* at 789–90 (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

150 Trump v. Anderson, 144 S. Ct. 662, 670.

151 *Cf. Celebrezze*, 460 U.S. at 823 (Rehnquist, J., dissenting) ("I find nothing in the Constitution which requires this result."); Williams v. Rhodes, 393 U.S. 23, 48–61 (1968) (Stewart, J., dissenting) (emphasizing the breadth of state authority over presidential electors under Article II).

152 Burdick v. Takushi, 504 U.S. 428, 440 n.10 (1992) ("It seems to us that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable. The dissent's suggestion that voters are entitled to cast their ballots for unqualified candidates appears to be driven by the assumption that an election system that imposes any restraint on voter choice is unconstitutional. This is simply wrong." (citation omitted) (citing *Celebrezze*, 460 U.S. at 788)). Professor Marty Lederman, who penned a much more extensive argument under *Anderson v. Celebrezze* than anything the Court relied on, argues for a distinction between candidates whose disqualification is "clear" versus "contested." Marty Lederman, *A User's Guide to* Trump v. Anderson*, Part Eight*, BALKINIZATION (Feb. 8, 2024, 9:44 PM), https://balkin.blogspot.com/2024/02/a-users-guide-to-trump-v-anderson-part_8.html [https://perma.cc/3TUK-49M3]. *See generally* Siegel, *supra* note 131. With respect, we believe that judges should simply figure out *the right answer* to whether the candidate is eligible to office, notwithstanding whether others contest it.

desperate to avoid: *Is Donald Trump constitutionally eligible to the office of the presidency?*

As part of its discussion of *Anderson v. Celebrezze* the Court relied less on the case's actual doctrinal holding (which as we have seen, is easily set aside) and instead segued into a series of *practical* objections to Colorado's exercise of its Article II authority: the spectre of "patchwork."[153] The Court condemned the possibility of "[c]onflicting state outcomes concerning the same candidate . . . result[ing] not just from differing views of the merits, but [also] from variations in state law governing the proceedings," including the burden of proof, the rules of evidence, the relevant forum, etc.: "The result could well be that a single candidate would be declared ineligible in some States, but not others, based on the same conduct (and perhaps even the same factual record)."[154]

At the risk of repeating ourselves, *of course* states' different election procedures and practices affect the overall national election for President. That is precisely how the Electoral College system works. As Professor Chris Green has put it, "Federalism itself *is* a state-by-state patchwork."[155] The Electoral College was a deliberate constitutional decision to rely precisely on this federalism "patchwork" of different state choices to elect the President of the United States because the alternative of centralization was thought to be too dangerous.

But even considered on its own terms, how seriously can we take the "patchwork" concern? If the concern is with differences among states *in interpretation of federal law* — potential disuniformity among states in interpretation of Section Three — that is a familiar species of problem and one for which there is an obvious answer and remedy: The U.S. Supreme Court has appellate jurisdiction to review decisions of state court systems on federal questions and to finally decide such questions as a judicial matter and thereby achieve uniformity of interpretation on such questions.[156] If a state gets the law wrong, all the Court need do is review the legal question presented on the merits and reverse the error. If state decisions conflict on questions of federal law, the Court can decide which is correct.

If the concern is that different states or state court systems, employing different procedures and standards, might reach different conclusions as to questions of *fact*, the simple answer is that this is true for adjudication of *any* matter of civil litigation for which multiple courts

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153 *See* Trump v. Anderson, 144 S. Ct. at 671 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 822 (1995)).

154 *Id.* at 670–71.

155 Chris Green, Trump v. Anderson *and Federalist 68*, ORIGINALISM BLOG (Mar. 4, 2024, 2:07 PM), https://originalismblog.typepad.com/the-originalism-blog/2024/03/trump-v-anderson-and-federalist-68.html [https://perma.cc/N2W9-U239].

156 See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351, 364–65 (1816), and countless other cases.

might possess authority to adjudicate. Welcome to the American civil litigation system. In an ordinary case, the existence of multiple different potential courts in which a factual dispute might be decided admits of the possibility of different outcomes in different courts. That is why we have an elaborate set of rules governing jurisdiction and forum selection about where a particular dispute belongs; another elaborate set of rules governing abstention, equitable restraint, and coordination among competing fora; and yet another elaborate set of rules governing preclusion and full faith and credit and resolution of potentially conflicting judgments.[157]

But if the Justices had the strong intuition that an issue like constitutional eligibility could not be trusted to the ordinary rules of American civil litigation, they had an obvious answer and remedy to that, too. Under the doctrine of "constitutional fact review,"[158] memorialized in cases like *Bose Corp. v. Consumers Union of United States, Inc.*,[159] the Court can review even *factual* questions de novo where they sufficiently implicate core constitutional questions. (The doctrine appears to have deep roots in Supreme Court review of state court decisions,[160] and it is worth noting that in those cases, unlike in *Bose*, there is no written rule of procedure requiring any deference to state court factual findings in the first place.[161])

In other words, had the Court really wished to ensure uniform resolution of whether particular candidates had or had not engaged in insurrection covered by the Fourteenth Amendment, it could easily have done so.[162] But when this prospect was raised at oral argument, the Justices seemed utterly nonplussed.[163] On the other hand, had the Justices wished *not* to resolve those factual questions they could have left those to the usual trappings of state litigation, reviewing factual findings only for clear error on the basis of the record properly amassed in district court.

What is bizarre about *Trump v. Anderson* is that the Court neither wished to answer the fundamental constitutional question about Section Three's coverage itself, nor to let other courts answer it. The question was apparently so explosive — perhaps because its answer is so

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157 *See generally* GEOFFREY C. HAZARD, JR., WILLIAM A. FLETCHER, STEPHEN MCG. BUNDY & ANDREW D. BRADT, PLEADING AND PROCEDURE (12th ed. 2020).

158 Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 231 & n.17 (1985).

159 466 U.S. 485, 510–11 (1984).

160 *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) ("This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."); *see also id.* ("We must 'make an independent examination of the whole record . . . .'" (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963))); Monaghan, *supra* note 158, at 261–63.

161 *See Bose*, 466 U.S. at 498–99.

162 *See* Monaghan, *supra* note 158, at 271–76 (emphasizing that the doctrine of constitutional fact review gives the Court a great deal of discretion).

163 *See* Transcript of Oral Argument, *supra* note 103, at 77–89, 99, 131–32.

irresistible and yet so momentous? — that the Court scrambled to find a way out. But looking for the escape hatch, it jumped out a window. *Splat*.

III. SECTION THREE LIVES! LESSONS LEARNED, LESSONS LOST, UPSHOTS, AND IMPLICATIONS

To briefly recap: The Court's decision dodged the key constitutional questions of Section Three's meaning and its application to Donald Trump. The Court's pretensions to consensus devolved into confusion. And the Justices' one shared rationale for avoiding the merits of the case — that states lack power to comply with and apply Section Three in state elections for federal constitutional offices like the presidency — is deeply flawed.

What are we to make of this now? What led the Court to look for a way to escape the major questions presented in *Trump v. Anderson*, and what led the Justices to jump out *this* window in particular? What lessons, if any, does *Trump v. Anderson* teach about the viability of "originalism" as an interpretive method (or about its would-be adherents' fidelity to that method)? What is the legal force of the case for other constitutional actors, in exercising their own independent constitutional duties, in contexts not involving or decided by the Court? In this Part, we examine the lessons, implications, and upshots of the case.

A. Judicial Motives: The Perils of Pragmatism

We begin by considering and reflecting on what drove the peculiar decision in *Trump v. Anderson*. Judging by their questions and comments at oral arguments, the Justices started out with a strong disposition not to uphold the Colorado Supreme Court's decision that Section Three rendered Trump disqualified. Their time was spent in desperate search of a persuasive legal rationale. It is difficult to be certain what subjectively motivated individual Justices, and we wish to be cautious in doing so. It does strike us, however, that three themes, three overarching considerations of supposed judicial "statesmanship" — that is, three *political* considerations — loomed large in the Justices' consideration of the case.

First, we credit the possibility that some or many members of the Court approached the case with a strong presumption that the Court should not be seen as interfering, or meddling, with the electoral process (or even allowing other officials to do so) — a thumb on the scale in favor of democracy, of a sort.[164] They might have feared for the Court's

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[164] *See* Michael W. McConnell, *Is Donald Trump Disqualified from the Presidency? A Response to Matthew J. Franck*, PUB. DISCOURSE (Jan. 18, 2024), https://www.thepublicdiscourse.com/2024/01/92428 [https://perma.cc/2ZMF-6QCW]. *But see* Will Baude & Michael Paulsen, *The*

legitimacy. Indeed, they might even have feared that a judicial decision seen as interfering in the presidential election process would provoke unrest, resistance, or even political violence and undermine the legitimacy of the Court.

For better or worse, the Court may have been chastened by the perceived lessons of the experience of *Bush v. Gore* that the Court loses credibility when it intervenes to "decide" a presidential election. But declining to enforce the rules of the game — underenforcement of the Constitution — is just as much an improper interference with the proper functioning of the electoral process as inventing new rules — overenforcement. Thus in *Trump v. Anderson* the Supreme Court *did* intervene to decide a presidential election — in a fashion strikingly analogous to what many charged the Court with having done in *Bush v. Gore* twenty-four years earlier.

This possibility may have been exacerbated by a second factor, the perceived novelty of the argument for disqualification. Section Three, of course, is not novel, and its Framers knew how to apply it. But before January 6, 2021, there had been no application of Section Three in any of the Justices' lifetimes.[165] It *felt* novel and counterintuitive, and courts often resist the novel and the counterintuitive.[166] And this was exacerbated by the lack of any obvious consensus about the sweep and force of Section Three. It might have mattered if there had been a groundswell of state decisions or actions excluding Trump from the ballot in numerous states, or other indications of strong and bipartisan political support for enforcing Section Three.[167] It also might have made a difference if scholarly support for Section Three's enforceability and applicability had been more consistent across the political spectrum.[168] The Court shouldn't do its job by lifting a wet finger to the wind to gauge the current intellectual trends, but sometimes it seems like it does.

Finally, it is also possible that purely internal institutional factors influenced how some on the Court viewed the proper course of action, quite apart from purely legal reasoning. The possible desire to speak with "one voice," to avoid insofar as possible the appearance of division

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Objection that Enforcing Section Three Is "Undemocratic," REASON: VOLOKH CONSPIRACY (Feb. 3, 2024, 5:04 PM), https://reason.com/volokh/2024/02/03/the-objection-that-enforcing-section-three-is-undemocratic [https://perma.cc/Q867-NTYR]; Huq, *supra* note 94, at 206–23.

165 The most recent had been the exclusion of Victor Berger from the House of Representatives in 1919. Baude & Paulsen, *supra* note 33, at 673.

166 *See* Trump v. Anderson, 144 S. Ct. at 669 ("[A] lack of historical precedent is generally a 'telling indication' of a 'severe constitutional problem' with the asserted power." (quoting United States v. Texas, 148 S. Ct. 1964, 1970 (2023))).

167 But see, instead, *Growe v. Simon*, 2 N.W.3d 490, 494 (Minn. 2024) (per curiam) (ducking question) and *LaBrant v. Secretary of State*, 998 N.W.2d 216, 216 (Mich. 2023) (mem.) (same).

168 But see, instead, McConnell, *supra* note 164; Samuel Moyn, Opinion, *The Supreme Court Should Overturn the Colorado Ruling Unanimously*, N.Y. TIMES (Dec. 22, 2023), https://www.nytimes.com/2023/12/22/opinion/trump-colorado-ballot-ban.html [https://perma.cc/8DGY-SJ9A]; Feldman, *supra* note 65; Lash, *supra* note 34, at 311; and Blackman & Tillman, *supra* note 34, at 359.

along "partisan" lines, to avoid unprofitable and unnecessary personal conflict and contention with colleagues, to avoid an exercise-in-futility dissent, to go along with an outcome favored by usual judicial allies even if not fully persuaded of the correctness of the legal grounds being proffered — all these considerations could have affected the thinking, and perhaps the decisions, of at least some of the individual Justices and thus of the Court as a whole. An institutional concern to protect the image, prestige, and reputation of the Court from charges of partisanship might have led some Justices to suppress disagreements they might have otherwise expressed — or expressed more strongly. (Even strong natural dissenters from a holding might not want the Court of which they are a member to be diminished, disparaged, or discredited as an institution. They have an ongoing stake in the Court's reputation, too.) There are echoes of such considerations in *Trump v. Anderson* — spoken aloud, even, in Justice Barrett's concurrence.[169]

As a descriptive matter, we think it more than plausible that factors like these, in some combination, played a role — even an outsized role — in *Trump v. Anderson*. This is not to the Court's credit. Quite the contrary: It suggests a fundamental mission drift. Some of these instincts may be correct instincts, in certain cases. Often, court decisions that interfere with democratically selected outcomes on the basis of novel constitutional theories are wrong. One need only flip through the twentieth-century *U.S. Reports* to see that. But they are not *always* wrong, and that is not *why* they are wrong. The ultimate test is the Constitution itself, to which the Justices owe ultimate fidelity. Practical, pragmatic, personal, and institutional considerations often confirm the correctness of the decision not to invent law or ignore the Constitution as written; they should never *override* the duty of the Court to render judgment according to law.

In a high-stakes case on a fast timeline, it is easy for these practical instincts to rise to the fore — driven by a kind of legal muscle memory — and it can take time and extensive study to see that these instincts may not be legally applicable to a particular case. There is a sense in which deciding *Trump v. Anderson* correctly required extraordinary judicial fortitude, patience, and insight, in an extraordinary case, under extraordinary circumstances. The situation may indeed have demanded more than we can reasonably expect of the men and women who serve as Justices of the U.S. Supreme Court. (This is why great cases sometimes make bad law.) But however real the difficulty, however predictable the failure, it remains in our judgment true that the Court failed to rise to the occasion.

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[169] *See infra* Conclusion, pp. 715–16.

B. Judicial Methods: Whither Originalism?

Trump v. Anderson was not a faithful application of the original meaning of the Constitution. It does not adhere to the objective, original meaning of the constitutional text — the meaning the words and structure of the text would have had to reasonably informed readers of a legal text of this sort, in the time and legal setting in which it was enacted.[170] It does not enforce the original meaning of Section Three. Instead, it invents — contrives — an escape hatch that flatly contradicts the text, structure, and historical intention of Article II's assignment of power to states in presidential elections.

Most of the Justices currently on the Court have claimed to be adherents of originalism in some form.[171] (Important variations include the degree to which the Justices feel permitted to follow and even extend precedents in tension with the first-best understanding of the Constitution, and also the level of abstraction at which the Justices read and find the Constitution's original meaning.) But none of the opinions in *Trump v. Anderson* — none of the Justices — delivered a coherent, principled, originalist rationale for the outcome in the case.

So is *Trump v. Anderson* the case that killed originalism (as the question was put to us at a recent academic conference)? Does the failure of the Justices to employ originalist methodology, and to follow the logic of its consequences where it leads, demonstrate the bankruptcy or futility of originalism as an interpretive methodology? Such was the immediate claim of several critics of the case. As one put it, the conservative Justices' evident hypocrisy "offers final proof, if any more were needed, that textualism and originalism, the doctrines on which conservatives have long based their judicial philosophy, are nothing but instruments of right-wing activism to produce prearranged outcomes."[172]

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[170] *See* Baude & Paulsen, *supra* note 33, at 613–17 and sources cited therein.

[171] *See, e.g.*, *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th CONG. 62 (2010) (statement of Elena Kagan) ("[S]ometimes [the Framers] laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So, in that sense, we are all originalists."); Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014, 12:00 AM), https://spectator.org/sam-alito-a-civil-man [https://perma.cc/4K46-NXTF] ("I would consider myself a practical originalist."); *Jackson Confirmation Hearing, Day 2 Part 4*, C-SPAN, at 11:51 (Mar. 22, 2022), https://www.c-span.org/video/?518342-13/jackson-confirmation-hearing-day-2-part-4 [https://perma.cc/V68N-NP24] (describing "Justice Scalia's notion of originalism" as "the prevailing interpretive frame for interpreting the Constitution" and also stating "I identify with the position insofar as that is how the text is interpreted, of the Constitution"); United States v. Rahimi, 144 S. Ct. 1889, 1908 (2024) (Gorsuch, J., concurring); *id.* at 1910–11 (Kavanaugh, J., concurring); *id.* at 1924–25 (Barrett, J., concurring).

[172] Sean Wilentz, *The Constitution Turned Upside Down*, N.Y. REV. OF BOOKS (Mar. 6, 2024), https://www.nybooks.com/online/2024/03/06/the-constitution-turned-upside-down [https://perma.cc/6DAH-6WWL]; *see also* Ruth Marcus, Opinion, *With Colorado Ruling, The Court Displays an "Originalism of Convenience,"* WASH. POST (Mar. 7, 2024, 6:30 AM), https://www.washingtonpost.com/opinions/2024/03/07/colorado-trump-ballot-supreme-court-originalism-convenience [https://perma.cc/698K-RTZM] ("So much for originalism.").

No. This simply does not follow. The failure of purported originalists to faithfully follow originalist principles might demonstrate several things. But it does not *refute* originalism as a principled method of constitutional interpretation. To the contrary, original meaning supplies an objectively proper standard with which to evaluate the propriety of judicial decisions and opinions on legal questions and a yardstick by which to measure the fidelity of individual Justices to such interpretive principles. That some judicial decisions flunk the test — that they fail the originalist standard — does not disprove the legitimacy of the method. Just the reverse: Correct originalist principles supply the standard by which to criticize judicial decisions.[173]

Does *Trump v. Anderson* at least suggest, though, that none of the Court's Justices are true originalists? Does it suggest that originalism, in some positivist sense, is not "our law"?[174] Even here, we are not convinced. As we have emphasized, it is notable that the Court scrambled to come up with some way to sweep the original meaning of Section Three under the rug, apparently unwilling or unable to forthrightly reject it.[175] In this sense *Trump v. Anderson* was a betrayal of originalist principles — an "originalist disaster," in one commentator's words — but it was not a refutation of originalism as a principle, as law, or as anything else.[176]

C. Judicial Limits: If Trump v. Anderson *Is "Bad Law," Is It Still "Good Law"?*

Finally, in considering the lessons, upshots, and future consequences of the case, we would like to offer some disquieting thoughts concerning the legal options available to other actors in our constitutional system — each of whom has a general duty to support and adhere to the Constitution in the execution of his or her official duties.

First, the decision in *Trump v. Anderson* does not purport to control the actions and decisions of coordinate branches of the national government, in the exercise of their constitutional powers and responsibilities. The case decided only that *states* do not have power to enforce Section Three through their election laws and procedures — and even that holding is limited to state elections for federal offices. Even if one holds the

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[173] *See generally* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022).

[174] *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2349 (2015).

[175] *Cf.* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1477–78 (2019); William Baude & Stephen E. Sachs, *The Official Story of the Law*, 43 OXFORD J. LEGAL STUD. 178, 179–82 (2023).

[176] Mike Rappaport, *The Originalist Disaster in* Trump v. Anderson, ORIGINALISM BLOG (Mar. 5, 2024, 8:00 AM), https://originalismblog.typepad.com/the-originalism-blog/2024/03/the-originalist-disaster-of-trump-v-andersonmike-rappaport.html [https://perma.cc/5W5J-PNE4]; *see also* Chris Green, *Are Cases that Get Original Meaning Wrong "Anti-Originalist"?*, ORIGINALISM BLOG (July 11, 2024, 9:50 AM), https://originalismblog.typepad.com/the-originalism-blog/2024/07/are-cases-that-get-original-meaning-anti-originalist.html [https://perma.cc/DZT4-ACGX].

view that a decision of the Supreme Court is itself "supreme Law of the Land,"[177] binding all other officials and levels of government, the actual scope of the Court's decision is, as discussed above, very limited.

Thus, each house of Congress can, and in duty should, employ Section Three to refuse to seat newly elected members, or to expel existing members, whom it determines are constitutionally disqualified by Section Three, pursuant to each house's Article I, section 5 authority with respect to its own membership.[178] Each house of Congress can and should employ Section Three in the exercise of its respective powers concerning impeachment of federal officers.[179] The Senate can and should employ Section Three in determining whether to consent to appointments for federal offices, where Senate consent is required.[180] Federal executive officers similarly can, and in duty should, interpret, apply, and enforce Section Three in making nominations and appointments, and in exercising powers to remove subordinate officers.[181]

The decision in *Trump v. Anderson* also does not limit whatever powers the two houses of Congress might properly possess when meeting in joint session pursuant to the procedures established by the Twelfth Amendment to decline to count votes cast by electors for a presidential candidate who is constitutionally disqualified by Section Three.[182] Nor does it limit the power and responsibilities of electors themselves, acting within the scope of their authority under the Constitution and state law, to decline to cast ballots for constitutionally ineligible candidates for the offices of President and Vice President.[183] Nor does it limit the powers of the Vice President and Cabinet under the Twenty-Fifth Amendment.[184] Nor does it limit the powers and responsibilities of federal courts to decide cases properly within their jurisdiction involving challenges to the legal validity of actions taken by federal officers where such actions might be ultra vires because their legal validity depends on

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[177] In our judgment this view is mistaken. *See* PAULSEN, MCCONNELL, BRAY & BAUDE, *supra* note 6, at 413–15.

[178] *See* Baude & Paulsen, *supra* note 33, at 636–38, 743; *accord* Trump v. Anderson, 144 S. Ct. 662, 669 (2024).

[179] *See* Baude & Paulsen, *supra* note 33, at 638–39, 642–43, 743.

[180] *Id.* at 633.

[181] *Id.* at 633–36.

[182] In *The Sweep and Force of Section Three*, we expressed uncertainty as to whether the joint session of Congress provided by the Twelfth Amendment for counting votes cast by electors permits Congress to decline to count votes cast for a constitutionally disqualified candidate under current law: "This is an unsettled question and we are, candidly, not sure of the answer." *Id.* at 640. Forceful arguments exist on both sides of the question. *See id.* at 640–42; *see also supra* note 111; Muller, *Administering Presidential Elections and Counting Electoral Votes After* Trump v. Anderson, *supra* note 94 (manuscript at 37–39).

[183] Baude & Paulsen, *supra* note 33, at 639–40.

[184] *Id.* at 642–43.

the decision or action of an officer who is constitutionally disqualified by Section Three.[185]

States and state officials, too, constitutionally may interpret, apply, and enforce Section Three, in state elections to state offices; in making or confirming nominations and appointments to state office; in making decisions with respect to the impeachment or removal of state officers; in adjudicating state *quo warranto* actions brought to remove state officers allegedly disqualified by Section Three. It is even possible that state courts might be able to hear some such actions against federal officers. *Trump v. Anderson* says that states cannot "somehow remove *sitting* federal officeholders who may be violating Section 3" and that "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."[186] But what about an action for damages or a criminal prosecution in state court against an unconstitutional pretender to federal office? Could somebody who is not constitutionally eligible to office still avail himself of official immunity against civil suit or criminal prosecution and punishment? *Trump v. Anderson* certainly does not say that. The question remains open.[187]

In short, while *Trump v. Anderson* cuts a Section Three–sized hole in the constitutional role of states in the Electoral College, it does not kill Section Three itself or erase its commands as governing law. Section Three lives. An officeholder or candidate for office who was, as a matter of fact and law, legally disqualified by Section Three *before* the Court's decision remains disqualified *after* the Court's decision. It remains entirely within the province, duty, and power of other constitutional actors to effectively enforce Section Three's disqualifications from office.

Second, going forward, it is also possible that even within the context of state elections for President, states could constitutionally circumvent the Court's decision in *Trump v. Anderson*. Notwithstanding the Court's ruling, states retain the constitutional power under Article II, section 1, clause 2 of the Constitution to exercise directly their power to select presidential electors — presumably including the decision *not* to select electors supportive of a candidate disqualified from the presidency.

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185 The viability of such challenges will also depend on such rules as the de facto officer doctrine. *See id.* at 656–59; *see also supra* note 106.

186 144 S. Ct. 662, 668 (2024) (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)).

187 It is notable, for instance, that in the landmark case of *McCulloch v. Maryland*, before concluding that the Bank of the United States was protected by intergovernmental immunity, Chief Justice Marshall *first* concluded that the Bank had been lawfully established. 17 U.S. (4 Wheat.) 316, 425 (1819). It would appear to follow from *McCulloch* that a putative federal officeholder who in fact holds that office unlawfully could not properly claim immunity from criminal punishment imposed by a state on the ground that such punishment interferes with the lawful operation of an agency or officer of the national government. (On the other hand, there might be an argument that an individual who unlawfully occupies a federal office is nonetheless protected by the de facto officer doctrine, *see supra* note 106.)

Democratic norms and state constitutional principles[188] may well prevent many or most states from doing this — and no state did so during the 2024 election. But the fact that this remains a constitutional possibility — both in theory and in the future — even after *Trump v. Anderson,* shows how little the Court really did.

We have no illusions that any of this will happen, or that the Supreme Court would not intervene to stop it from happening. As this piece goes to press, there seems to be little political will or practical interest in enforcing Section Three. And even if there were, the Supreme Court that decided *Trump v. Anderson* might well decide other cases in a similar spirit.[189] If called upon to extend the fallacious reasoning of *Trump v. Anderson*, the Court might well extend it, by hook or by crook. The ominous references in the per curiam to the "acute" "disruption" that might occur "if Section 3 enforcement were attempted after the Nation has voted" and which might "arriv[e] at any time or different times, up to and perhaps beyond the Inauguration" may well have been intended as a shot across the bow,[190] and other constitutional actors may well be afraid of getting shot. The nation having watched the Supreme Court sweep Section Three under the rug, it may well be that nobody will dare to lift the rug up for a long time.[191] But if that is what happens, we should have no illusions that that is what the opinion in *Trump v. Anderson* actually requires — let alone what the Constitution requires.

CONCLUSION

It is perhaps unfair to single out Justice Barrett for saying out loud what the rest of the Court was doing in *Trump v. Anderson*. But she's the one who said it. She broke the fourth wall: The Court was intent on making the Section Three problem go away.

Having decided to reverse the Colorado Supreme Court, Justice Barrett wrote: "In my judgment, this is not the time to amplify disagreement with stridency."[192] This was the time to cool things down: "The Court has settled a politically charged issue in the volatile season of a

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188 *See supra* note 135.

189 *Cf., e.g.*, Trump v. United States, 144 S. Ct. 2312 (2024). For criticism, see Michael Stokes Paulsen, *A Lawless Court Gives Us a Lawless Presidency*, PUB. DISCOURSE (July 22, 2024), https://www.thepublicdiscourse.com/2024/07/95374 [https://perma.cc/4CYT-JUVA]; William Baude, Opinion, *A Principled Supreme Court, Unnerved by Trump*, N.Y. TIMES (July 5, 2024), https://www.nytimes.com/2024/07/05/opinion/supreme-court-trump.html [https://perma.cc/S6QP-FZRC].

190 Trump v. Anderson, 144 S. Ct. at 671.

191 For an interesting parallel concerning the unconstitutional appointment of Justice Hugo Black, which was never defended on the merits by the Court, and then swept under the rug for Justice Black's lifetime on the Court, see William Baude, *The Unconstitutionality of Justice Black*, 98 TEX. L. REV. 327, 351–53, 355–56 (2019); *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (per curiam).

192 Trump v. Anderson, 144 S. Ct. at 671 (Barrett, J., concurring in part and concurring in the judgment).

Presidential election. Particularly in this circumstance, writings on the Court should turn the national temperature down, not up."[193]

This may or may not be good statesmanship, but it is not good law. To the extent the Court avoided stridency and charged issues, it was by sweeping them aside, blinking at its judicial duties, and concocting a bogus federalism rationale that let it avoid answering the real questions in the case. *Trump v. Anderson* settled very little, but it did allow the Justices to reverse the Colorado Supreme Court, put Trump back on the ballot, and move on, while presenting a (somewhat) united façade.

Justice Barrett made the Court's attention to appearances sadly transparent: "For present purposes, our differences are far less important than our unanimity: All nine Justices agree on the outcome of this case."[194] And then the clinching, closing sentence: "That is the message Americans should take home."[195]

But is it? Of course, judicial opinions should strive to persuade readers — litigants, leaders, lawyers, and lay citizens alike — of the legal correctness of the Court's conclusions, through sound legal argument and careful legal analysis. But should it really be thought the business of the Supreme Court to adjust the nation's political temperature, manage public opinion, or instruct Americans on the "message" they "should take home" from the Court's decisions?[196]

What the Justices should do, individually and collectively, is nothing more or less than apply the Constitution as law, consistently, in a principled fashion. Each Justice swore an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States."[197] Did the Justices really adhere to this oath in *Trump v. Anderson*, or did they shrink from a faithful and impartial application of the Constitution, paying too much respect to particular persons and particular pressures?

The "message Americans should take home" from *Trump v. Anderson* is that when it wants to, the Supreme Court will find a way to avoid performing its constitutional duties. It will dodge and weave. It will play politics. It will sweep the Constitution under the rug.

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[193] *Id.*

[194] *Id.* at 671–72.

[195] *Id.* at 672.

[196] *Cf.* Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 125–31 (2021).

[197] 28 U.S.C. § 453.