REVITALIZING EXECUTIVE BRANCH DISQUALIFICATION: HEEDING AN IMPERFECTLY LEARNED WATERGATE LESSON

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ABSTRACT

This country has recently witnessed firsthand that in the consent of the governed, upon which the legitimacy of democratic government stands, also resides democracy's innate vulnerability—its dependence on a broad fidelity of its citizens to the institutions and norms by which they agreed to be governed. Battered, though not broken, what has protected American democracy through challenges, present and past, were what are often referred to as guardrails of democracy. Although long-term efforts to rectify the nation's economic dislocations and entrenched power, and to assimilate its continuing demographic changes, are needed to achieve stronger democratic stability, it is to democracy's guardrails that attention must be given in the near term, if those efforts are to continue unimpeded.

This Article examines, with respect to the Executive Branch, one of several guardrails that the House's January 6th Committee specifically recommended for attention in its January 2023 final report: the Fourteenth Amendment's Disqualification Clause. That provision precludes persons who have engaged in certain forms of seditious conduct from holding Executive Branch office. Despite some significant lapses, there can be no doubt that often, at critical moments in 2020 and 2021, individual qualities of official goodwill and character stood strong against assaults on the nation's democracy. The Disqualification Clause's purpose is assuring such qualities in official office.

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INTRODUCTION

At the conclusion of the Constitutional Convention, when asked about the form of government the Framers fashioned for a nation recently born of the War for Independence, Benjamin Franklin's response was, given recent history, eerily prescient: "A republic . . . if you can keep it."[1] More precisely, the Constitution's Framers offered the nation a "democratic republic."[2] Despite Franklin's apparent reservations, that republic has persevered for over 200 years.

Watergate, which occurred against the backdrop of a nation deeply polarized over the Vietnam War, was a warning sign of what Franklin feared, more so, we now know, than was realized even at the time of the original "gate" scandal. After the Watergate building break-in was thwarted, the aggrandizement and misuse of executive power that came to light shocked the nation and held its attention for over a year. In response, several reforms, which have proven useful for curtailing executive abuse, were implemented.[3]

Although President Nixon exploited his relationship with then-Attorney General John Mitchel, and his obstructions of justice reached into the Department of Justice, once Nixon resigned from office and President Ford thereafter pardoned him, the reformative response turned from Nixon the person and the problematic character of his personal conduct, to more general matters. Aimed at curtailing future executive abuse, reforms were implemented partially through legislation[4] and partially through norm-based policies regarding contacts between the Office of the President and the Department of Justice.[5] What the reforms did not account for was what Franklin feared—the vulnerability of democratic government to

1. Richard R. Beeman, *Perspectives on the Constitution: A Republic If You Can Keep It*, NAT'L CONST. CTR., https://constitutioncenter.org/education/classroom-resource-library/classroom/perspectives-on-the-constitution-a-republic-if-you-can-keep-it (last visited Apr. 19, 2023).

2. David Childs, *A Democratic Republic: What Is That???*, DEMOCRACY & ME (Dec. 10, 2018), https://www.democracyandme.org/a-democratic-republic-what-is-that/.

3. For an interview about Watergate reforms led by Harvard Law Today with Jack L. Goldsmith, Learned Hand Professor of Law at Harvard University, see *Watergate-era Reforms 50 Years Later*, HARV. L. TODAY (June 8, 2022), https://hls.harvard.edu/today/watergate-era-reforms-50-years-later/ [hereinafter *Goldsmith Interview*].

4. *Id.*; *see* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

5. John Kruzel, *Post-Watergate Reforms May Frame DOJ Decision Over Prosecuting Trump*, THE HILL (June 17, 2022, 6:00 AM), https://thehill.com/regulation/3526790-post-watergate-reforms-may-frame-doj-decision-over-prosecuting-trump/.

the human frailties of its citizens and their leaders, particularly in times of socioeconomic stress and under leaders with authoritarian tendencies.[6]

Franklin knew of what he spoke. Recently, this country has witnessed firsthand that in the consent of the governed, upon which the legitimacy of democratic government stands, also resides democracy's innate vulnerability—its dependence on a broad fidelity of the governed to the institutions and norms by which they agreed to be governed.[7] But when the democratic polity is stressed by demographic division, socioeconomic inequalities, and major demographic change, such strain engenders anxiety, anger, discord, and division.[8] Then, through exploitation of the resulting resentment, discontent, and xenophobia, hawkers of false promises and expedient, often authoritarian, solutions alienate fidelity to the existing democratic order as enticing forms of political extremism insidiously displace it.[9]

From a political science perspective, democratically maintaining societal order requires acceptance of being ruled, despite the impairment to self-realization through majoritarian self-rule.[10] As stressors increase the degree of social discord and tension, the natural temptation of government and popular sentiment is toward increasing amounts of control, to maintain harmony and order.[11] The "seductive lure of authoritarianism," as it has been characterized,[12] increasingly encroaches upon self-rule and, in turn,

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6. For analysis of the Nixon presidency's material authoritarian tendencies, see JOHN W. DEAN & BOB ALTEMEYER, AUTHORITARIAN NIGHTMARE: TRUMP AND HIS FOLLOWERS *passim* (2020); Randall J. Stephens, *Richard Nixon's Authoritarian Loathing of the Media Lives on in Donald Trump*, THE CONVERSATION (Feb. 22, 2017, 8:17 AM), https://theconversation.com/richard-nixons-authoritarian-loathing-of-the-media-lives-on-in-donald-trump-73323; Ed Tant, *From Watergate to Jan. 6, America Is Edging Toward Authoritarianism Again*, FLAGPOLE (June 22, 2022), https://flagpole.com/news/street-scribe/2022/06/22/from-watergate-to-jan-6-america-is-edging-toward-authoritarianism-again/; *Autocratic Leadership Explained: What is Autocratic Leadership?*, VILL. UNIV. (Sept. 9, 2022), https://www.villanovau.com/resources/leadership/autocratic-leadership-explained-what-is-autocratic-leadership/. *See also* Jeremy D. Bailey, *Transcript of David Frost's Interview with Richard Nixon*, TEACHINGAMERICANHISTORY.ORG (2023), https://teachingamericanhistory.org/document/transcript-of-david-frosts-interview-with-richard-nixon/:

> **Frost:** So, what in a sense you're saying is that there are certain situations . . . where the president can decide that it's in the best interest of the nation or something and do something illegal.
>
> **Nixon:** Well, when the president does it . . . that means that it is not illegal.

Cf. Sonam Shef, *Trump falsely claims that "when somebody is the president of the United States, the authority is total*," BUSINESS INSIDER (Apr. 14, 2020), https://www.businessinsider.in/politics/news/trump-falsely-claims-that-when-somebody-is-the-president-of-the-united-states-the-authority-is-total/articleshow/75131945.cms.

7. ANDREW COAN, PROSECUTING THE PRESIDENT 208–11 (2019).

8. *See generally* Anna Barford, *Emotional Responses to World Inequality*, 22 EMOTION, SPACE & SOC'Y 25 (2016).

9. ANNE APPLEBAUM, TWILIGHT OF DEMOCRACY: THE SEDUCTIVE LURE OF AUTHORITARIANISM 16–17, 106–14 (2020).

10. *Id.* at 22–23.

11. *Id.* at 106–09.

12. *Id.* at title (referring to the title of the book). "[P]eople are often attracted to authoritarian ideas because they are bothered by complexity. They dislike divisiveness. They prefer unity. A sudden onslaught of diversity . . . makes them angry. They seek solutions . . . that make[] them feel safer and more secure." *Id.* at 106.

self-realization.[13] Preserving democracy, therefore, is "a [p]roblem of [r]uling and [b]eing [r]uled," balancing "the tension between democratic self-realization and democratic self-destruction."[14]

In a brief historical moment, the centrifugal forces of discord and discontent can be democracy's undoing. These forces ran high throughout 2020, in a nation economically, demographically, and pandemically stressed. These circumstances primed the receptiveness of a large portion of the electorate to the seductive attraction of a president's authoritarian claims of electoral fraud and dysfunction. The anti-democratic response nearly plunged this nation into a constitutional crisis and brought unprecedented mass violence directly against the government—not just against government property but also against its officials and employees.[15] Contrast this with Ukraine. Though stressed by Russia's unrelenting aggression, Ukraine, against all odds, is on the verge of overcoming the Russian assault, its electorate firmly consolidated by a common enemy, the common purpose of democratic survival, and the inclusive, not divisive, and inspiring, not demeaning leadership of a president whose profession was once bringing everyone together with humor.[16]

Many democratic governments have succumbed to democracy's innate vulnerability. Dissension fueled by economic distress and factional extremism lead to the collapse of Weimar Germany.[17] Poland and Hungary are current-day studies in the descent of democracies into authoritarianism.[18] Although startling recent events have exposed the fragility of

13. *Id.* at 23–25.

14. Tom Ginsburg, Aziz Z. Huq, & David Landau, The Law of Democratic Disqualification 1, 5–6, 37–38 (Univ. Chi. L. Sch. Pub. L. & Legal Theory, Working Papers) (2021) [hereinafter *Democratic Disqualification*] (available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2317&context=public_law_and_legal_theory). Democracy's innate vulnerability resides not just in self-rule but also in self-rule's unavoidable component—the enigmatic "problem of democratic design: the tension between democratic self-realization and democratic self-destruction. Democratic institutions have a reasonable claim to set the terms of political participation. . . .Yet at the same time, there is a risk that the power to set rules for the democratic game will be used to fence out disfavored groups [and] to entrench incumbents beyond electoral challenge . . . ." *Id.* at 5–6.

15. *See* Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160, 160 (2021) ("From death threats against previously anonymous bureaucrats and public-health officials to a plot to kidnap Michigan's governor and the 6 January 2021 attack on the U.S. Capitol, acts of political violence in the United States have skyrocketed . . . ."); Congressional Testimony from Rachel Kleinfeld, Senior Fellow, Carnegie Endowment for Int'l Peace, on The Rise of Political Violence in the United States and Damage to Our Democracy before the Select Comm. to Investigate the Jan. 6th Attack on the U.S Capitol, at 4–5 (Mar. 31, 2022) (available at https://carnegieendowment.org/files/2022-Rachel%20Kleinfeld%20Jan%206%20Committee%20Testimony.pdf) ("The consciously propagated false narrative regarding election theft is directly linked to the growing support for violence on the right. Those who believed the election was fraudulent were twice as likely . . . to endorse a military coup and were more likely to justify armed citizen rebellion.") (footnote omitted).

16. Eugene Rumer, *Putin's War Against Ukraine: The End of the Beginning*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Feb. 17, 2023), https://carnegieendowment.org/2023/02/17/putin-s-war-against-ukraine-end-of-beginning-pub-89071.

17. *See generally* Sheri Berman, *Civil Society and the Collapse of the Weimar Republic*, 49 WORLD POL. 401 (1997).

18. Anne Applebaum, *The Disturbing New Hybrid of Democracy and Autocracy*, THE ATLANTIC (June 9, 2021), https://www.theatlantic.com/ideas/archive/2021/06/oligarchs-democracy-

America's democracy, the country has, at least for now, survived a forceful and broadly orchestrated challenge to a democratic and peaceful transfer of power. But rectifying the nation's economic dislocations and power entrenchments, as well as assimilating its continuing demographic changes, are *long-term* undertakings. Battered though not broken, what has protected American democracy through the recent short-term challenge are commonly referred to as the guardrails of democracy.[19]

Although these guardrails may be conceptualized in various ways,[20] broadly speaking, they may be grouped into three categories. First, some of these guardrails are structural, particularly the Constitution's provisions for a separation of powers, checks and balances, presidential and congressional term limits, and a politically independent judiciary.[21] Through the Constitution's checks and balances, Congress and the Judiciary held an Executive bent on autocratic rule at bay. Second, other guardrails establish democratic procedures and order, such as constitutional and statutory provisions for elections.[22] Third, there are provisions and protections for democratic values and norms, such as transparency through statutory disclosure requirements; equality of voice through campaign finance limitations; interests that the Bill of Rights protects, like press and speech freedoms; and accepted norms of official conduct, like civility in official discourse, adherence to the notion of objective truth and, especially, respect for the peaceful and orderly transfer of power.[23] Foremost, however, the vitality of these latter norms is dependent on the goodwill and character of government officials.[24] Although the current vitality of such norms may be

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autocracy-daniel-obajtek-poland/619135/; Daniel Tilles, *Poland Is World's "Most Autocratizing Country", Finds Democracy Index*, Notes From Poland (Mar. 11, 2021), https://notesfrompoland.com/2021/03/11/poland-is-worlds-most-autocratizing-country-finds-democracy-index/; Edit Zgut-Przybylska, *A Most Similar Comparison: The Authoritarianism of Poland and Hungary*, CUNY GRADUATE CTR. (Oct. 24, 2022), https://www.gc.cuny.edu/news/most-similar-comparison-authoritarianism-poland-and-hungary-edit-zgut-przybylska.

19. *See generally* Edward B. Foley & Franita Tolson, *Restoring the Guardrails of Democracy: Team Progressive*, NAT'L CONST. CTR., 5–6 (2022), https://constitutioncenter.org/news-debate/special-projects/guardrails/the-progressive-report; Sarah Isgur, David French, & Jonah Goldberg, *Restoring the Guardrails of Democracy: Team Conservative*, NAT'L CONST. CTR. (2022), https://constitutioncenter.org/news-debate/special-projects/guardrails/the-conservative-report; Clark Neily, Walter Olson, & Ilya Somin, *Restoring the Guardrails of Democracy: Team Libertarian*, NAT'L CONST. CTR. (2022), https://constitutioncenter.org/news-debate/special-projects/guardrails/the-libertarian-report.

20. *See generally* sources cited *supra* note 19.

21. *See* Michael McConnell, *Checks, Balances, and Guardrails*, HOOVER INST. (Oct. 29, 2020), https://www.hoover.org/research/checks-balances-and-guardrails.

22. William A. Galston & Elaine Kamarck, *Is Democracy Failing and Putting Our Economic System at Risk*, BROOKINGS INST. (Jan. 4, 2022), https://www.brookings.edu/research/is-democracy-failing-and-putting-our-economic-system-at-risk/.

23. "[I]n ancient Athens, . . . a civil virtue of self-restraint was cultivated by which citizens 'restrain[ed themselves] from self-aggrandizing actions that compromise another's dignity.'" *Democratic Disqualification*, *supra* note 14, at 40 (second alteration in original) (quoting JOSIAH OBER, DEMOPOLIS: DEMOCRACY BEFORE LIBERALISM IN THEORY AND PRACTICE 120 (2017)).

24. *See* COAN, *supra* note 7, at 206–08; *How to Restore the Guardrails of Democracy*, NAT'L CONST. CTR. (Feb. 9, 2021), https://constitutioncenter.org/news-debate/podcasts/how-to-restore-the-guardrails-of-democracy?gclid=Cj0KCQiAjbagBhD3ARIsANRrqEt0XnG5xAs5CuORe51Xtaw-GytJKCp65bVtww4Q8W71nMpjDOUYIyegaAhMPEALw_wcB.

questioned in light of recent events,[25] there can be no doubt that often, at critical moments in 2020 and 2021, government officials' goodwill and character stood strong against assault on the nation's democracy.[26] Nor should there be any dispute that the disregard and denigration of norms by some does not warrant abandonment of insistence on continuing adherence to such norms.[27]

Notwithstanding existing guardrails, democracy's detractors have likely learned lessons for their next assault, including that there are weaknesses in the guardrails and ways to exploit them. Therefore, it is imperative that before long-term solutions for the country's ails are undertaken—or the country experiences social healing—democracy's believers also learn from recent experience, work to strengthen existing guardrails, and add new protections where needed to thwart future challenges. Although long-term efforts are needed to achieve stronger democratic stability, democracy's innate vulnerability requires continued attention to its guardrails in the short-term. With respect to the Executive Branch, this Article examines one of several guardrails specifically recommended for renewed consideration and future employment by the House's January 6th Committee in its January 2023 final report,[28] the Disqualification Clause of the Fourteenth Amendment enacted in 1868. The Disqualification Clause precludes persons who have engaged in certain forms of seditious conduct from holding Executive Branch office.[29]

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25. *The Guardrails of Democracy Project*, GUARDRAILS OF DEMOCRACY (Oct. 11, 2020), https://guardrailsofdemocracy.com/2020/10/11/the-guardrails-of-democracy-project/ ("[I]t is unwise to rely on the goodwill, civic-mindedness and political courage of our politicians to fill the gaps. A disturbing number of the guardrails of democracy are simply norms that depend on people acting in good faith.").

26. *See, e.g.*, H.R. REP. NO. 117-663, at 16, 34–35, 39, 44, 46–47, 53–54, 78–80, 84–85, 106, 110, 222–25, 229, 263–64, 282, 286–88, 381, 397–99, 438 (2022) [hereinafter *Final Report*] (referencing statements and sentiments expressed by various government officials).

27. *See How to Restore the Guardrails of Democracy*, *supra* note 24.

28. In its "Recommendations," the *Final Report* made eleven recommendations. *Final Report*, *supra* note 26, at 689–92. Among these were five recommendations that address guardrails of democracy: (1) enactment of the "Election Reform Act," H.R. 8873, 117th Cong. 2022; (2) invoking the Disqualification Clause against certain persons involved in the effort to overturn the 2020 presidential election; (3) reforming certain criminal laws and penalties protecting election procedures; (4) enacting legislation facilitating the enforcement of House subpoenas, in connection with oversight and investigative activities; and (5) evaluating the potential for executive abuse of the so-called "Insurrection Act," 10 U.S.C. §§ 251–55. *Id.* As described in the *Final Report's* Recommendations, the Election Reform Act:

> [R]eaffirms that a Vice President has no authority or discretion to reject an official electoral slate submitted by the Governor of a state. It also reforms Congress's counting rules to help ensure that objections in the joint session conform to Congress's narrow constitutional role under Article II and the Twelfth Amendment. It provides that presidential candidates may sue in federal court to ensure that Congress receives the state's lawful certification, and leaves no doubt that the manner for selecting presidential electors cannot be changed retroactively after the election is over.

Id. at 689.

29. *See* Liz Hempowicz, David Janovsky, & Norman Eisen, *The Constitution's Disqualification Clause Can Be Enforced Today*, POGO, at 2 (Nov. 15, 2022), https://www.pogo.org/report/2022/11/the-constitutions-disqualification-clause-can-be-enforced-today.

Part I of this Article describes the Disqualification Clause, its history, and its implications for Executive Branch power. Part II audits disqualification from office with respect to democratic interests, values, and norms. Finally, Part III considers revitalizing the Disqualification Clause through its reimplementation in manners consistent with democratic values.

I. THE DISQUALIFICATION CLAUSE AND ITS IMPLICATIONS FOR EXECUTIVE POWER

Certainly, the normative guardrails that officials of goodwill and character provide would be compromised were persons of demonstrated hostility to democratic government and respect for the rule of law permitted to hold official office, particularly, in the United States, the Presidency. It is not just the "seductive lure of authoritarianism" that can itself fatally infect democracy. The lure also requires seducers, a leader or leadership elite with strong authoritarian inclinations,[30] which a revitalized Disqualification Clause can help thwart. For all the guardrails erected to protect democracy, it is the goodwill and character of those who hold the reins of power on which democratic government fundamentally depends for its security.[31]

The Disqualification Clause falls in the third category of guardrails described above: protections for democratic values and norms. The Disqualification Clause provides a means for removing or precluding from official power persons who have, by certain conduct inimical to democracy, demonstrated themselves untrustworthy and unworthy of holding power.[32] Set forth in Section 3 of the Fourteenth Amendment, the clause provides in full:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[33]

One of three Civil War Amendments, the Fourteenth Amendment was enacted, after the war in response to the insurrection and rebellion of

30. APPLEBAUM, *supra* note 9, at 14–17.

31. Knowing "that any political system built on logic and rationality was always at risk from an outburst of the irrational," the Framers aimed through the now vestigial Electoral College to prevent corrupt leadership. APPLEBAUM, *supra* note 9, at 14–15. *See* THE FEDERALIST NO. 68 (Alexander Hamilton).

32. *See* U.S. CONST. amend. XIV, § 3.

33. *Id.*

the Confederacy.[34] The Fourteenth Amendment sought to prohibit slavery, remedy its effects, and subject state action to due process and equal protection.[35] The Disqualification Clause addressed the continued perceived threat of insurrection and rebellion to the Republic "if not on the battlefield, then in the political arena."[36] In particular, the Disqualification Clause recognized the existence of that continuing threat through those who had taken an oath of office to uphold the Constitution—a more formal form of fidelity to government—but then participated in insurrection or rebellion, or provided aid and comfort to an enemy.[37]

In light of the January 6, 2021 attack on the Capitol,[38] two failed impeachments of former President Trump[39] and, thereafter, President Trump's now-announced candidacy in 2024 for the presidency,[40] considerable attention has recently turned to the Disqualification Clause's quiescent guardrail.[41] Incompetence and venal corruption are certainly dangers to the Republic, but the greatest threat is from those who would, by force, intimidation, or artifice, unlawfully usurp control of its governance.[42] Impeachment of federal officers, whatever merits the Framers believed it had, has, in recent experience, demonstrated itself to be woefully wanting as a bulwark against insurrection.[43]

During Reconstruction, many persons were barred from office under the Disqualification Clause and pursuant to the Enforcement Act of 1870 (Enforcement Act), which, among other things, was enacted to supplement the then-recent clause's provisions and require its enforcement, among other things.[44] Congress repealed the Enforcement Act with the Amnesty

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34. *History of Law: The Fourteenth Amendment*, TUL. UNIV. L. SCH.: BLOG (July 9, 2017), https://online.law.tulane.edu/articles/history-of-law-the-fourteenth-amendment#:~:text=Some%20southern%20states%20began%20actively,well%20as%20protect%20civil%20rights (in addition to the Fourteenth Amendment, the Civil War Amendments include the Thirteenth and Fifteenth Amendments).

35. *Id.*

36. Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153, 155 (2021).

37. *Id.* at 167–70.

38. *See, e.g.*, Azi Paybarah & Brent Lewis, *Stunning Images as a Mob Storms the U.S. Capitol*, N.Y. TIMES (Jan. 16, 2021), https://www.nytimes.com/2021/01/06/us/politics/trump-riot-dc-capitol-photos.html.

39. Domenico Montanaro, *Senate Acquits Trump in Impeachment Trial – Again*, NPR (Feb. 13 2021, 3:52 AM), https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/13/967098840/senate-acquits-trump-in-impeachment-trial-again.

40. Gabby Orr, Kristen Holmes, & Veronica Stracqualursi, *Former President Donald Trump Announces a White House Bid for 2024*, CNN POL. (Nov. 16, 2022, 1:25 PM), https://www.cnn.com/2022/11/15/politics/trump-2024-presidential-bid/index.html.

41. *See, e.g.*, Gillian Brockell, *Confederates, Socialists, Capitol Attackers: A 14th Amendment History Lesson*, WASH. POST (Sept. 11, 2022, 7:00 AM), https://www.washingtonpost.com/history/2022/09/11/14th-amendment-disqualification-couy-trump/.

42. Robert S. Levine, *Why We Must Hear the Warning in Frederick Douglass' 'Sources of Danger to the Republic' Today*, TIME (Sept. 24, 2021, 4:53 PM), https://time.com/6101116/frederick-douglass-sources-danger-republic/.

43. Kimberly Wehle, *The Senate Is About to Abolish Impeachment*, THE ATLANTIC (Dec. 20, 2019), https://www.theatlantic.com/ideas/archive/2019/12/senate-about-neuter-impeachment/603940/.

44. Act of May 31, 1870, ch. 114, §§ 14–15, 16 Stat. 140, 143–44.

Act of 1872[45] and granted wholesale amnesty to Confederate officials, largely because of a growing and burdensome backlog of disqualification challenges.[46] But, whatever consideration was given to repealing the clause itself, it was not repealed.[47]

Since the repeal of the Enforcement Act and prior to January 6, 2021, there has been only one federal proceeding under the Disqualification Clause—against a member of Congress at the start of World War I in 1917.[48] Events contemporaneous with the clause's enactment, however, and its express terms do not suggest that the clause was limited to officials of the Confederacy.[49] The clause is not couched in terms limiting its application to Civil War insurrection, as one would expect were that the intention, which is unlikely. Having just endured a bloody, multiyear insurrection, avoiding disruption and rebellion that would threaten another such tragedy, even injury to person and property on a much more limited scale, seems a highly probable objective at the time. In recent decades, targets of the clause would include participants in events of domestic terrorism and rebellion, including the January 6 attack. Notably, at least eighty-eight of the participants in the January 6 attack on the Capitol were past or present law enforcement, military, or government officials—persons who would, or should, have taken oaths to protect the Constitution.[50]

By its terms the Disqualification Clause precludes, among others, any person who has taken an oath to support the United States Constitution and has thereafter "engaged in insurrection or rebellion against the [United States], or given aid or comfort to the enemies [of the United States]" from being a federal presidential elector, holding any office in the Executive Branch, or being a candidate to hold any office in the Executive Branch.[51]Accordingly, for any person who has taken the requisite oath and then engaged in the requisite seditious conduct, the Disqualification Clause places the Executive Branch off limits, including the office of the President, Vice President, cabinet heads and other federal department

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

46. Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 111–13 (2021).

47. *Id.*

48. Lynch, *supra* note 36, at 210–14. A New Mexico state judge recently disqualified a state official in an action based on the Disqualification Clause for participation in the January 6, 2021 attack on the Capitol. *See* Findings of Fact, Conclusions of Law and Judgment, New Mexico v. Griffin, No. D-101-CV-2022-00473 (Santa Fe 1st Jud. Dist. Ct. Sept. 6, 2022).

49. Hempowicz, Janovsky, & Eisen, *supra* note 29, at 3 ("The disqualification clause of the 14th Amendment covers any member of Congress, officer of the United States, member of a state legislature, or executive or judicial officer of any state who has taken an oath to support the Constitution of the United States.").

50. *See* Olivia Rubin, *Number of Capitol Riot Arrests of Military, Law Enforcement and Government Personnel Rises to 52*, ABC NEWS (Apr. 23, 2021, 2:14 AM), https://abcnews.go.com/US/number-capitol-riot-arrests-military-law-enforcement-government/story?id=77246717; Eleanor Watson & Robert Legare, *Over 80 of Those Charged in the January 6 Investigation Have Ties to the Military*, CBS NEWS (Dec. 15, 2021, 6:32 PM), https://www.cbsnews.com/news/capitol-riot-january-6-military-ties/.

51. U.S. CONST. amend. XIV, § 3.

officers, and military leadership.[52] The Disqualification Clause is not only a vehicle for precluding a former president who engaged in prohibited conduct from seeking the Presidency or some other office again, but would also provide a remedy to remove a president who had engaged in such conduct before or while in office.[53] Even an incumbent president, the majoritarian choice, whose seditious conduct had occurred prior to election or reelection, could be disqualified and removed.[54]

The Disqualification Clause also operates as a limitation on presidential power to appoint seditious persons (that is, insurrectionists, rebels, and enemy aiders and comforters) to office and permits the removal of seditious persons from office by procedures in addition to impeachment,[55] despite presidential resistance to exercising even discretionary removal power.[56] Additionally, the clause precludes presidential appointment of seditious persons to the Supreme Court[57] and permits their removal by procedures in addition to impeachment under Articles II and III.[58] Finally, the Disqualification Clause should operate to deter federal officers or aspirants to office in the United States from engaging in, or even contemplating, disqualifying conduct.[59]

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52. Although it has been argued that the President is not an "officer of the United States" for Disqualification Clause purposes, Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, 15 N.Y.U. J.L. & LIBERTY 1, 4–5 (2021), the predominant and more reasonable view is that the President is an officer of the United States. *See* Richard D. Bernstein, *Lots of People Are Disqualified from Becoming President*, THE ATLANTIC (Feb. 4, 2021), https://www.theatlantic.com/ideas/archive/2021/02/trump-disqualification-president/617908/; Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-To Guide*, LAWFARE (Jan. 19, 2021, 1:43 AM), https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide; Lynch, *supra* note 36, at 163–64; Magliocca, *supra* note 46, at 93–94. Indeed, it makes no sense for the clause to reach electors but not also the President and Vice President themselves.

53. *See* Hemel, *supra* note 52.

54. *See id.*

55. "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

56. Although, "with the Advice and Consent of the Senate," the President appoints "Officers of the United States, whose Appointments are not [in the Constitution] otherwise provided for" and appoints, without such advice and consent, "such inferior Officers" as Congress authorizes the President to appoint. U.S. CONST. art. II, § 2, cl. 2. Unless removed pursuant to the Disqualification Clause, removal from the offices that a president fills is at that president's discretion.

57. Supreme Court justices are officers of the United States. *See* U.S. CONST. art. II, § 2, cl. 2 (providing that the President appoints "Judges of the supreme Court, and all *other* Officers of the United States") (emphasis added).

58. As civil officers of the United States, *see* source cited *supra* note 57 and accompanying text, Supreme Court justices are subject to impeachment on the grounds set forth in Article II (conviction for treason, bribery, or other high crimes and misdemeanors) and for failure to maintain "good Behaviour" in office. U.S. CONST. art. III, § 1.

59. *See* Gerard Magliocca, *The 14th Amendment's Disqualification Provision and the Events of Jan. 6*, LAWFARE (Jan. 19, 2021, 1:43 PM), https://www.lawfareblog.com/14th-amendments-disqualification-provision-and-events-jan-6.

II. THE DISQUALIFICATION CLAUSE ASSESSED IN DEMOCRATIC CONTEXT

After the second impeachment of President Trump ended on February 13, 2021, commentators and legal scholars considering whether another Trump presidential run could yet be barred rather quickly and facilely turned to the Disqualification Clause, despite its quiescence.[60] Attempts to derail a presidential election, including the forceful and violent January 6 attack on the Capitol and legislators, and the specter of a Trump presidential run in 2024 readily account for the renewed attention to the clause—which is facially applicable to the former president's conduct—and its potential reach. Any procedural device, however, that allows thwarting democratic choice or reversing democratic decision warrants careful consideration before turning to the details of its implementation.

The Disqualification Clause is one of several similar types of safeguards found in democratic governments and characterized as the "disqualification regime."[61] Impeachment is another such disqualification safeguard.[62] In purpose and effect, however, the disqualification regime is a subset of the third category of democratic guardrails—processes and provisions intended to protect and effectuate democratic norms and values, including avoiding leadership characteristics detrimental to such rule.[63] But on account of democracy's innate vulnerability, disqualification safeguards may also facilitate authoritarian rule[64] if misused to thwart democratic choices—specifically, the seating of majoritarian elected officials—enabling an electorate that is trending toward increasing authoritarian control to implant authoritarian leadership.[65]

Just as impeachment has been, and is currently being, abused for political purposes—including against government executives[66]—recently,

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60. Adia Robinson, *Trump Could Still Be Barred from Holding Future Office Despite Acquittal: Impeachment Manager Rep. Jamie Raskin*, ABC NEWS (Feb. 17, 2021, 5:08 PM), https://abcnews.go.com/Politics/trump-barred-holding-future-office-acquittal-impeachment-manager/story?id=75946175.

61. *Democratic Disqualification*, *supra* note 14, *passim*.

62. Disqualification devices should be distinguished "from the *ex ante* categorical exclusions of certain classes of persons—such as noncitizens, minors or, even more dubiously, women or racial and ethnic minorities—from public office." *Id.* at 5.

63. *See id.* at 8, 37.

64. *See id.* at 5, 20.

65. *See id.* at 5, 20–21.

66. *See* Jasmine Aguilera, *Why House Republicans Want to Try to Impeach DHS Secretary Mayorkas*, TIME (Dec. 8, 2022, 1:50 PM), https://time.com/6239041/why-republicans-want-to-impeach-alejandro-mayorkas/; Will Fassuliotis, *Impeachment Stories: Congressman Gerald Ford's Attempt to Remove Justice William O. Douglas*, VA. L. WEEKLY (Apr. 11, 2019), https://www.lawweekly.org/col/2019/4/11/impeachment-stories-congressman-gerald-fords-attempt-to-remove-justice-william-o-douglas; Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 HOFSTRA L. REV. 349, 352 (1999) ("[P]resident[] [Clinton]'s impeachment and acquittal confirm the important distinction between constitutional and political legitimacy. It demonstrated that something might be constitutional (such as the . . . unreviewable discretion to conduct impeachment proceedings . . .) but still be politically problematic (such as the House's decisions to render its final impeachment judgment in a lame duck session and to forego

abuse of the Disqualification Clause has also been threatened, and the breadth of its terms, like "rebellion" and "aid and comfort," lend to such misuse.[67] Likewise, the line between protected speech and incitement of unlawful conduct is not clear and is often context dependent.[68] Indeed, prior to *Brandenburg v. Ohio*,[69] the Disqualification Clause was invoked to challenge the seating of a Congressman who published statements opposing the United States' involvement in World War I.[70] Exemplifying threatened abuse of the Disqualification Clause, during a 2019 political rally, Congresswoman Marjorie Taylor Greene charged former Speaker Nancy Pelosi with "giv[ing] aid and comfort to our enemies" and being "guilty of treason," noting that "by our law, representatives and senators can be kicked out and no longer serve in our government."[71] Congresswoman Greene insisted that because "Nancy Pelosi is guilty of treason[,] we want her out of our government."[72]

These examples illustrate that "the power to disqualify in practice stands at the heartland of the complex project of democratic rule. Janus-faced, it is both an instrument for preserving democratic rule, and a knife for its murder."[73] Though a democratic guardrail, disqualification is also a mechanism entrenched power "can [wield] not just in defense of democracy, but also to bring the process of 'ruling and being ruled in turn' to its end."[74]

The Disqualification Clause's implementation through a non-majoritarian branch of government, the Judiciary, can further enhance its potential for misuse or, at least, the appearance of misuse.[75] Still, in large measure, the Judiciary is an institution populated with persons uniquely positioned and acutely able to distinguish and vindicate democratic principles

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independent fact finding, decisions that became the basis for attacking the House's procedural choices as partisan or unfair in the Senate trial)."); Russell Riley, *The Clinton Impeachment and Its Fallout*, MILLER CTR., https://millercenter.org/the-presidency/impeachment/clinton-impeachment-and-its-fallout.

67. *Democratic Disqualification*, *supra* note 14, at 51 ("Section 3's threshold of 'insurrection or rebellion' invites careless application . . . .").

68. *See* Beck Reiferson, *Making the Case for Trump's January 6th Speech as Incitement*, PRINCETON LEGAL J. (Apr. 19, 2021), https://legaljournal.princeton.edu/making-the-case-for-trumps-january-6th-speech-as-incitement/.

69. 395 U.S. 444, 448–49 (1969) (holding speech, unless directed to inciting or producing imminent lawless action and likely to incite or produce such action, is protected by the First Amendment).

70. Lynch, *supra* note 36, at 210–14.

71. Xander Landen, *Marjorie Taylor Greene Saying Pelosi Deserves Death Resurfaces After Attack*, NEWSWEEK (Oct. 29, 2022, 11:47 AM), https://www.newsweek.com/marjorie-taylor-greene-saying-pelosi-deserves-death-resurfaces-after-attack-1755593; Em Steck & Andrew Kacynski, *Marjorie Taylor Greene Indicated Support for Executing Prominent Democrats in 2018 and 2019 Before Running for Congress*, CNN POL. (Jan. 26, 2021, 11:31 PM), https://www.cnn.com/2021/01/26/politics/marjorie-taylor-greene-democrats-violence/index.html.

72. Landen, *supra* note 71.

73. *Democratic Disqualification*, *supra* note 14, at 5.

74. *Id.* at 38. Likewise, we have painfully witnessed in recent times how private media, also insulated from democracy, can misuse and abuse the guardrail values enshrined in the First Amendment—the privileges of speech, press, and religion—to imperil democracy.

75. *Id.* at 26.

against antidemocratic doctrine by virtue of their analytic legal training.[76] The focus in implementing guardrail mechanisms, "therefore, is to work out how to maximize their efficacy against democratic threats, while at the same time minimizing the risk that they pose to a democracy."[77] This brings us to the final topic of this Article, democratically revitalizing the Disqualification Clause as it concerns the Executive Branch.

III. Democratic Revitalization of the Disqualification Clause

A. The Judiciary as the Most Suitable Venue for Executive Branch Disqualification Proceedings

A necessary first consideration in democratically revitalizing the Disqualification Clause is determining in which venues it may and should be enforced. The Disqualification Clause does not specify any venue, but the two obvious candidates, as the clause regards enforcement against the Executive Branch, are Congress and the Judiciary.[78] It is highly doubtful, however, that Congress would be comprehensively suited to implement and enforce the clause, even with constitutional amendments necessary to give it the power to declare a disqualification. Unlike with impeachment, where the Senate is constitutionally established as the trier of fact and law, and empowered to convict an impeached president,[79] neither the House nor the Senate is empowered to make a binding determination that the conduct of an accused Executive Branch officer or aspirant to office has violated the Disqualification Clause.[80]

Even if Congress were an alternative for disqualification proceedings, using it would not be a prudent choice, at least for exclusive jurisdiction of disqualification proceedings. Determining a person's legal status with finality, including qualification status, is, in a common law legal system, a core adjudicatory function and one for which Congress is not particularly suited.[81] Moreover, in a divided, highly partisan democracy, such as the one that exists in the United States today, placing a mechanism for disqualification of Executive Branch officers, particularly the President, in the hands of the Legislative Branch is likely to be counterproductive, causing discord and dysfunction.[82]

One need only look to past and currently threatened impeachment proceedings to appreciate the high likelihood of debacle. Politically

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76. *Democratic Disqualification*, *supra* note 14, at 46 ("Constitutional designers sometimes turn to judges because of their perceived impartiality. Courts are usually seen as the appropriate institution to handle the sensitive decision whether to ban anti-constitutional parties.").

77. *Id.* at 38.

78. *Id.* at 46.

79. U.S. CONST. art. I, § 3, cl. 6.

80. U.S. CONST. amend. XIV, § 3.

81. *See generally* Richard F. Cleveland, *Status in Common Law*, 38 HARV. L. REV. 1074 (1925).

82. *Democratic Disqualification*, *supra* note 14, at 47 ("[I]t would be a mistake to rely solely on legislators and elected actors, as the United States treads close to doing. Especially where parties are very strong, disciplined, and polarized, the risk that disqualification will be instrumentalized is too great.").

infected impeachments, those not for reasonably objective abuses of official power but for matters collateral to governing[83] or for policy disagreements about the use—not abuse—of power[84] impede, if not prevent, the work of government for its citizens, waste time and resources, and exacerbate divisions.[85] Given Congresswoman Greene's call to disqualify Speaker Pelosi from holding office, the opportunity and likelihood for congressional abuse of the Disqualification Clause is evident.

Indeed, the Legislative Branch is a poor candidate for deciding even bona fide matters of disqualification because its overt political character may well render it impotent, as the two most recent presidential impeachments evidenced.[86] For reasons similar to those making impeachment an unreliable—if not moribund—remedy for abuse of power, courts are more likely than Congress to enforce the Disqualification Clause:[87]

> A legislative process may also prove too difficult to deploy against even clear threats to democracy. This risk may be especially acute where the legislative processes involve[] a supermajority voting rule . . . . Such processes are likely to be unresponsive even when an actor or group poses a clear threat to democracy, as many commentators argued was the case during the second Trump impeachment trial in early 2021.[88]

Because judges stand outside the political process and because of their legal training, they can be better trusted not only to protect the political process but also to respect democratic values, such as due process, objective truth, competent evidence, and reasoned decision-making—not to mention First Amendment values.[89] It is doubtful many members of Congress would appreciate the reality that even strong speech against the government, short of incitement to unlawful conduct, is not sedition,

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83. Frank O. Bowman, III & Stephen L. Sepinuck, "*High Crimes & Misdemeanors": Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1544–46 (1999) (describing President Clinton's impeachment for dishonesty and obstruction in a civil action about personal, not official, conduct).

84. Steven G. Bradbury, *Impeaching Mayorkas: The House's Duty*, HERITAGE FOUND. (Feb 17, 2023), https://www.heritage.org/homeland-security/commentary/impeaching-mayorkas-the-houses-duty (describing the threatened Mayorkas impeachment for congressional disagreements with executive immigration policies).

85. Bowman & Sepinuck, *supra* note 83, at 1564.

86. *Democratic Disqualification*, *supra* note 14, at 6–7 ("[T]he Trump example suggests that the *disqualification* mechanisms in the U.S. Constitution are too fragmented and cumbersome to respond to contemporary threats to democracy. Impeachment is too difficult a tool to wield, especially in light of the modern American party system. The Trump example suggests that it may be all but dead as an effective disqualification tool.") (emphasis added).

87. *Id.* at 33 ("Perhaps surprisingly, moving disqualification decisions outside elected bodies is correlated with increases in the rate of disqualification. Contrary to the concern that elected actors would use disqualification as an instrument for entrenchment, it seems that reposing a discrete and individualized disqualification power in the legislature generates a détente, or a fear-based equilibrium: The focused threat of retaliation against whoever opens the possibility of individualized removal induces all to keep their powder dry. In contrast, non-elected actors labor under no parallel disincentive dampening the active deployment of disqualification powers.").

88. *Id.* at 46.

89. *Id.* at 40.

insurrection, or rebellion, let alone aid and comfort to any enemy. Competence and institutional integrity warrant confining Executive Branch disqualification proceedings to the Judicial Branch.

With regard to the Judiciary, it is also notable that "[r]esponding to the risk that elected actors will abuse their authority to entrench themselves in power, many democracies have established institutional mechanisms—call the[m] guardian institutions—insulated from democracy that are tasked with the protection of democracy."[90] In the United States, the Judicial Branch, whose Supreme Court Justices are appointed for life,[91] not elected, is such an insulated institution.[92] To be sure, however, insulated institutions themselves can be an entrenchment of power, enabling their use of guardrail mechanisms "that are intended to guard democracy [to] also be turned to democracy's undoing."[93] Accordingly, "a guardian institution standing apart from democratic currents to act as a safeguard of the process of 'ruling and being ruled in turn,' is also an institution that can intervene to derail that well-functioning democratic process."[94] Indeed, because it is exercised by a non-majoritarian institution substantially "insulated from democracy," even the power of judicial review, another democratic guardrail mechanism, can be misused to disrupt democratic process and choice.[95]

In light of the non-majoritarian politically insulated character of judicial power, opinions will inveterately diverge as to the limitations federal judges should impose upon themselves or that should be imposed upon them in the exercise of their powers. Famously, however, footnote four of the Supreme Court's 1938, pre-Warren Court *United States v. Carolene Products Co.*[96] decision recognized the "guardian institution" function of the Judiciary in the United States,[97] and the core principle *Carolene Products* posited still positions the Judiciary as a democratic institution today.[98] "The courts should step in only when there is some problem that prevents the political process from functioning in the way that it should. Bad outcomes do not justify the courts in intervening; only some

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90. *Id.*

91. *See* U.S. CONST. art. III, § 1.

92. *Democratic Disqualification*, *supra* note 14, at 40 (justifying judicial review as a means of responding to failures in the political process).

93. *Id.* at 38.

94. *Id.* at 40.

95. *Id.* (pointing to *Bush v. Gore*, 531 U.S. 98 (2000), as an example of "[a] supposedly neutral institution . . . [that] instead determined an election out of partisan self-interest"). *See also* Elizabeth Garrett, *Leaving the Decision to Congress*, *in* THE VOTE: BUSH, GORE & THE SUPREME COURT 38–54 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

96. 304 U.S. 144, 152 n.4 (1938).

97. *Id.* at 152 ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

98. David A. Strauss, *Is* Carolene Products *Obsolete?*, U. ILL. L. REV. 1251, 1252, 1254 (2010).

identifiable defect in the process can."[99] Despite the Judiciary's non-majoritarian decision-making and the risks to democracy that such power poses, it is not only appropriate but also imperative that, at least with regard to the Executive Branch, the Judiciary play the predominant role and be the final arbiter of legal issues, in enforcement of the Disqualification Clause. That judges—both state and federal, Democrat and Republican—held the line against the onslaught of myriad lawsuits seeking to overturn 2020 election results cannot be gainsaid.[100]

To be sure, the Framers did consider the Judicial Branch, specifically, the Supreme Court, as a potential venue for impeachments but ultimately rejected the Court in favor of Congress.[101] They did so for reasons that, while material and credible in 1787 when the Constitutional Convention ended, are neither material nor credible today. In fact, in light of two well-grounded but failed impeachments and a violent, even murderous insurrection that those failures did not pretermit, the Framer's reasons for not selecting the Supreme Court cut in favor of the Judicial Branch. First and foremost, in 1787, the Senate was expected to be not only a strongly deliberative body but also one that would be judicious in its conduct, and the model in England and some states was for one house to impeach and the other to try the case.[102] Then, according to *The Federalist*:

> What, it may be asked, is the true spirit of the [Senate] itself? Is it not designed as a method of *national inquest* into the conduct of public men? . . . [W]ho can so properly be the inquisitors for the nation as the representatives of the nation themselves? . . . In Great Britain it is the province of the House of Commons to prefer the impeachment, and of the House of Lords to decide upon it. Several of the State constitutions have followed the example. . . .
>
> Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel *confidence in its own situation*, to preserve, unawed

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99. *Id.* at 1254 (internal citations omitted). "Judicial review, when it is justified and limited in the ways described by the *Carolene Products* footnote, is not antidemocratic, not an overriding of the will of the people, but rather a matter of making sure that the true will of the people is expressed." *Id.* at 1258.

100. *See Kari Lake Loses Challenge of Election Loss in Arizona Governor's Race*, CBS NEWS (Feb. 16, 2023, 8:02 PM), https://www.cbsnews.com/news/kari-lake-arizona-governor-race-loss-appeal-ruling/; Rosalind S. Helderman & Elise Viebeck, *'The Last Wall': How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020, 2:12 PM), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html; Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, but Not a Wipe-Out*, BROOKINGS (Nov. 30, 2021), https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/ ("One sign of a healthy democracy is a judiciary that applies the law independently, even in cases involving powerful partisan interests. When President Donald Trump tried to enlist the courts in his campaign to overturn the results of the election, state and federal judges applied the law as they understood it. They did so despite Trump's history of lashing out at judges who crossed him during his 2016 campaign and later.").

101. *See* THE FEDERALIST NOS. 65, 66 (Alexander Hamilton).

102. *About Impeachment: Historical Overview*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/overview.htm.

> and uninfluenced, the necessary impartiality between an *individual* accused, and the *representatives of the people, his accusers*?[103]

Can any less be said about what has become the character, abilities, and bearing of the Supreme Court and the rest of the federal Judiciary over the last 200 years? By contrast, recent history is strong testimony to the Senate's demise as the "world's greatest deliberative body."[104] And, whether one agrees or disagrees with them, decisions such as *United States v. Nixon*,[105] *New York Times Co. v. United States*,[106] *Brown v. Board of Education*,[107] and *Youngstown Sheet & Tube Co. v. Sawyer*,[108] just to mention a few, surely now put *The Federalist* view of a feeble Judiciary to rest:

> It is much to be doubted, whether the members of [the Supreme Court] would at all times be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task; and it is still more to be doubted, whether they would possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives.[109]

At any rate, though Congress specified the Legislative Branch as the venue for initiating and trying impeachments, it left venue open in the Fourteenth Amendment's Disqualification Clause, perhaps because the House and Senate already had some power under the Constitution to oversee their membership when they proposed the amendment, despite the Judicial Branch having by then become the branch better qualified for conducting disqualification proceedings, whether of Executive or even Legislative Branch officials.[110]

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103. *See* THE FEDERALIST NO. 65 (Alexander Hamilton).

104. Quinta Jurecic & Benjamin Wittes, *The Utter Ridiculousness of the U.S. Senate: The World's Greatest Deliberative Body? Really?*, THE ATLANTIC (Jan. 27, 2020), https://www.theatlantic.com/ideas/archive/2020/01/utter-ridiculousness-us-senate/605566/; Odette Overton, *How to Save the World's Greatest Deliberative Body From Becoming a Graveyard: Reform the Filibuster*, PRINCETON UNIV. J. PUB. & INT'L AFFS. (Mar. 31, 2022), https://jpia.princeton.edu/news/how-save-worlds-greatest-deliberative-body-becoming-graveyard-reform-filibuster ("Historically known as 'The World's Greatest Deliberative Body,' the United States Senate has recently been referred to as 'America's Most Structurally Racist Institution,' the 'Judicial Approval Factory,' and—most commonly—a 'Legislative Graveyard.'").

105. 418 U.S. 683, 686 (1974) (executive privilege).

106. 403 U.S. 713 (1971) (Pentagon Papers).

107. 347 U.S. 483 (1954) (desegregation).

108. 343 U.S. 579 (1952) (executive war powers).

109. THE FEDERALIST NO. 65 (Alexander Hamilton).

110. Under their limited constitutional powers to oversee their respective memberships, the House and the Senate have some dispositive function under the Disqualification Clause. *See* U.S. CONST. art. I, § 5, cls. 1, 2; Lynch, *supra* note 36, at 194–95; *but see* Powell v. McCormack, 395 U.S. 486 (1969). An open question, unnecessary to address in this Article, where the focus is the Executive Branch, is whether the Disqualification Clause could be enforced judicially against incumbent members of Congress, as well as by Congress itself, or enforced against members of Congress only by Congress. Although the Constitution originally only gave oversight of their respective members to the House and Senate and the powers of impeachment and conviction to them as well, the Disqualification Clause, which came nearly a century later, does not single out anyone in the same express manner as

Although invalidation of one majoritarian body's action by another may be perceived as lending necessary legitimacy to that decision, as the Framers noted,[111] majoritarian invalidation is not essential for overturning majoritarian action, including an electorate's majority vote.[112] The Judiciary, even federal district courts subject, of course, to Supreme Court review, regularly review majoritarian branch actions—both legislative and executive—without the Court or anyone else necessarily questioning the legitimacy of that review, even in cases directly involving elections.[113] Moreover, "[d]isqualification by the legislature . . . comes with a greater risk of repression[,]" precisely because majoritarian views may reject minority, but meritorious, viewpoints.[114]

B. Protection of Democratic Values Through Standing Constraints on Executive Branch Disqualification Actions

In re-implementing a dormant but still viable constitutional provision, it may be possible for the Judiciary itself to ameliorate some concern about the democratic legitimacy of judicial disqualification of Executive Branch officials, including the President and the President's Cabinet. First, consideration should be given to who would have standing to initiate a disqualification proceeding, a matter subject to both judicial determination (under Article III's "Cases and Controversies" requirement[115] and principles of prudential standing[116]) and to supplementation by legislation.[117]

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the decision-maker in specific disqualification controversies. Where the disqualification challenge is to a candidate for congressional office, not a sitting Senator or Representative, presumably, courts, not Congress would be the final decision-maker, although state election law may require a state election official to be the initial decision-maker. *See* Order, Cawthorn v. Circosta, No. 5:22-cv-00050-M (E.D.N.C. Mar. 10, 2022), *rev'd sub nom. on other grounds*, Cawthorn v. Amalfi, 35 F.4th 245 (4th Cir. 2022); Opinion and Order, Greene v. Raffensperger, No. 22-cv-1294-AT (N.D. Ga. Apr. 18, 2022), *dismissed as moot*, Greene v. Sec. of State, 52 F.4th 907 (11th Cir. 2022).

111. THE FEDERALIST NO. 65 (Alexander Hamilton) ("[I]t is still more to be doubted, whether [the Supreme Court] would possess the degree of credit and authority, which might, on certain occasions, be indispensable . . . ."); *see also Democratic Disqualification*, *supra* note 14, at 46 ("Disqualification by the legislature may yield greater public legitimacy for decisions . . . .").

112. *Cf.* STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 85–86 (2009) (discussing the counter-majoritarian difficulty that arises from judicial invalidation of administrative actions).

113. *See* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1208 (2020) (ordering Wisconsin not to count ballots postmarked or delivered after state election day); Bush v. Gore, 531 U.S. 98, 110 (2000) (ordering presidential ballot recount in Florida be stopped); Williams v. Rhodes, 393 U.S. 23, 35 (1968) (affirming order to place candidate on ballot).

114. *Democratic Disqualification*, *supra* note 14, at 46.

115. *See* U.S. CONST. art. III, § 2, cl. 1; *cf.* Newman v. United States *ex rel.* Frizzell, 238 U.S. 537, 539, 550 (1915) (In *quo warranto* proceedings brought in the name of the United States on the relation of a citizen and taxpayer of the District of Columbia for the purpose of ousting from the office of Civil Commissioner of the District one appointed by the President and confirmed by the Senate, "[t]he interest which will justify such a proceeding by a private individual must be more than that of another taxpayer. It must be 'an interest in the office itself, and must be peculiar to the applicant.'").

116. *See* Flast v. Cohen, 392 U.S. 83, 92, 101–03 (1968) (upholding income taxpayer standing to challenge federal spending program as violating the Establishment and Free Exercise Clauses, though recognizing discretion in the exercise of judicial power).

117. *See* Associated Indus. of N.Y. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943) ("[T]here is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy [regarding action in excess of authority], even if the sole

The ability of anyone to bring a disqualification action would threaten undue disruption to the presidential election process and presidential nominations of Executive Branch officials, but standing's gatekeeping function would provide the courts the means to manage the disruptive potential of disqualification litigation, balancing judicial enforcement of the Disqualification Clause against majoritarian and separation of powers interests.[118]

Not just any individual citizen or voter should, or likely would, have standing to seek the disqualification of an incumbent executive official or even a candidate for President or Vice President—the only elected officials in the Executive Branch. Any such individual's interest in disqualification is indistinguishable from any other individual's.[119] The same would be true for any attempted challenge by an individual to the nomination of an Executive Branch official, many of which nominations, in any case, would be subject to senatorial confirmation.[120] An individual running for President or Vice President may have standing to challenge another's candidacy, however, but arguably only if and when the individual was their party's candidate for office.[121] The point at which such an individual's candidacy and, thereby, standing would be determined, however, might be too late in the electoral process to allow completion (trial and appeal) of the major litigation required for a disqualification proceeding. Accordingly, a political party would be better suited to bring an electoral challenge, whether prior to a primary or the general election stage.[122]

At the other end of the spectrum of interest, the House or the Senate, which each have the democratic bearing of their constitutional impeachment roles, would likely have standing to institute a disqualification action but, again, not individual senators or representatives. In between these extremes, as one moves from the majoritarian end of the spectrum to the individual end, the standing question becomes more problematic, but at least two public interest government oversight organizations have expressed the view that they have the standing to seek disqualification of a presidential candidate.[123] In any case, through standing requirements imposed judicially and legislatively, institution of disqualification proceedings by extreme non-majoritarian interests may, and should, prove to be limited.

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purpose is to vindicate the public interest."); *see also* Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033–34 (1968).

118. *See generally* J. Colin Bradley, *Prudence Lost? Separation of Powers and Standing after* Lexmark, 96 N.Y.U. L. REV. 1273 (2021).

119. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992).

120. U.S. CONST. art. II, § 2, cl. 2.

121. *See* JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB10569, THE INSURRECTION BAR TO OFFICE: SECTION 3 OF THE FOURTEENTH AMENDMENT 5 (2022).

122. *Id.*

123. *CREW to Pursue Disqualification if Trump Runs*, CITIZENS FOR RESP. & ETHICS IN WASH. (Nov. 3, 2022), https://www.citizensforethics.org/legal-action/legal-complaints/crew-to-pursue-disqualification-if-trump-runs/; *Trump team prepares to fight efforts to block him from ballots over Jan. 6*, WASH. POST (Apr. 18, 2023), https://www.washingtonpost.com/politics/2023/04/18/trump-ballots-january-6/.

C. Protection of Democratic Values Through Procedural Constraints on Executive Branch Disqualification Actions

As Disqualification Clause actions prior to the 2022 general election plainly demonstrate, such actions, like all litigation, are fraught with procedural issues and contingencies.[124] The Disqualification Clause does not set forth specific procedures for how it should be implemented and enforced generally, let alone judicially—deficiencies, however, that hardly impaired judicial enforcement of the clause in the years after its addition to the Constitution.[125] Nor should the absence of implementing legislation be an impediment to enforcement, or a prerequisite for enforcement, just as has been true for many other constitutional safeguards and values, particularly those in the Bill of Rights and in Civil War amendment provisions other than the Disqualification Clause.[126]

Constitutional questions of law and procedures arising under the Disqualification Clause are certainly within the jurisdiction of the Judicial Branch.[127] Unlike impeachment, for which the Constitution specifies the decision-makers but only provides limited instruction for conducting impeachment proceedings,[128] civil actions in the federal courts accommodate a wide range of proceedings and have detailed and established procedures

124. NEW YORK CITY BAR TASK FORCE ON THE RULE OF LAW, REPORT BY THE TASK FORCE ON THE RULE OF LAW ON SECTION 3 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION – THE DISQUALIFICATION CLAUSE, (2022) [hereinafter *NYC BAR REPORT*] (available at https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/disqualification-clause-history-and-recommendations-for-amendments) (should the Disqualification Clause "be invoked as to a candidate running in multiple states (for example, should former President Trump seek reelection in 2024), it is highly likely that the ensuing disparate results would create confusion, chaos and a constitutional crisis.").

125. *See, e.g.*, Case of Davis, 7 F. Cas. 63, 90 (C.C.D. Va. 1867) (No. 3,621a) (discussing enforcement of the Disqualification clause).

126. Early in the Disqualification Clause's history, Chief Justice Chase, riding Circuit, ruled in Griffin's Case, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815), that the clause was not self-executing. Griffin had been sentenced to prison for assault with intent to kill by a Confederate judge, and his lawyer initiated a habeas proceeding, seeking Griffin's release on grounds that the judge held his office in violation of the Disqualification Clause and, therefore, had no authority to sentence Griffin. *Id.* at 8. Although the case was not a direct enforcement action under the clause, Chase, concerned that acceptance of counsel's argument would mean Griffin's release and possibly the release of many others, ruled that the clause was not self-executing. *Id.* at 15, 26–27.

Griffin has since been advanced for the proposition that before a direct enforcement action can be brought under the Disqualification Clause, Congress needs to enact implementing legislation. *Democratic Disqualification*, *supra* note 14, at 51; Lynch, *supra* note 36, at 194. Plainly, however, Chase's ruling was not essential to the case's disposition or, therefore, good precedent. He could have ruled that the trial judge had only voidable, not void authority, and that, cloaked with the authority of the office, the judge's power continued until he was, in fact, disqualified in a direct enforcement action. What is more, in a case one year earlier, decided virtually contemporaneously with adoption of the Disqualification Clause, Chief Justice Chase ruled that it was Congress's intent that the clause be self-enforcing. *See* Magliocca, *supra* note 46, at 100–02. At any rate, since *Griffin,* "the Fourteenth Amendment has been reconceptualized as primarily being judicially, rather than congressionally, enforceable." Lynch, *supra* note 36, at 206 (citing City of Boerne v. Flores, 521 U.S. 507 (1997)); *see also* Magliocca, *supra* note 46, at 106.

127. *See* 28 U.S.C. § 1331 (federal question jurisdiction).

128. *See* U.S. CONST. art. I, § 2, cl. 5; *id.* at art. I, § 3, cls. 6, 7; *id.* at art. II, § 4.

that would suit a disqualification proceeding.[129] And, as has been true for a multitude of constitutional concepts, common law principles of construction are well suited for defining Disqualification Clause concepts such as "insurrection," "rebellion," "aid and comfort," and "enemies" of the United States.[130]

To be sure, although it is not necessary, legislation may facilitate implementation and enforcement of the Disqualification Clause, and Section 5 of the Fourteenth Amendment specifically empowers Congress to enforce the amendment's provisions by appropriate legislation.[131] Thus, for example, legislation that is currently enacted would furnish the dormant constitutional provision with a renewed democratic imprimatur. Similarly, judicial proceedings are more likely to gain acceptance where they proceed with order, not chaos and uncertainty.[132] Legislation and rules established specifically with an eye toward disqualification proceedings can help bring order, instead of, say, dozens of persons testing their standing and bringing duplicate actions.[133] Given, however, that there are existing

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129. The common law writ of *quo warranto* is specifically purposed for challenging the validity in office of an office holder and is what the *Enforcement Act* authorized federal attorneys to seek in requiring challenges to former members of the Confederacy holding office after the Civil War. Lynch, *supra* note 36, at 187, 192–94, 206 n.365. Federal courts are specifically empowered to entertain actions based on common law "writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651 (codifying the All Writs Act).

130. Likewise, cases construing the Insurrection Act of 1807, which is really the codification of several statutes Congress enacted between 1792 and 1871, *see* 10 U.S.C. §§ 251–55, will provide guidance in construing the Disqualification Clause. *See* Lynch, *supra* note 36, at 167–70. Interestingly, the Act requires the President to issue a proclamation requiring insurgents to disperse and retire peaceably as a prerequisite to the President taking action under the Act to quell an insurrection. 10 U.S.C. § 254. Presumably though, this would not be a requirement for there to be an insurrection under the Disqualification Act, particularly where it is the President or a former president who is to be charged with insurrection. Otherwise, rebellious presidents could insulate their conduct from challenge under the clause simply by not issuing a proclamation.

131. U.S. CONST. amend. XIV, § 5.

132. JUDICIAL CONFERENCE OF THE UNITED STATES, STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 9–11 (2020) (available at https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf).

133. Since the January 6, 2021 attack on the Capitol, several actions have been brought in state and federal courts, some originating in state administrative agencies, under the Disqualification Act. In addition to those legal issues discussed here, they have raised legal issues as to enforcement of the Disqualification Clause, in particular, whether enforcement actions would raise political questions; whether Congress, as to its members, has jurisdiction, exclusive of the Judiciary, over such actions; whether separation of powers would bar judicial disqualification actions; whether the Disqualification Clause needs to be reconciled with the Constitution's original and earlier grant of power to the states to regulate the manner of federal elections; whether the Amnesty Act in some manner neutralized the clause (despite the clause's superior order of authority); what conduct is sufficient to constitute insurrection and the other conduct the clause targets; whether the clause is self-enforcing or requires instead legislation for its implementation; and whether the specific conduct the clause proscribes should be definitively defined, including whether the clause should be broadened to reach more sophisticated means of sedition that do not involve actual force or palpable aid and comfort to enemies, such as the disclosure of state secrets and classified information. *See Democratic Disqualification*, *supra* note 14, at 7, 42, 55 (suggesting that disqualification should "be keyed to a broader range of modern anti-democratic threats than [the clause's] narrow, historically-bound focus on 'insurrection or rebellion'" and "broadening the grounds for disqualification beyond 'insurrection or rebellion,' a standard designed primarily to deal with the particular problems posed by the Civil War" because "[i]n place of military coups and sudden democratic implosions, parties and actors tend to attack democracy gradually, using legal tools and constitutional changes to consolidate power and to repress the opposition.");

judicial proceedings adequate for the Disqualification Clause's enforcement and implementation, and the self-executing treatment and construction of other constitutional safeguards, there is no good reason for requiring legislation as a prerequisite for enforcement of the clause.

Pursuant to its power to manage jurisdiction within the Judicial Branch[134] and its power under the Necessary and Proper Clause to make laws "for carrying into Execution" all powers that the Constitution vests in the branch,[135] Congress could vest exclusive jurisdiction over certain disqualification actions–say for the President, Vice President and Cabinet officials–in a three-judge district court, as it has done legislatively for other cases with gravitas, and could provide for direct appeal from such a court to the Supreme Court.[136] Jurisdiction, however, could not be vested, as an original matter, in the Supreme Court, unless perhaps a state sought, as a party, to institute a disqualification action for which action a state, given the diversity and size of its constituency, might have standing.[137]

Further, although the presumption is that state and federal courts have concurrent jurisdiction over federal causes of action, "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."[138] Rather than federal executive officials, nominees, and candidates being subject to disqualification actions in state courts, Congress could, and should, confine jurisdiction over such actions to federal courts. The federal interest is certainly strong enough, particularly with respect to executive branch officials and candidates, as opposed to members of Congress, and it seems prudent for the sake of procedural consistency.[139] Likewise, given the

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NYC BAR REPORT, *supra* note 124; *cf*. Bond v. Floyd, 385 U.S. 116, 123 (1966) (ruling that the clause concerned actual not threatened or attempted insurrection).

Recommendations for legislation to address these issues have been made. *See NYC BAR REPORT*, *supra* note 124; *see also Democratic Disqualification*, *supra* note 14, at 51–53. Although some legislation may be useful, except for the issue whether the Disqualification Clause is self-enforcing (which would be mooted were enforcement legislation enacted), none of these issues can be definitively resolved legislatively. They can only be resolved by judicial construction or constitutional amendment because they are constitutional in nature and because broadening the scope of conduct proscribed is bound to come up against First Amendment and Equal Protection limitations. Enforcement legislation could include provisions clarifying and confirming who has standing, but it cannot resolve all questions of who would have Article III standing to invoke the clause. *See* notes, discussion, and accompanying text, *supra* notes 116–17.

As for whether the Disqualification Clause requires legislation for its enforcement, it is submitted that, although such legislation would moot the issue, the issue is otherwise insubstantial, and that enforcement litigation is not a prerequisite to enforcement. *See* discussion, *supra* note 126.

134. U.S. CONST. art. III, § 1.

135. *Id.* at art. I, § 8, cl. 18.

136. Among other matters, "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made . . . ." *Id.* at art III, § 2, cl. 1. Although, except for the Constitution's specification of the Supreme Court's original jurisdiction, the Court's jurisdiction is otherwise limited to appellate jurisdiction, *id.* at cl. 2, "[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* at § 1.

137. U.S. CONST. § 2, cl. 2.

138. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–78 (1981).

139. *NYC BAR REPORT*, *supra* note 124, at 15–19.

shortness of election cycles, Congress could also provide for expedited proceedings in federal court disqualification actions and specify the means for obtaining personal jurisdiction over federal officials, nominees, and candidates by providing that holding or being a candidate or nominee for federal office is consent to federal personal jurisdiction.[140]

Still, the history of the Disqualification Clause's treatment and actions under it and, more so, its purpose as a democratic guardrail against real threats of insurrection, rebellion, and expedient but dangerous covert relations with foreign enemies should put disqualification,[141] like so many other constitutional protections, outside a need for implementing legislation as a prerequisite to its enforcement.

CONCLUSION

As the nation did during Watergate,[142] this Article looks to the Judiciary, a non-majoritarian branch of government as an essential venue for the protection of democracy from individual malefactors that would exploit its vulnerabilities to sow the seeds of democratic demise. With the Disqualification Clause, it is resort to the non-majoritarian Judiciary that must be available to keep the Executive Branch in good hands. As non-democratic as judicial decisions to disqualify persons from executive office would be, the circumstances requiring such decisions are certainly ones which, as Chief Justice Marshall admonished in *Cohens v. Virginia*,[143] the courts "cannot avoid," despite political considerations otherwise.[144]

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140. *Id.*

141. Benjamin Weiser & William K. Rashbaum, *Former Senior F.B.I. Official in New York Charged with Aiding Oligarch*, N.Y. TIMES (Jan. 23, 2023), https://www.nytimes.com/2023/01/23/nyregion/fbi-money-laundering-charles-mcgonigal.html.

142. *See* William F. Swindler, *Watergate and Constitutional Power - A Perspective for United States v. Nixon*, WM. & MARY L. SCH. SCHOLARSHIP REPOSITORY, at 15–16 (1974), https://scholarship.law.wm.edu/facpubs/1600.

143. 19 U.S. 264 (1821).

144. *Id.* at 404 ("The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the [C]onstitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously perform our duty."). "[T]here is fairly strong evidence that the Framers meant for the [constitutional] allocation of powers to be adjusted among the branches over time," justifying, as circumstances may require, democracy's protection by the non-majoritarian Judiciary. Erwin Chemerinsky, *A Paradox Without A Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1107–08 (1987); *accord* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1131 (2013) ("Areas of presidential power that typically see little judicial involvement might become areas of greater involvement under certain conditions. Moreover, the likelihood of judicial review is probably affected by the extent to which courts perceive the President to be stretching traditional legal understandings. As a result, it might be more accurate to describe the constitutional law of presidential power as judicially underenforced, rather than unenforceable."); Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1810 (2019) ("Particularly in light of the developments of the last century — which has seen a massive transfer of

But much like Godel's Theorem,[145] no matter how much this nation strives to perfect democracy's institutions and guardrails, democracy's viability will ineluctably rest in the hands of individuals holding high democratic office, not judges. History teaches that the aggrandizement of power to which democracy is vulnerable has and will continue to threaten the norms, values, and interests that are the foundation for the acceptance and success of democratic rule. It also teaches, however, that their salvation will always eventually be found, but either in the denouement of rebellion[146] or in the same qualities of individual mind and character that stood fast in the creation of this nation. "[I]t is up to the American people. We will get exactly the presidency—and democracy—we deserve. Let us choose wisely."[147]

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policymaking authority from the legislative branch to the executive branch, coupled with increasingly aggressive attempts by presidents to control that policymaking[,] separation-of-powers principles cut not only in the direction of *protecting* the president . . . . They also cut in the direction of *checking* the president, to help ensure that he remains within legal limits.").

145. In any logical and provable system of statements, there is always an unavoidably nonprovable statement. *See* Melvin Henriksen, *What is Godel's Theorem?*, SCI. AM. (Jan. 25, 1999), https://www.scientificamerican.com/article/what-is-godels-theorem/.

146. As former Secretary of State Hilary Clinton, speaking at the United Nations' Human Rights Council, once admonished in reference to a revolutionary's execution of Libya's Muammar Qaddafi, "The power of human dignity is always underestimated, until the day it finally prevails." SAMANTHA POWER, THE EDUCATION OF AN IDEALIST 295 (2019) (quoting Hilary Clinton).

147. COAN, *supra* note 7, at 211; *accord Goldsmith Interview*, *supra* note 3 ("[U]ltimately, the efficacy of checks on the presidency depends on the identity of the man or woman whom the American people choose to elect.").