THE SUPREME COURT'S REWRITING OF THE FOURTEENTH AMENDMENT DISQUALIFICATION CLAUSE: *TRUMP V. ANDERSON* AND THE GREENLIGHTING OF INSURRECTION

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ABSTRACT

The Framers of the Fourteenth Amendment prescribed in Section Three the remedy for an official oath-taker who betrays their vow and turns against their government. It is disqualification from ever serving in office again. Donald Trump is just such an office holder, having sworn to preserve and protect the Constitution, but then inciting a violent mob to reverse the voters' rejection of him for a second term. January 6, 2021, was actually the culmination of several unlawful schemes to restore Trump to the Presidency.

Yet the Supreme Court ignored the clear mandate of Section Three, and in *Trump v. Anderson* cast aside the chilling facts found by the lower courts regarding the events of January 6 and reversed their order of disqualification. The consequences are already all too apparent, as the returning President issues a daily flurry of executive orders directing mass deportations, pursues prosecutions of political opponents and punishes law firms that have sued him, cuts funding to Universities that refuse to bend to his will, and overturns birthright citizenship guaranteed by the very same Fourteenth Amendment.

This Article traces the history of Section Three, its virtual deletion from the Constitution by the Court, and the momentous consequences—present and future.

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"A demagogue who supports violent insurrection to perpetuate himself in office is precisely what our Founders warned us about. To ignore such a threat . . . is to turn the Constitution they drafted on its head."

Brief for Amicus Curiae Common Cause in Support of Respondents, *Trump v. Anderson.*

INTRODUCTION

In Tom Stoppard's masterful re-imagination of *Hamlet*, bit players Rosencrantz and Guildenstern find themselves sailing off to their own execution after a series of plot twists seemingly out of their control. Only near the fateful end of their journey do the two ponder the question—when had they passed the point of no return, before which they could have stopped the path to their demise?—*"[T]here must have been a moment, at the beginning, where we could have said—no. But somehow, we missed it."*[1]

Donald Trump's twisted (and, to many, inconceivable[2]) journey to the White House, *twice*, is just such a tale. There were so many moments where he could have been told "No!" They coincide with the slow but steady disassembly of the architecture of our constitutional Republic—de-democratization, as some would call it. Like the frog being boiled, it came in small increments of temperature, each barely perceptible, until. . . . When the Sands Hotel in Las Vegas was brought down in a single act of planned demolition, observers watched in awe. Had it instead been accomplished over time, room by room, floor by floor, how many would have paid attention? With Trump's second term, the pot is now boiling over, and the demise of the Sands is upon us. How did we get here? Let's look at the missteps along the way.

First, the 448-page Report of Special Counsel Robert Mueller[3] documented "the sweeping and systematic" interference by Russia in the 2016 election,[4] its coordination with Trump's campaign, and at least ten instances where Trump obstructed justice to impede the investigation.[5] Yet, instead of

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1. TOM STOPPARD, ROSENCRANTZ AND GUILDENSTERN ARE DEAD, *Act III*, p. 125 (Grove Press, 1967). A contemporary version is the comment of a swing voter after the guilty verdict in *People of NY v. Donald J. Trump*: "Baffled. This whole situation is just so weird. A former president on trial? How did we get to this point?" Patrick Healy, Frank Luntz, & Adrian J. Rivera, *'Antihero' or 'Felon': 11 Undecided Voters Struggle with How to See Trump Post-Verdict*, N.Y. TIMES (June 4, 2024), https://www.nytimes.com/interactive/2024/06/04/opinion/trump-verdict-focus-group.html [https://perma.cc/2MUH-U3V4] (quoting the sentiments of Ben, a forty-two-year-old white college adviser from Texas).

2. *See* THE PRINCESS BRIDE (20th Century Fox 1987). In this film, the leitmotif is how "inconceivable" it is that the masked hero manages to stay right behind the Princess and her abductors, no matter how impassable the route.

3. ROBERT S. MUELLER, THE MUELLER REPORT: REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1 (12th Media Services, 2019). For a summary of its findings, see American Constitution Society, "Key Findings of the Mueller Report," https://www.acslaw.org/projects/the-presidential-investigation-education-project/other-resources/key-findings-of-the-mueller-report/

4. *Id.* at Vol. I, 1–5.

5. *Id.* at Vol. II, 15–156.

referring the matter to the Justice Department for prosecution, Mueller merely capped the Report with:

> Because we determined not to make a traditional prosecutorial judgment, we did not draw ultimate conclusions about the President's conduct. The evidence we obtained about the President's actions and intent presents difficult issues that would need to be resolved if we were making a traditional prosecutorial judgment. At the same time, if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, we are unable to reach that judgment. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.[6]

The Report was then impounded by Trump's Attorney General, Bob Barr, and released only after Barr put his misleading spin on it—a four-page letter and ninety-minute press conference falsely asserting it exonerated the President (like portraying a guilty verdict as an acquittal).[7] In addition, it was disclosed that Mueller had agreed not to interrogate Trump during the investigation after Trump's lawyers persuaded Mueller that the President would perjure himself and might reveal national security secrets.[8]

Then, two subsequent impeachments ended when majorities in the Senate fell short of the two-thirds required to remove Trump from office. The first arose from Trump's effort (recorded on a phone call) to coerce the Ukrainian President to investigate presidential candidate Joe Biden's son.[9] The second, Trump's insurrectionist conspiracy to overturn the results of the 2020 election, which he lost,[10] culminated in the infamous violent attack on the U.S. Capitol on January 6, 2021.

Two prominent Federalist Society scholars described the events of January 6th and the lead-up to it:

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6. *Id.* at Vol. II, 182. *See generally* WILLIAM G. HOWELL & TERRY M. MOE, PRESIDENTS, POPULISM, AND THE CRISIS OF DEMOCRACY 101 (Univ. of Chicago Press, 2020) (describing Mueller's decision as something that "will surely go down as one of the strangest—and most consequential—moves in modern legal history. . . . In refusing to draw legal conclusions from his evidence, Mueller simply didn't do his job . . . [and] because he didn't, he failed to carry out his duty to tell the American people what his investigation actually revealed about Trump's lawless behavior, and he failed to draw a bright line that would keep future presidents within legal bounds.").

7. HOWELL & MOE, *supra* note 6, at 102.

8. Tina Nguyen, *Ex-Trump Lawyer Told Mueller That Trump Is Too Dumb to Testify*, VANITY FAIR (Sept. 4, 2018), https://www.vanityfair.com/news/2018/09/ex-trump-lawyer-told-mueller-trump-is-too-dumb-to-testify?srsltid=AfmBOopZQ4TURh9eBPoxbAttsqcuPIENpklnuLHqJbOyszq1A7gc-eXo [https://perma.cc/L5GQ-GHRQ] (reviewing BOB WOODWARD, FEAR: TRUMP IN THE WHITE HOUSE (Simon & Schuster, 2018)).

9. Zachary Cohen & David Shortell, *Trump Pressured Ukraine's President to Investigate Biden's Son*, CNN, https://www.cnn.com/2019/09/20/politics/wsj-trump-ukraine-calls-biden-investigation-giuliani/index.html (Sept. 20, 2019).

10. Sarah Fortinsky, *Voter Data Expert Hired by Trump Campaign Says 2020 Election was not Stolen*, HILL (Jan. 2, 2024), https://thehill.com/homenews/campaign/4385239-voter-data-expert-trump-campaign-2020-election-not-stolen/

> [A]ttempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for states' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several states; the efforts of Members of Congress to reject votes lawfully cast by electors; and, finally, the fomenting and incitement of a mob that attempted to forcibly prevent Congress and the Vice President from counting lawfully cast votes, culminating in a violent and deadly assault on the Capitol (and Congress and the Vice President) on January 6, 2021.
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> Taken as a whole, these actions represented an effort to prevent the lawful, regular termination of President Trump's term of office in accordance with the Constitution. They were an attempt to unlawfully overturn or thwart the lawful outcome of a presidential election and to install, instead, the election *loser* as president. They constituted a serious attempt to overturn the American constitutional order. . . .
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> January 6 was an insurrection . . . and [President] Trump "engaged in . . ." and gave "aid or comfort . . ." within the original meaning of . . . Section Three [of the Fourteenth Amendment].[11]

When Trump summoned and incited the angry mob to attack the Capitol, it was after months of planning and coordination between extreme right-wing groups like the Proud Boys and Oath Keepers.[12] He witnessed the rampaging mob violently breaching the Capitol on a White House television screen—attacking police, damaging and defacing the treasured chambers of government, and hunting his own Vice President. Yet Trump took no action and indeed encouraged the horrifying assault on social media.[13] He ignored frantic pleas from members of Congress and others to take immediate action.[14]

As promised, on his first day back in the White House for a second term, Trump pardoned nearly 1,600 convicted for their part in the January 6 events, including those found guilty of violent assaults on police and seditious conspiracy.[15] Proclaiming them true "patriots," he has "flipped the

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11. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 730–31, 740 (2024).

12. Kyle Cheney, *Proud Boys Leaders: Trump Caused Jan. 6 Attack*, POLITICO (Apr. 25, 2023), https://www.politico.com/news/2023/04/25/proud-boys-trial-trump-tarrio-00093678.

13. Patricia Zengerle & Richard Cowan, *Trump Watched Jan. 6 U.S. Capitol Riot Unfold on TV, Ignored Pleas to Call for Peace*, REUTERS, https://www.reuters.com/world/us/us-capitol-probes-season-finale-focus-trump-supporters-three-hour-rage-2022-07-21 (July 22, 2022).

14. Lisa Mascaro, Farnoush Amiri, & Eric Tucker, *Jan. 6: Trump Spurned Aides' Pleas to Call off Capitol Mob*, ASSOCIATED PRESS (July 21, 2022), https://apnews.com/article/capitol-siege-panel-hearing-3e3dc618ed8cee37147cf6a792c0c0fa

15. Alan Feuer, *Trump Grants Sweeping Clemency to All Jan. 6 Rioters*, N.Y. TIMES, Jan. 21, 2025, at A14 (Trump also directed the Justice Department to dismiss "all pending indictments" that remained against people facing charges for January 6); David Cohen, *Trump on Jan. 6 Insurrection: 'These Were Great People,'* POLITICO (July 11, 2021), https://www.politico.com/news/2021/07/11/trump-jan-6-insurrection-these-were-great-people-499165.

script" on January 6.[16] And having vowed retaliation against prosecutors, judges, media outlets, and politicians who have opposed him,[17] they have now become his targets in his first few months back in the White House.[18]

All this is right out of the playbook of authoritarian leaders around the globe,[19] and has now been largely normalized by the media.[20] Further exacerbating the situation is the Democratic Party's inability or unwillingness to resist the existential danger.[21] Like the frog, the American public has been largely desensitized to the slow hollowing out of what we once knew to be our architecture of government.

Yet our highest court, in *Trump v. Anderson*,[22] refused to enforce Section Three's[23] clear mandate to keep insurrectionists from office, thus greenlighting the former President's second candidacy and sending him on to another four-year term (and perhaps longer[24]) in the White House. This is the *one decision* that could have saved us from our fate.

This Article will explore the transcendent importance of *Anderson* for the future of the American Republic. Given the jurisprudence of the "conservative"[25] Court supermajority, can we any longer define the boundary between Law and Politics, between judicial decisions and the Republican wish list, between Democracy and the mere appearance of it? Will the Su-

16. Dan Barry & Alan Feuer, '*A Day of Love': How Trump Inverted the Violent History of Jan. 6*, N.Y. TIMES (Jan. 5, 2025), https://www.nytimes.com/2025/01/05/us/politics/january-6-capitol-riot-trump.html; David Frum, *Don't Mention the Coup! The Memory of January 6 Vanishes from Trump's New Washington*, ATLANTIC (Jan. 6, 2025), https://www.theatlantic.com/ideas/archive/2025/01/january-6-memory-trump/681216/?utm_source=newsletter&utm_medium=email&utm_campaign=the-atlantic-am&utm_term=The+Atlantic+AM [https://perma.cc/7UJF-LK8C].

17. Alexandra Ulmer, *Who Has Donald Trump Threatened to Prosecute as President?* REUTERS, https://www.reuters.com/world/us/trumps-threats-prosecute-opponents-election-workers-google-2024-10-30/ (Jan. 20, 2025).

18. Zachary Basu, *Trump's Overflowing Grudge List*, AXIOS ENT. (Mar. 21, 2025), https://www.axios.com/2025/03/21/trump-retaliation-revenge-biden-security-clearance.

19. *See* TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY, 9–13 (Crown, 2017).

20. Rebecca Solnit, *The Mainstream Press is Failing America–and People are Understandably Upset*, THE GUARDIAN (Sept. 6, 2024), https://www.theguardian.com/commentisfree/article/2024/sep/06/trump-clinton-harris-election.

21. Jamelle Bouie, *Now Is Not the Time for Surrender*, N.Y. TIMES (Dec. 18, 2024), https://www.nytimes.com/2024/12/18/opinion/democrats-trump-opposition.html

22. 601 U.S. 100 (2024) (per curiam).

23. *See* infra, note 26.

24. Timothy L. O'Brien, *Believe Trump When He Says He Won't Give Up Power*, BLOOMBERG (July 29, 2024), https://www.bloomberg.com/opinion/articles/2024-07-29/believe-trump-when-he-says-he-won-t-give-up-power (detailing Trump's fixation on becoming "President for life").

25. As the name literally means, and as was the case until relatively recently in the Court's history, the term connotes those who seek to *conserve* and *preserve* a stable status quo, not those who seek to radically overturn it. *New York Times* columnist Maureen Dowd writes: "The once August court, which the public held in highest esteem, is now hopelessly corroded: It is in the hands of a cabal of religious and far-right zealots, including a couple of ethical scofflaws with MAGA wives." Maureen Dowd, *The Verdict is in on the Supreme Court*, N.Y. TIMES (June 9, 2024), https://www.nytimes.com/2024/06/04/opinion/columnists/supreme-court-alito-flag.html.

preme Court simply operate as just another sharply partisan, rigidly ideological arm of the Chief Executive?[26]

I. SECTION THREE

The framers of the Fourteenth Amendment, having just beaten down their own bloody insurrection in the form of the Civil War, added measures in Section Three to prevent those who had violated their oath of loyalty (and those who would do so in the future) from ever holding office again.[27] The provision provides in clear and mandatory terms that any oath-taking office holder who engages in "insurrection or rebellion" is thereby disqualified from ever again holding office.[28] While early drafts were "limited to the Civil War itself, by the time of ratification, the language was broadened to insurrection and rebellion generally."[29] The legal consensus at the time, as well as *Webster's Dictionary*, defined "insurrection" as both large and small-scale violent resistance by a group to the execution of law.[30]

Section Three represented the grave concern that the Republic could be overturned by those committed to its demise, the unrepentant Confederates of the day. "The Rebels seek to gain by the ballot what they could not gain by the bullet," as one Arkansas newspaper put it.[31] Elections in the South were already returning to office "notorious and unpardoned rebels . . . who made no secret of their hostility to the government and people of the United

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26. Public opinion polls show the majority has already answered that in the affirmative. Thomas Beaumont & Linley Sanders, *New Poll Shows Majority of Americans Believe Supreme Court Justices Put Ideology over Impartiality*, PBS NEWS (June 27, 2024), https://www.pbs.org/newshour/nation/new-poll-shows-majority-of-americans-believe-supreme-court-justices-put-ideology-over-impartiality [https://perma.cc/4UKN-TSLQ].

27.

> 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.

U.S. CONST. amend. XIV, § 3. For a thorough analysis of this Section, *see* MARK A. GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR (Univ. Press of Kan., 2023). *See* Michael Meltsner, *After Section 3 Comes Section 2: The Election Lawsuit About the 14th Amendment That You Might Not Know About*, AM. PROSPECT (Jan. 2, 2024), https://prospect.org/justice/2024-01-02-election-lawsuit-14th-amendment-trump/ [https://perma.cc/Y35E-5UJ5] ("Section Two of the Fourteenth Amendment . . . strip[s] congressional representation from states that disfranchise voters. The text applies to general methods states adopt that keep people from voting and is not limited to racial discrimination. The proportional loss of congressional representation would also reduce the votes that states would get in the Electoral College.").

28. U.S. CONST. AMEND. XIV, § 3.

29. Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153, 168 (2021).

30. Brief of Constitutional Law Professor Mark A. Graber as Amicus Curiae in Support of Respondent at 3–12, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719); *Insurrection*, WEBSTER'S DICTIONARY (1st ed. 1828).

31. CONG. GLOBE, 39th Cong., 1st Sess. 783 (1866) (quoting from a local newspaper from Arkansas entitled *The New Era*).

States."[32] "Throughout the history of the Republic, southerners had dominated the White House, the Supreme Court, and Capitol Hill. Southerners saw no reason why they should not simply resume their traditional leading role" in government.[33] By way of example, Alexander Stephens, Vice President of the Confederacy, was elected to the Senate, though he was not permitted to take his seat.[34]

In addition, the draconian Black Codes spreading across the South were the new version of servitude, and the "unprecedented terror campaign" by the KKK and similar white supremacist groups were subordinating former slaves as well as free Black persons.[35] "The picture of the re-emerging Slave Power," as Garrett Epps puts it, haunted the framers of the post-Civil War amendments.[36]

In the face of all this, Section Three was "framed as to disenfranchise from office the leaders of the past rebellion [the Confederacy] as well as *any rebellion hereafter to come*."[37] An earlier draft had expressly applied only to "the late insurrection."[38] Section Three imposed no other punishment beyond disqualification, and was considered, under the circumstances, "generous" given the calamity of the Civil War just ended.[39]

Disqualification of Confederates followed swiftly,[40] though Congress later enacted amnesty legislation removing the disability from most, except for the leaders of the rebellion, like Jefferson Davis and Robert E. Lee.[41] This was part of a turn against "Radical" Reconstruction that essentially freed the Slave States from the strictures of the post-war amendments pro-

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32. H.R. REP. NO. 39-30, (1866), *reprinted in* JOINT COMM. ON RECONSTRUCTION, REPORT OF THE JOINT COMM. ON RECONSTRUCTION, at xviii (1866).

33. Garrett Epps, *The Undiscovered Country: Northern Views of the Defeated South and the Political Background of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 411, 415 (2004). *See generally* GRABER, *supra* note 27, at 3 ("Rebel rule had to be prevented. The persons responsible for secession had to be politically neutered, if not subject to penal and economic sanctions.").

34. Jill Lepore, *What Happened When the U.S. Failed to Prosecute an Insurrectionist Ex-President*, NEW YORKER (Dec. 4, 2023), https://www.newyorker.com/magazine/2023/12/11/what-happened-when-the-us-failed-to-prosecute-an-ex-president.

35. GRABER, *supra* note 27, at 79.

36. Epps, *supra* note 33, at 428; Lynch, *supra* note 29, at 155 ("After the Civil War ended, Congress recognized that its losers would continue to fight—if not on the battlefield, then in the political arena.").

37. CONG. GLOBE, 39th Cong., 1st Sess. 3505–06 (1866) (Sen. Henderson) (emphasis added).

38. *Infra*, note 99, at 23.

39. CONG. GLOBE, 39th Cong., 1st Sess. 2901 (1866) (Sen. Sherman).

40. In fact, Section Three was enforced even before the Amendment was ratified. Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT 87, 90 (2021); *see also* Brief for Professors Orville Vernon Burton, Allan J. Lichtman, Nell Irwin Painter, James M. McPherson, Manisha Sinha, et al. as Amici Curiae in Support of Respondents, *Anderson*, 601 U.S. at 100 (No. 23-719).

41. Magliocca, *supra* note 40, at 100–02; *see also* Case of Davis, 7 F. Cas. 63 (C.C.D. Va. 1871) (No. 3,621A). Davis was indicted for treason and cleverly argued that he had already suffered the disqualification penalty imposed by Section Three, which "executes itself, acting proprio vigore. It needs no legislation on the part of Congress to give it effect." The case was mooted when President Andrew Johnson pardoned Davis.

tecting former slaves.[42] The Supreme Court itself soon also lost its enthusiasm for the restructuring of southern society. The *Civil Rights Cases*[43] severely curtailed the protections of due process and equal protection by excluding private, non-governmental conduct from their reach.[44]

1869 saw an unsuccessful effort to enforce Section Three against a Confederate judge in *Griffin's Case*, when Chief Justice Chase (ruling as a Single Justice) held Section Three was not self-enforcing but required Congressional legislation.[45] Just two years later, he reached the very opposite conclusion in Jefferson Davis's treason case.[46] Davis cleverly used Section Three as his defense, arguing that the prosecution was barred because he had already suffered the disqualification penalty (an argument that seems to have been suggested by Chase himself[47]). Although there had been no legislation initiating the prior action, his attorneys argued that the Section "executes itself, acting *proprio vigore*. It needs no legislation on the part of Congress to give it effect."[48] The case was mooted when President Andrew Johnson pardoned Davis with his general amnesty proclamation.[49] America's most quintessential insurrectionist thus avoided punishment, and his exoneration "bolstered the cause of white supremacy."[50]

On the other hand, the North Carolina Supreme Court ruled in favor of the County Commissioners' disqualification of a sheriff who held his office before and during "the rebellion," having sworn an oath to the Constitution.[51]

Constitutional disqualification has rarely been invoked since the post-Civil War era, *as there have been no "insurrections*"—until, of course, January 6, 2021. It has been used questionably to exclude unpopular candidates like Representative Victor Berger, a Socialist member of Congress from Wisconsin, after he published a manifesto in his Milwaukee newspaper opposing American entry into World War I.[52] Other candidates on the Left

42. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 1 (Harper & Row, 1988); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860–1880 1 (Harcourt, Brace & Co., 1935).
43. 109 U.S. 3 (1883).
44. *Id.*
45. In re Griffin, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815).
46. *Case of Davis*, 7 F. Cas. at 97.
47. CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS 275 (Cambridge Univ. Press, 2017).
48. *Case of Davis*, 7 F. Cas. at 97 ("[T]his constitutional provision executes itself, and requires for its complete enforcement no judicial action. This is too manifest for denial, and seems to be conceded.").
49. *Id*.
50. Lepore, *supra* note 34.
51. *Worthy v. Barrett*, 63 N.C. 199, 202–05 (N.C. 1869).
52. Edward J. Muzik, *Victor L. Berger: Congress and the Red Scare*, 47 WIS. MAG. HIST. 309 (1964); Lynch, *supra* note 29, at 210–14.

have suffered a similar fate, despite the fact that they participated in no "insurrection."[53]

Most recently, Couy Griffin, one of the participants in the January 6 events, was removed as County Commissioner in New Mexico, after his conviction for instigating and participating in the violent mob that attacked the Capitol.[54] A group of New Mexico citizens filed a quo warranto action against Griffin under New Mexico law, seeking his removal from office.[55] The New Mexico district court took evidence, received legal arguments, and then deemed January 6 a constitutional "insurrection," finding that Griffin, founder of "Cowboys for Trump," had "voluntarily aid[ed] the insurrectionists' cause by helping to mobilize and incite" the crowd, and then joined the mob, even though Griffin himself did not commit a violent act.[56] The court concluded that Griffin was disqualified under Section Three, ordering his immediate ejection from office, and permanently enjoining him from seeking or holding any other covered position.[57]

Two other Section Three challenges, one against Georgia Representative Marjorie Taylor Greene and the other against Arizona Representative Mark Finchem and U.S. Representatives Paul Gosar and Andy Biggs, were dismissed. In Greene's case, it was for lack of sufficient proof that she had participated in the January 6 insurrection,[58] and in the latter, the Arizona Supreme Court concluded that state law did not provide a private cause of action for a disqualification challenge.[59]

It goes without saying that January 6 posed the most dramatic Section Three case since its inception after the Civil War. The provision seemed tailor-made for what happened on that day. But not in the view of the U.S.

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53. *See, e.g.*, Cleaver v. Jordan, 393 U.S. 810 (1968) (denying certiorari to Black Panther Eldridge Cleaver in 1968); Socialist Workers Party of Ill. v. Ogilvie, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (holding that a state electoral board did not violate the Socialist Workers Party's due process rights when it denied certification of the Party's candidate because the candidate did not meet the state's age requirement for holding office); Munro v. Socialist Workers Party, 479 U.S. 189, 199 (1986) (holding that a state law precluding a Socialist Workers Party candidate from the general ballot because the candidate did not secure at least 1% of votes cast is constitutional, in light of the state's strong interest in ensuring general ballot candidates have significant voter support); Lindsay v. Bowen, 750 F.3d 1061, 1063–64, 1065 (9th Cir. 2014) (holding that a state's barring of a Peace and Freedom Party candidate from the ballot, because the candidate did not meet the federal age requirement for holding office, did not violate either the First Amendment or the Equal Protection clause).

54. White v. Griffin, No. D-101-CV-2022-00473, 2022 WL 4295619, slip op. at *16, 25 (1st Dist. N.M., June 28, 2022).

55. *Id.* at *3.

56. *Id.* at *3–15, 20, 24

57. *Id.* at *25.

58. Greene v. Sec'y of State for Ga., 52 F.4th 907, 909–10 (11th Cir. 2022); Kate Brumback, *Challenge over Marjorie Taylor Green's Eligibility Fails*, ASSOCIATED PRESS (May 6, 2022), https://apnews.com/article/2022-midterm-elections-georgia-marjorie-taylor-greene-congress-1a3adca947abd4af6ae8a2f5e0cc901a. Greene had unsuccessfully sought injunctive relief to halt the proceedings against her. Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1288 (N.D. Ga. 2022).

59. *See* Jerod MacDonald-Evoy, *Judge Boots Case to Disqualify Gosar, Biggs and Finchem from Ballot as 'Insurrectionists,'* ARIZ. MIRROR (Apr. 22, 2022), https://azmirror.com/briefs/judge-boots-case-to-disqualify-gosar-biggs-and-finchem-from-ballot-as-insurrectionists/ [https://perma.cc/Z532-7ZJ8].

Supreme Court. The hard-won efforts to protect the Republic were dismissed by a Court unwilling even to acknowledge the attempted coup.

II. THE LEADUP TO *TRUMP V. ANDERSON*—THE COLORADO LITIGATION

In the early fall of 2023, a group of Colorado voters petitioned the Denver District Court to order that Donald J. Trump be removed from the Republican primary ballot, pursuant to Section Three of the Fourteenth Amendment, because he had engaged in an "insurrection" on January 6, 2021.[60]

After pretrial procedures, the district court conducted a five-day evidentiary trial.[61] Donald Trump presented seven witnesses, the Colorado election officials eight.[62] Testimony was heard from Capitol police officers who had been attacked with a variety of weapons and engaged in hand-to-hand combat with the assailants, as well as Congresspersons who made desperate efforts to escape.[63] Experts on political extremism testified to Trump's coded language that far-right extremists understood to be Trump's calls for violence.[64]

The district court also relied on the Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol,[65] admitted over Trump's hearsay objections.[66] The Colorado Supreme Court found no error, as the state's hearsay rule, 803(8), follows its federal counterpart in admitting such reports of public agencies.[67]

Confirming what the nation (and the world) saw on their screens, the district court found (by clear and convincing evidence) that Trump:

> cultivated a culture that embraced political violence through his consistent endorsement of the same. He responded to growing threats of violence and intimidation in the lead-up to the certification by amplifying his false claims of election fraud. 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

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> One important aspect of Colorado's Election Code is that it enables the Secretary and state courts to determine ballot access qualifications before an election. . . . Colorado has successfully used this same state court procedure to resolve ballot access challenges for over 130 years. . . . Using this well-established procedure, a group of Colorado Republican and unaffiliated voters challenged the qualifications of Petitioner Donald J. Trump as a candidate for the 2024 Republican presidential primary.

Brief on the Merits for Respondent Jena Griswold, Secretary of State of Colorado, at 3–4, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719).

61. Anderson v. Griswold, 2023 WL 8006216, *1, 4 (D. Colo. 2023).
62. *Id.* at *7, 8–10, 11.
63. *Id.*
64. *Id.*
65. H.R. REP. NO. 117–663 (2022).
66. *See* Anderson v. Griswold, 2023 WL 8006216 at *3–5.
67. Anderson v. Griswold, 543 P.3d 283, 326–329 (Colo. 2023)

> 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.[68]

The district court found that Trump's belated and perfunctory calls "to remain peaceful" were feeble efforts at plausible deniability.[69]

Notwithstanding its conclusion that Trump sought to obstruct the peaceful transfer of power by inciting and engaging in an insurrection on January 6, 2021, "within the meaning of Section Three of the Fourteenth Amendment,"[70] the district court declined to remove him from the ballot on the determination that Section Three does not apply to the President because he is not an "officer" of the United States.[71]

The Colorado Supreme Court disagreed on the latter point and reversed, ordering Trump removed from the ballot.[72] After extensive semantic and historical analysis, it concluded that "officer of the United States," as used in Section Three, includes the President,[73] and that Section Three is "self-executing in the sense that its disqualification provision attaches without congressional action."[74]

Regarding the events of January 6, the Colorado Supreme Court affirmed that Trump had planned the attack on the Capitol for months, in coordination with extreme right-wing groups like the Proud Boys and Oath Keepers.[75] The evidence at trial (including video that millions around the world saw) established that Trump's speeches to the crowd and tweets "incited imminent lawlessness and violence,"[76] and even directed the mob against Vice President Pence to disrupt the process of certifying the results of the November election. His words and actions were a "call to arms."[77] The mob (many with weapons) forced itself into the Capitol, overpowered the police, and injured many of them in the process.[78] The purpose was to

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68. Anderson v. Griswold, 2023 WL 8006216 at *42.
69. *Id.* at *12.
70. *Id.* at *26, 34, 41.
71. *Id.*at *43–46.
72. Anderson v. Griswold, 543 P.3d. at 323–25, 342. There were three dissenting opinions. Three dissenters raised issues about the adequacy of the "due process" employed by the election administrators to disqualify the former president, issues under Colorado's Election Law, as well as the absence of any Congressional implementation of Section Three. *Anderson v. Griswold*, 543 P.3d. at 342–70 (Boatright, C.J., Samour, J., & Berkenkotter, J., dissenting). They did not challenge the findings of insurrection, or Trump's engagement in it.
73. Anderson v. Griswold, 543 P.3d. at 323–25.
74. *Id.* at 316.
75. *Id.* at 333–34. *See also* Cheney, *supra* note 12.
76. Anderson v. Griswold, 543 P.3d at 342.
77. *Id.* at 333 (noting the district court's findings). Catie Edmondson, *'So the Traitors Know the Stakes': The Meaning of the Jan. 6 Gallows*, N.Y. TIMES (June 16, 2022), https://www.nytimes.com/2022/06/16/us/politics/jan-6-gallows.html (A gallows was erected in front of the Capitol as the crowd yelled "Hang Mike Pence!").
78. Anderson v. Griswold, 543 P.3d at 330.

stop the certification of Joe Biden's victory and prevent the peaceful transfer of power.[79]

Finally, the court concluded:

> President Trump did not merely incite the insurrection. Even when the siege on the Capitol was fully underway, he continued to support it by repeatedly demanding that Vice President Pence refuse to perform his constitutional duty and by calling senators to persuade them to stop the counting of electoral votes. These actions constituted overt, voluntary, and direct participation in the insurrection.[80]

In response to Trump's claim that he had been denied due process, the Colorado Supreme Court observed that "the trial took place over five days, and included opening and closing statements, the direct- and cross-examination of fifteen witnesses, and the presentation of ninety-six exhibits," and representation by effective counsel.[81]

Accordingly, it was hardly surprising that Colorado's highest court ordered that Donald Trump be removed from the state's Republican primary ballot.[82] The order was stayed pending inevitable review by the United States Supreme Court.[83]

III. *TRUMP V. ANDERSON*

In its per curiam[84] opinion reversing the Colorado Supreme Court's disqualification of Donald Trump, the Supreme Court ruled that "the Constitution makes Congress, rather than the States, responsible for enforcing Section Three against federal officeholders and candidates."[85]

Minimizing (if not ignoring) the key role the States play in presidential elections under the Elections and Electors Clauses of Art. I, § 4, cl. 1 and Art. II, § 1, cl. 2—indeed, the States, in effect, run the national elections through their power to determine the manner of selecting presidential electors[86]—the Court held that States are accorded "no power under the

79. *Id.* at 335–36.
80. *Id.* at 336.
81. *Id.* at 311. No fewer than 42 lawyers participated by appearance or on the briefs.
82. Three dissenters raised issues about the adequacy of the "due process" employed by the election administrators to disqualify the former president, issues under Colorado's Election Law, as well as the absence of any Congressional implementation of Section Three. *Anderson v. Griswold*, 543 P.3d at 342–70 (Boatright, C.J., Samour, J., & Berkenkotter, J., dissenting). They did not challenge the findings of insurrection, or Trump's engagement in it.
83. Anderson v. Griswold, 543 P.3d at 342.
84. *Per curiam*, BLACK'S LAW DICTIONARY (12th ed., 2024) ("[A]ttributed to the entire panel of judges who have heard the appeal and not signed by any particular judge on the panel.").
85. Trump v. Anderson, 601 U.S. 100, 106 (2024).
86. S*ee also* Transcript of Oral Argument at 72, *Anderson*, 601 U.S. at 100 (No. 23-719). *Bush v. Gore*, 531 U.S. 98, 104 (2000) (acknowledging that "the state legislature's power to select the manner for appointing electors is plenary").

Constitution to enforce Section Three with respect to federal offices, especially the Presidency."[87]

The Court read the last provision in Section Three, providing that "Congress may by a vote of two-thirds of each House, remove such disability," as supporting Congress's *sole* role in disqualification.[88] It noted that Congress enacted the Enforcement Act of 1870, authorizing federal district attorneys to bring civil actions in federal court to remove nonlegislative office holders serving in violation of Section Three, confirming, in the Court's view, its authority on such matters.[89]

In addition, the Court concluded that Section Five of the Fourteenth Amendment[90]—which merely *enables* but does not *require* Congress to pass "appropriate legislation" to "enforce" its provisions—is an *exclusive* means of enforcement of the disqualification clause.[91]

Reasoning that the other provisions of the Fourteenth Amendment are *limitations* on State power—Due Process, Equal Protection, Privileges and Immunities— and that Section Five grants Congress the power to enforce the provisions, the Court concluded that "[i]t would be incongruous to read this particular Amendment as granting the States the power—silently no less—to disqualify a candidate for federal office."[92]

Lastly, the Court expressed understandable concern about the risks of conflicting rulings from States.[93] "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)."[94]

Chief Justice Roberts worried, moreover, that affirming the Colorado court would lead to each side, in future elections, charging the other with "insurrection" to disqualify their opponent:

> MR. MURRAY: There's a reason Section 3 has been dormant for 150 years. And it's because we haven't seen anything like January 6th since Reconstruction. Insurrection against the Constitution is something extraordinary. And—
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> CHIEF JUSTICE ROBERTS: It seems to me you're avoiding the question, which is other states may have different views about what constitutes insurrection. . . .

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87. *Anderson*, 601 U.S. at 110. One member of the majority, Justice Neal Gorsuch, while previously sitting on the United States Court of Appeals for the Tenth Circuit, had come to the opposite conclusion, holding that States have a "legitimate interest" in "excluding from the ballot [presidential] candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012).
88. *Anderson*, 601 U.S. at 113.
89. *Id.* at 114–15.
90. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").
91. *See Anderson*, 601 U.S. at 109.
92. *Id.* at 112.
93. *Id.* at 116–17.
94. *Id.* at 116.

> MR. MURRAY: [T]his Court can make clear that an insurrection against the Constitution is something extraordinary. And, in particular, it really requires a concerted group effort to resist through violence . . . .[95]

In short, while January 6 was *sui generis*, voters' counsel argued, it is anticipated by Section Three. "[U]ltimately, what we have here is an insurrection that was incited in plain sight for all to see."[96]

And the issue before the Court, it must be remembered, was the propriety of Colorado's exclusion *in this particular case*.

IV. THE DISAPPEARANCE OF SECTION THREE

On the key point of *who* can enforce Section Three, concurring Justices Sotomayor, Kagan, and Jackson parted company with the majority, thus undercutting the portrayal of the decision as unanimous:

> Remedial legislation of any kind, however, is not required. All the Reconstruction Amendments (including the due process and equal protection guarantees and prohibition of slavery) are self-executing," meaning that they do not depend on legislation. Similarly, other constitutional rules of disqualification, like the two-term limit on the Presidency, do not require implementing legislation. [The Per Curiam] simply creates a special rule for the insurrection disability in Section 3.[97]

Federalist Society Professors Baude and Paulsen agree:

> Section Three is legally self-executing. . . . [Its] disqualification is constitutionally automatic whenever its terms are satisfied. . . . [N]o prior judicial decision, and no implementing legislation, is required . . . . [It is to be enforced] "by officials sworn to uphold the Constitution whose duties present the occasion for applying Section Three's commands.[98]

Colorado's Secretary of State (or that of any state) is such an official—legally invested with authority and responsibility to decide whether a candidate is eligible for office.[99] The disqualification, in short, is "ready for use."[100]

The text itself reinforces Section Three's self-executing nature—"*No person shall be*" eligible—and at the time of adoption, Illinois Senator

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95. Transcript of Oral Argument at 85–86, *Anderson*, 601 U.S. at 100 (No. 23-719).

96. *Id.* at 99. It did not help the case for disqualification that Special Prosecutor Jack Smith chose not to indict Trump for insurrection under 28 U.S.C. § 2383. *See* Reply Brief in Opposition to Respondents Anderson and Griswold at 3, *Anderson*, 601 U.S. at 100 (No. 23-696).

97. *Anderson*, 601 U.S. at 121–22 (Sotomayor, J., Kagan, J., & Jackson, J., concurring in the judgment).

98. Baude & Paulsen, *supra* note 11, at 611.

99. *Id.* at 610–11, 623, 629. The Supreme Court fails even to acknowledge the work of these noted Federalist Society academics; despite the wide attention it drew even before publication. *See, e.g.*, Adam Liptak, *Conservative Case Emerges to Disqualify Trump for Role on Jan. 6*, N.Y. TIMES (Aug. 10, 2023), https://www.nytimes.com/2023/08/10/us/trump-jan-6-insurrection-conservatives.html. *See also* Amicus Curiae Brief of Aklil Reed Amar and Vikram David Amar in Support of Neither Party at 16, *Anderson*, 601 U.S. at 100 (No. 23-719) [hereinafter Brief of Amar and Amar].

100. Baude & Paulsen, *supra* note 11, at 611.

Lyman Trumbull observed: "It is the [F]ourteenth [A]mendment that prevents a person from holding office," with any proposed legislation simply "affor[ding] a more efficient and speedy remedy" for effecting the disqualification.[101]

The majority disingenuously ignored the obvious—that the current Congress *would certainly decline* to enforce the disqualification against a Republican candidate, the House at the time of the 2024 election being solidly in the control of Republicans, who are in the sway of Trump. Successor Congresses will likely stand on the sidelines as well, unless it serves their own political interests, notwithstanding the clear constitutional command.

Ironically, Congress *did* attempt to hold Trump accountable when it charged him with "incitement of insurrection" in his second impeachment in 2021. As noted above, he escaped removal only when a majority of the Senate fell short of the two-thirds required to convict.[102]

The disqualification provision in the Fourteenth Amendment has thus been rendered virtually unenforceable, essentially repealed by the Court, as had happened with the Emoluments Clause in earlier decisions.[103]

As one prominent historian put it:

> [T]he Court in *Trump v. Anderson* openly nullified the section of the Fourteenth Amendment that bars insurrectionists from holding federal or state office, discarding basic lessons about threats to American democracy dating back to the Civil War. . . . The Roberts Court has descended to a level of shame reserved until now for the Roger B. Taney Court that decided the case of *Dred Scott v. Sandford* in 1857. Just as that Court majority sought to suppress the antislavery Republican Party and to help permanently secure the Slave Power's control over American law and government, so the Roberts Court majority has sought, thus far successfully, to protect Trump from prosecution and to secure radical changes in American law friendly to MAGA authoritarianism. The Supreme Court has once again willfully placed itself at the center of a presidential election on which the future of American democracy turns (referring to *Bush v. Gore*, discussed below).[104]

V. THE DISAPPEARANCE OF JANUARY 6

Perhaps the most stunning aspect of *Trump v. Anderson* is the Court's refusal to grapple with (or even cite!) the District Court's fact findings (af-

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101. *Anderson*, 601 U.S. at 122 (Sotomayor, J., Kagan, J., & Jackson, J., concurring in the judgment).
102. IMPEACHING DONALD JOHN TRUMP, PRESIDENT OF THE UNITED STATES, FOR HIGH CRIMES AND MISDEMEANORS, H.R. Res. 24, 117th Cong. (2021) (as adjudged not guilty by Senate, Feb. 13, 2021).
103. The Court dismissed three cases in January 2021, which had sought to hold President Trump accountable under the Foreign and Domestic Emoluments Clauses for his business dealings with foreign actors seeking his favor (such as Saudi lobbyists spending $300,000 for rooms at a Trump hotel). Ciara Torres-Spelliscy, *Supreme Court Ducks an Opportunity on Trump Emoluments Cases*, BRENNAN CTR. FOR JUST. (Feb. 19, 2021), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-ducks-opportunity-trump-emoluments-cases [https://perma.cc/587W-Y9FD].
104. Sean Wilentz, *The 'Dred Scott' of Our Time*, NEW YORK REV. OF BOOKS (Aug. 15, 2024), https://www.nybooks.com/articles/2024/08/15/the-dred-scott-of-our-time/.

firmed by the Colorado Supreme Court) detailing Trump's elaborate efforts to overturn the results of the 2020 election (*the very reason the case was before the Court*), culminating on January 6. It was as if there had been no trial below, no testimony of fifteen witnesses, no news coverage and extensive video of the chaotic breach of the Capitol and battle with police, no trials and convictions of the insurrectionists, no hearings by the Senate Select Committee documenting the historic events of January 6.[105]

The *Anderson* majority showed no interest, either at oral argument or in their decision, in Trump's instigation ("We need to take our country back!" and "We will never give up, we will never concede!") of a mob armed with guns, batons, tasers, knives, pepper spray, and poles that breached the Capitol building to stop the electoral college certification process. The hand-to-hand combat left over 140 law enforcement officers injured, one dead, and members of Congress and the Vice President fleeing for their lives.[106] Estimates approximate the property damage at $2.73 million.[107]

Throughout the violence, for three full hours, Trump watched on the White House television, refusing to call in reinforcements, rejecting desperate pleas from members of Congress and law enforcement to intervene, and instead sending cheering Tweets (some explicitly targeting his own Vice President) to the attackers,[108] like a coach calling in plays from the sidelines.

Trump's lawyers argued, nonetheless, that there was no "insurrection," and if there was, Trump did not instigate it.[109] They pointed out that Special Counsel Jack Smith's[110] indictment of the former President omitted any charge of "insurrection" (a federal crime in itself).[111] Trump also claimed First Amendment protection for his speeches and social media posts urging

105. *See generally* FINAL REPORT OF THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, H.R. REP. NO. 117-663 (2022).

106. Tom Jackman, *Police Union Says 140 Officers Injured in Capitol Riot*, WASH. POST (Jan. 27, 2021), https://www.washingtonpost.com/local/public-safety/police-union-says-140-officers-injured-in-capitol-riot/2021/01/27/60743642-60e2-11eb-9430-e7c77b5b0297_story.html.

107. Zachary Snowdon Smith, *Capitol Riot Costs Go up: Government Estimates $2.73 Million in Property Damage*, FORBES, https://www.forbes.com/sites/zacharysmith/2022/04/08/capitol-riot-costs-go-up-government-estimates-273-million-in-property-damage/ [https://perma.cc/Q8ZH-P8Q7] (Apr. 11, 2022).

108. Patricia Zengerle & Richard Cowan, *Trump Watched Jan. 6 U.S. Capitol Riot Unfold on TV, Ignored Pleas to Call for Peace*, REUTERS, https://www.reuters.com/world/us/us-capitol-probes-season-finale-focus-trump-supporters-three-hour-rage-2022-07-21 (July 22, 2022).

109. Transcript of Oral Argument at 63–65, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719).

110. Appointed by Attorney General Merrick Garland.

111. Transcript of Oral Argument at 113, *Anderson*, 601 U.S. at 100 (No. 23-719). Some amici argued that this rendered Section Three inoperative, because when Congress enacted the Insurrection Act in 1909 (now 18 U.S.C. § 2383), tracking the language of Section Three and substituting criminal prosecution for disqualification as the penalty, it somehow preempted Section Three. *See, e.g.*, Brief of Amicus Curiae State of Kansas in Support of Petitioner at 27–28, *Anderson*, 601 U.S. at 100 (No. 23-719).

the assault on the Capitol, seeking refuge in *Brandenburg v. Ohio*'s[112] "clear and present danger" and "intent to incite violence" standards.[113]

When counsel for the voters tried to turn the attention to January 6 by describing it as a "coordinated attempt to disrupt a function mandated by the Twelfth Amendment, and essential to the constitutional transfer of presidential power,"[114] Justice Alito quickly interrupted and changed the subject: "Well, let me ask you a question about whether the power that you've described as plenary really is plenary."[115]

Only Justice Jackson pursued the question of "insurrection," and only very briefly, when Trump's lawyer argued: "This was a riot. It was not an insurrection. The events were shameful, criminal, violent, all of those things, but it did not qualify as insurrection as that term is used in Section Three" because it was too "chaotic" to constitute an organized insurrection.[116] Justice Jackson's response, "So your point is that a chaotic effort to overthrow the government is not an insurrection?" was left hanging in the air.[117] The majority may have accepted Trump's definition of "insurrection," but we don't know because they do not address the issue at all in their opinion.[118]

And so, in one of the most consequential rulings of the Court, it refused even to acknowledge the elephant in the room—*the attempted coup*. It's like telling the story of Noah and leaving out the part about The Flood. Rather, as noted above, the Court's focus was on the questions of "who can enforce Section [Three] with respect to a presidential candidate,"[119] and whether the president is an "officer of the United States" within the meaning of Section Three.[120] The latter was answered by counsel for the Colorado voters: "Look at the language, '*any* office under the United

112. 395 U.S. 444 (1969) (per curiam).
113. *Id.* at 453–54.
114. Transcript of Oral Argument at 88–89, *Anderson*, 601 U.S. at 100 (No. 23-719).
115. *Id.* at 89.

> JUSTICE ALITO: Suppose that the outcome of an election for president comes down to the vote of a single state, how the electors of the vote of a single state are going to vote. And suppose that Candidate A gets a majority of the votes in that state, but the legislature really doesn't like Candidate A, thinks Candidate A is an insurrectionist, so the legislature then passes a law ordering its electors to vote for the other candidate. Do you think the state has that power?
>
> MR. MURRAY: I think there may be principles that come into play in terms of after the people have voted that Congress—that the state can't change the rules midstream. I'm not sure because I'm not aware of this Court addressing it.

116. *Id.* at 63–65.
117. *Id.*
118. A word search of the per curiam opinion turns up "insurrection" only a few times, but not in the context of what happened on January 6.
119. Transcript of Oral Argument at 20, *Anderson*, 601 U.S. at 100 (No. 23-719) (quoting Justice Samuel Alito).
120. *Id.* at 3–4 (quoting Jonathan F. Mitchell, on behalf of the petitioner).

States,'"[121] and by Trump's counsel's inability to explain why the drafters would have excluded the President.[122]

VI. THE CONCURRENCES AND THE FUTURE OF SECTION THREE

Much of the media portrayed the *Anderson* ruling as "unanimous," repeating Trump's characterization of it as "a nine-to-nothing vote."[123] Yet, the four concurring opinions reveal disagreement on the key question: *who can force Section Three*?

Justice Barrett went along with the result, but objected to its broad scope, asserting that the case "does not require us to address the complicated question whether federal legislation is the exclusive vehicle through which Section Three can be enforced."[124]

Justices Sotomayor, Kagan, and Jackson, concurring only in the judgment, also decried the unnecessary resolution of "novel constitutional questions to insulate this Court and petitioner [Mr. Trump] from future controversy."[125] "The Court today needed to resolve only a single question: whether an individual State may keep a Presidential candidate found to have engaged in insurrection off *its* ballot,"[126] the narrow question of the certiorari grant.[127]

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121. *Id.* at 120 (emphasis added) (quoting Jason C. Murray, on behalf of the respondents). The assertion that the CEO of the United States is *not* an "officer" of it, *See, e.g.*, Brief for Republican National Committee and National Republican Congressional Committee as Amici Curiae in Support of Petitioner at 25–30, *Anderson*, 601 U.S. 100 [hereinafter Brief for RNC], has attracted at least two prominent scholars of elections. *See* Lawrence Lessig, *The Supreme Court Must Unanimously Strike Down Trump's Ballot Removal*, SLATE (Dec. 20, 2023), https://slate.com/news-and-politics/2023/12/supreme-court-trump-ballot-removal-colorado-wrong.html [https://perma.cc/3F9K-27Z2] ("[T]he crafting of Section 3 to omit the president was not an oversight.") (citing law professor Kurt Lash); Samuel Moyn, *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 ("[W]hat Section 3 requires [here] is far from straightforward. Keeping Mr. Trump off the ballot could put democracy at more risk rather than less. Part of the danger lies in the fact that what happened on Jan. 6—and especially Mr. Trump's exact role beyond months of election denial and entreaties to government officials to side with him—is still too broadly contested.").

Among other curious arguments in support of Trump was that Section Three only disqualifies persons from *holding* office, not *running for it*. Brief for RNC, *supra* note 121, at 4 (emphases in original). Another (that appears contradictory): Section Three does not disqualify people from *becoming* President, just *holding* the office. Transcript of Oral Argument at 31–33, *Anderson*, 601 U.S. at 100 (No. 23-719). And the point that the oath the President takes to "preserve, protect, and defend the Constitution" differs from the oath of other public officials to "*support"* the Constitution. *Id.* at 23–25.

122. Transcript of Oral Argument at 48, *Anderson*, 601 U.S. at 100 (No.23-719) ("And it does seem odd that President Trump would fall through the cracks in a sense.").

123. *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

124. Trump v. Anderson, 601 U.S. at 117–18 (Barrett, J., concurring in part and concurring in the judgment).

125. *Id.* at 119 (Sotomayor, J., Kagan, J., & Jackson, J., concurring in the judgment).

126. *Id.* at 123 (emphasis added).

127. *Id.* at 106 (per curiam).

The three agree that allowing a single state in this context to disqualify a presidential candidate would "create a chaotic state-by-state patchwork, at odds with our Nation's federalism principles. That is enough to resolve this case."[128] They would, however, not "shut the door on other potential means of federal enforcement," such as judicial action.[129] Nor did they agree with the majority that in order for Congress to act, it must enact "a particular kind of legislation pursuant to Section [Five]" with "procedures '"tailor[ed]"' to Section [Three]."[130]

Taking issue with the Court's resting enforcement *solely* in Congress, they additionally note that the *only* role assigned to Congress by Section Three—*to remove the disqualification by a two-thirds vote of each chamber*—comes only *after* disqualification of a candidate.[131] It is therefore "hard to understand why the Constitution would require a congressional supermajority to remove a disqualification if a simple majority could nullify Section Three's operation by repealing or declining to pass implementing legislation."[132] In fact, when Justice Kagan pointed out at oral argument that "if Congress has the ability to lift the vote by a two-thirds majority, then surely it can't be right that one House of Congress can do the exact same thing by a simple majority," Trump's lawyer admitted as such.[133]

Underscoring the profound stakes, Sotomayor ends with:

> Section 3 serves an important, though rarely needed, role in our democracy. The American people have the power to vote for and elect candidates for national office, and that is a great and glorious thing. The men who drafted and ratified the Fourteenth Amendment, however, had witnessed an "insurrection [and] rebellion" to defend slavery. They wanted to ensure that those who had participated in that insurrection, and in possible future insurrections, could not return to prominent roles. Today, the majority goes beyond the necessities of this case to limit how Section 3 can bar an oathbreaking insurrectionist from becoming President. Although we agree that Colorado cannot enforce Section 3, we protest the majority's effort to use this case to define the limits of federal enforcement of that provision. Because we would decide only the issue before us, we concur only in the judgment.[134]

128. *Id.* at 119 (Sotomayor, J., Kagan, J., & Jackson, J., concurring in the judgment).
129. *Id.* at 119, 122.
130. *Id.*
131. *See id.* at 121.
132. *Id.*
133. Transcript of Oral Argument at 31–32, *Anderson*, 601 U.S. at 100 (No. 23-719). ("Yeah, there certainly is some tension, Justice Kagan, and some commentators have pointed this out.") (quoting Jonathan F. Mitchell, on behalf of the petitioner). Trump's lawyer sought his way out of this dilemma by arguing that Congress's ability to lift a disqualification "is something akin to a pardon power." *Id.* at 31–32 (quoting Jonathan F. Mitchell, on behalf of the petitioner).
134. *Anderson*, 601 U.S. at 123 (Sotomayor, J., Kagan, J., & Jackson, J., concurring in the judgment).

"By resolving these unnecessary issues, the majority attempts to insulate all alleged insurrectionists from future challenges to their holding federal office."[135]

Quoting Justice Breyer's dissent in the other decision eliding the line between *electing* presidents and judicially *appointing* them: "What it does today," Sotomayor et. al. complained, "the Court should have left undone.[136]

VII. THE SUPREME COURT CASTS ITS PRESIDENTIAL BALLOT—*AGAIN*

When *Trump v. Anderson* overturned Colorado's exclusion of Donald Trump and put him back on the primary ballot, it was, in fact, the second time a conservative Republican Court intruded into the electoral arena to choose the candidate from the party that appointed them. *Bush v. Gore* actually *put* George W. Bush directly into the White House, notwithstanding his solid loss of the popular vote.[137]

By a five-to-four margin, the Court immediately halted the recount, ordered by the Florida Supreme Court, once Bush was certified (by the Secretary of State, *his own campaign co-chair*) to be ahead by a mere 537 votes.[138] The decision was not only unprecedented, but the majority proclaimed *Bush v. Gore* would itself *not* stand as precedent, but was a one-time-only ruling.[139]

In both cases, avoidance of "chaos" served as the pretext for the unprecedented decisions. The *Anderson* Court was, however, blithely indifferent to the chaos and profound distress of *the attempted coup on January 6 and its aftermath*, as all the world witnessed on their screens. The "chaos" that the *Bush v. Gore* Court references was largely the doing of Bush supporters in Florida, who angrily disrupted the vote counting and aggressively intimidated the official counters.[140]

The *Anderson* majority also purported to be concerned about having one or a handful of states determine a presidential election.[141] But, of course, that is precisely the situation now—half a dozen "battleground

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135. *Id.* at 122.

136. *Id.* at 123 (quoting *Bush v. Gore*, 531 U.S. at 158 (Breyer, J., dissenting)).

137. 531 U.S. 98 (2000). *See generally* Mark S. Brodin, Bush v. Gore: *The Worst (or At Least Second-to-the-Worst) Supreme Court Decision Ever*, 12 NEV. L. J. 563 (2012).

138. *Id.* at 564–66.

139. 531 U.S. at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." [The decision thereby] "disappear[ed] down the legal world's version of the memory hole," [and looks like] "not a legal decision but a raw assertion of power."). *See* Adam Cohen, *"Has Bush v. Gore Become the Case That Must Not Be Named?,"* N.Y. TIMES, Aug. 15, 2006, at A18. For those familiar with the British rail system, *Bush v. Gore* is a one-day-return ticket.

140. *What Is the Brooks Brothers Riot? 'Stop the Count' Protests Draw Comparisons to November 2000 Election Chaos*, NEWSWEEK (Nov. 4, 2020), https://www.newsweek.com/what-brooks-brothers-riot-stop-count-protests-draw-comparisons-november-2000-election-chaos-1544989.

141. *Anderson*, 601 U.S. at 116–17 (per curiam).

states" determine who sits in the Oval Office.[142] The Court has long recognized that "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States."[143] The election of 2000 demonstrated dramatically that the single state of Florida (with a governor who was the brother of the Republican candidate, and a Secretary of State who was his campaign co-chair) *could and did* determine the presidential election.[144]

Several amicus briefs in support of Donald Trump predicted catastrophic consequences of a ruling affirming the Colorado decisions, viz., allowing one state to remove Trump from the ballot would open the gates for other states to do the same in retaliation.[145] Moreover, if Trump were removed from the ballot in Colorado, the argument went, it would dilute the votes of his supporters in other states where he remained on the ballot because of his diminished chances for victory.[146]

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142. *See* Anderson v. Griswold, 543 P.3d 283, 305 (Colo. 2023) ("States exercise these powers through 'comprehensive and sometimes complex election codes,' regulating the registration and qualifications of voters, the selection and eligibility of candidates, and the voting process itself. These powers are uncontroversial and well-explored in U.S. Supreme Court case law."). In fact, two noted constitutional scholars observe that "different states may properly have different procedures and protocols for implementing Section Three." Brief of Amar and Amar, *supra* note 99, at 3. It should be noted as well that the conservative Justices, as a matter of ideology, usually promote state sovereignty over federal power, except when not convenient, as in *Bush v. Gore*, where the U.S. Supreme Court overrode the Florida Supreme Court's order that the recount continue to completion.

143. Anderson v. Celebrezze, 460 U.S. 780, 794 (1983).

144. E. Tammy Kim, *The Ghost of* Bush v. Gore *Haunts the Supreme Court's Colorado Case*, NEW YORKER (Feb. 7, 2024), https://www.newyorker.com/news/news-desk/the-ghost-of-bush-v-gore-haunts-the-supreme-courts-colorado-case; Lesley Kennedy, *How the 2000 Election Came Down to a Supreme Court Decision*, HIST. CHANNEL, https://www.history.com/news/2000-election-bush-gore-votes-supreme-court [https://perma.cc/C8JW-KA6R] (Dec. 1, 2023).

145. *See, e.g.*, Brief for RNC, *supra* note 122, at 15.

146. *See, e.g.*, Brief of Amici Curiae States of Indiana, West Virginia, Twenty-Three Other States, the Arizona Legislature, and the Legislative Leadership of North Carolina in Support of Petitioner at 23, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719) ("[N]o State is an electoral island because 'the impact of the votes cast in each State is affected by the votes cast'– or, in this case, not cast–'in other States.'"); Brief of Amicus Curiae Landmark Legal Foundation in Support of Petitioner at 1, *Anderson*, 601 U.S. at 100 (No. 23-719) ("If the Court permits the Colorado Supreme Court's standard of insurrection to stand, it will effectively allow a state trial court to disenfranchise millions of voters and erode trust Americans have in the electoral process without affording a political candidate adequate due process of law."); Brief of 102 Colorado Registered Electors as Amici Curiae in Support of Petitioner at 30, *Anderson*, 601 U.S. at 100 (No. 23-719) ("The Colorado court sought to change the course of the 2024 presidential election by making a choice which affects the franchise of all Colorado voters and potentially leads other states down the same road.").

But see Brief of Amicus Curiae Sherrilyn A. Ifill in Support of Respondents and Affirmance at 22, *Anderson*, 601 U.S. at 100 (No. 23-719).

> The contention that applying Section 3 to President Trump will "open up the floodgates," allowing it to be wielded as a sword against those engaged in protected First Amendment activity are either cynically perverting the history of political protest in this country or are seeing monsters in the shadows. Insurrection is not protest. Insurrection as defined by the Colorado Supreme Court makes the distinction between insurrection and protest clear.

Id. It should be noted that this Court has already greenlighted the extreme gerrymandering of state and congressional districts that dramatically dilutes the voting power of Democratic constituents, creates

The concurring Justices raised these matters as well at oral argument. Justice Jackson asked counsel for the Colorado respondents: "[W]hy [would] the Framers have designed a system that would—could result in interim disuniformity in this way where we have elections pending and different states suddenly saying you're eligible, you're not, on the basis of this kind of thing?"[147] Mr. Murray responded:

> Well, what they were concerned most about was ensuring that insurrectionists and rebels don't hold office. And so, once one understands the sort of imperative that they had to ensure that oath-breakers wouldn't take office, it would be a little bit odd to say that states can't enforce it, that only the federal government can enforce it, and that Congress can essentially rip the heart out of Section 3 by a simple majority just by failing to pass enforcement legislation. Federalism creates redundancy. And, here, the fact that states have the ability to enforce it as well, absent federal preemption, provides an additional layer of safeguards around . . . Section 3.[148]

Justice Kagan followed with similar questions.[149]

In fact, the Constitution explicitly assigns each state the authority to decide a candidate's qualifications for itself. The Electors Clause provides: "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for the President and Vice President.[150] The section gives the states "far-reaching authority" to run presidential elections.[151]

But the *Anderson* Court majority sees "little reason to think that these Clauses implicitly authorize the States to enforce Section Three against federal officeholders and candidates."[152] The split opinions of the Justices leave the complicated matter of the role of the States in enforcement of Section Three in limbo. What, for example, would be the result if *several* States disqualified a candidate from their own ballots? A majority of States? Should the solution not lie in Congress's otherwise inexplicable prerogative to overturn disqualification by a two-thirds vote? Should Trump have sought redress there, rather than the Supreme Court?

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permanent Republican majorities that do not reflect the views of the citizens of those districts, and skews national politics towards the far right. *See* Rucho v. Common Cause, 588 U.S. 684, 718 (2019).

147. Transcript of Oral Argument at 95–96, *Anderson*, 601 U.S. at 100 (No. 23-719).

148. *Id.* at 96.

149. *Id.* at 106 ("[W]hat's a state doing deciding who gets to—who—other citizens get to vote for president?"). Complicating the matter is the possibility, raised by Justice Alito, of non-mutual collateral estoppel having a "cascading effect" among the states, freezing in the first determination of Section Three issues. *Id.* at 133. The Secretary of State's counsel replied:

> [T]here may be some messiness of federalism here because that's what the Electors Clause assumes will happen. And if different states apply their principles of—of collateral estoppel and come to different results, that's okay. And—and Congress can—can act at any time if—if it thinks that it's truly federalism run amok.

Id. at 134–35.

150. U.S. CONST. art. II, § 1, cl. 2.

151. Chiafalo v. Washington, 591 U.S. 578, 588–89 (2020).

152. Trump v. Anderson, 601 U.S. at 112 (per curiam).

Notably, Colorado was not the only state to disqualify the former President in 2024. Maine's Secretary of State also excluded Trump from its ballot under Section Three, writing:

> The events of January 6, 2021, were unprecedented and tragic. They were an attack not only upon the Capitol and government officials, but also an attack on the rule of law. The evidence here [at an adversary hearing] demonstrates that they occurred at the behest of, and with the knowledge and support of, the outgoing President. The U.S. Constitution does not tolerate an assault on the foundations of our government, and [state election law] requires me to act in response.[153]

The state Superior Court remanded the case to the Secretary, on Trump's appeal, with instructions to await the Supreme Court's ultimate decision.[154]

Illinois also removed Trump from the primary ballot after an evidentiary hearing by a retired Republican Judge acting for the Board of Elections, finding "the evidence presented at the hearing on January 26, 2024, proved by a preponderance of the evidence that President Trump engaged in insurrection, within the meaning of Section 3 of the Fourteenth Amendment."[155] That finding was affirmed by a Cook County judge, who ruled that Trump was not "legally qualified" for the office of the presidency.[156] Several other state and federal challenges were dismissed for lack of private citizen standing.[157]

The Colorado disqualification was, of course, the one that found its way to the U.S. Supreme Court.

It must be noted that the Court's refusal to disqualify Trump is not without its liberal academic supporters. Both Lawrence Lessig (Harvard) and Samuel Moyn (Yale) published *New York Times* op eds urging the Court, on pragmatic grounds, to unanimously overturn the Colorado decision and leave the matter to the voters, as democracy would seem to require.

Professor Moyn wrote:

> Like many of my fellow liberals, I would love to live in a country where Americans had never elected Mr. Trump — let alone sided with him by the millions in his claims that he won an election he lost, and that he did nothing wrong afterward. But nobody lives in that America. For all the power the institution has arrogated, the Supreme Court can-

153. Melissa Quinn, *Maine Court Pauses Order That Excluded Trump from Primary Ballot, Pending Supreme Court Ruling*, CBS NEWS (Jan. 17, 2024), https://www.cbsnews.com/news/trump-maine-superior-court-primary-ballot-eligibility-supreme-court/ [https://perma.cc/VSC3-22V3].

154. *Trump Was Disqualified for Insurrection in the Only Three States That Heard Evidence*, CITIZENS FOR ETHICS (Feb. 6, 2024) https://www.citizensforethics.org/reports-investigations/crew-reports/trump-was-disqualified-for-insurrection-in-the-only-two-states-that-actually-heard-evidence/ [https://perma.cc/Q4HM-HNP2].

155. *Id.*

156. *Id.*

157. *Id.*

> not bring that fantasy into being. To bar Mr. Trump from the ballot now would be the wrong way to show him to the exits of the political system, after all these years of strife. . . .Keeping Mr. Trump off the ballot could put democracy at more risk rather than less.[158]

Professor Lessig reached a similar conclusion, despite his acknowledgement that:

> Donald Trump is an astoundingly dangerous candidate for president. He is a pathological liar, with clear authoritarian instincts. Were he elected to a second term, the damage he would do to the institutions of our republic is profound. His reelection would be worse than any political event in the history of America—save the decision of South Carolina to launch the Civil War.[159]

Nonetheless, Lessig worries that excluding him, particularly by a close vote of the Supreme Court, could well trigger the next Civil War.[160] "We must defeat him politically—not through clever lawyer interpretations of ambiguous constitutional text."[161]

The Framers of the Fourteenth Amendment had more than ample reason to take the matter out of the hands of voters, which they explicitly did in Section Three. And, alas, Trump was not defeated at the polls.

VIII. FINAL THOUGHTS

The Supreme Court chose to use a case involving the disqualification of a Presidential candidate by *a single state*, from its *own primary ballot*, to effectively delete Section Three from the Fourteenth Amendment. *Trump v. Anderson* leaves the crucial provision in tatters, endangering the Constitutional order that has prevailed for 230 years. The Chief Executive may now summon force to stay in power unlawfully, without consequence, and serve another Term.

A few months later, in another unprecedented ruling,[162] the same six-Justice supermajority immunized Donald Trump (and presumably all future presidents)[163] from criminal prosecution for crimes committed while in office.[164]

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158. Moyn, *supra* note 121.

159. Lawrence Lessig, *The Supreme Court Must Unanimously Strike Down Trump's Ballot Removal*, SLATE (Dec. 20, 2023), https://slate.com/news-and-politics/2023/12/supreme-court-trump-ballot-removal-colorado-wrong.html [https://perma.cc/3F9K-27Z2].

160. *Id.*

161. *Id.*

162. Trump v. United States, 603 U.S. 593 (2024).

163. As with *Anderson*, it remains to be seen whether the hard-right majority would treat a Democratic President with the same unprecedented leniency.

164. *See* Trump v. United States, 603 U.S. 593 at 606. Amazingly, Trump's lawyers argued (as they did in the lower courts) that the President could order the assassination of a political rival and avoid criminal prosecution, as long as he had not been previously impeached and convicted for it. *See* Transcript of Oral Argument at 9, Trump v. United States, 603 U.S. at 593 (No. 23-939) (noting a hypothetical posed by Justice Sotomayor, wherein a sitting President orders the assassination of a political rival, and Trump attorney John Sauer's response to the question of whether the president would be

It could be said that the majorities[165] in both these cases were engaged in the same kind of oath-violating as Donald Trump. They apparently misled the Senate when they testified under oath that *Roe v. Wade* was "settled law," and then went about overruling it at the first opportunity.[166] They have blithely overturned key long-standing precedent.[167] They have created out of whole cloth doctrines that elevate presidents to nearly royal status, immune from accountability for their criminal acts,[168] and that transfers power from federal regulatory agencies to the courts, where Republican judges predominate.[169] They have slow-walked decisions like *Trump v. United States* in order to protect him from prosecution and run out the clock before the 2024 election.[170]

How can it be that our treasured Constitution could countenance the return to office of a Commander-in-Chief whose utter contempt for democratic norms and values culminated in our only insurrection since 1860?[171]

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immune from such conduct). *See also* Alison Durkee, *Trump Attorney John Sauer Doubles Down on Argument That Presidents Are Immune from Assassinating Political Rivals at Supreme Court*, FORBES (Apr. 25, 2024), https://www.forbes.com/sites/alisondurkee/2024/04/25/trump-attorney-john-sauer-doubles-down-on-argument-that-presidents-are-immune-from-assassinating-political-rivals-at-supreme-court/ [https://perma.cc/KCV2-4TXX].

165. At least four of the group were themselves controversial appointments at the time, and the other two since their appointments. *See* Katelyn Fossett, *30 Years After Her Testimony, Anita Hill Stills Wants Something from Joe Biden*, POLITICO (Oct. 1, 2021) (discussing the appointments of Justice Thomas and Justice Kavanaugh), https://www.politico.com/news/magazine/2021/10/01/30-years-after-her-testimony-anita-hill-still-wants-something-from-joe-biden-514884; N.Y. Times Editorial Board, *Neil Gorsuch, the Nominee for a Stolen Seat*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/opinion/neil-gorsuch-the-nominee-for-a-stolen-seat.html; Joan Biskupic, *Amy Coney Barrett Joins the Supreme Court in Unprecedented Times*, CNN POL. (Oct. 27, 2020), https://www.cnn.com/2020/10/27/politics/amy-coney-barrett-joins-supreme-court-unprecedented/index.html [https://perma.cc/2JX3-83LJ]; Jodi Kantor, Aric Toler, & Julie Tate, *Another Provocative Flag Was Flown at Another Alito Home*, N.Y. TIMES (May 22, 2024), https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.htm; Jeff Shesol, *The Tragedy of John Roberts*, N.Y. TIMES (July 3, 2023), https://www.nytimes.com/2023/07/03/opinion/john-roberts-supreme-court.html.

166. *See* D'Angelo Gore, Robert Farley, & Lori Robertson, *What Gorsuch, Kavanaugh and Barrett Said About Roe at Confirmation Hearings*, FACTCHECK.ORG (May 9th, 2022), https://www.factcheck.org/2022/05/what-gorsuch-kavanaugh-and-barrett-said-about-roe-at-confirmation-hearings.

167. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024), overturning the *Chevron* doctrine, dating back to 1984, that courts may not substitute their own construction of statutory provisions for the reasonable interpretation made by an agency with expertise on the matter.

168. *See* Trump v. United States, 603 U.S. 593, 614–15 (2024).

169. *See Loper Bright*, 603 U.S. at 369.

170. John Kruzel & Andrew Goudsward, *US Supreme Court's Slow Pace on Immunity Makes Trump Trial Before Election Unlikely*, REUTERS (July 1, 2024), https://www.reuters.com/world/us/us-supreme-courts-slow-pace-immunity-makes-trump-trial-before-election-unlikely-2024-06-30/.

171. Professor Aziz Rana persuasively warns against relying on the Constitution to save us. *See generally* AZIZ RANA, THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM (Univ. of Chicago Press, 1st ed., 2024).

The Supreme Court has created the very Imperial Presidency[172] most feared by the patriots of 1776 and the Framers of 1789 and 1868— unaccountable, immune from both disqualification[173] and criminal prosecution,[174] unconstrained by either the courts, the Congress, or the administrative state.[175]

The previously inconceivable has now become reality. A Chief Executive who had sought to remain in power after losing his re-election by inciting a violent mob to attack the Nation's Capital is now back in the White House, with a compliant Senate, a compliant Congress, a compliant Supreme Court, and a cheering public. Timothy Snyder's feared "anticipatory compliance" to the new Sheriff in town is now well underway.[176]

It did not have to play out this way. The warning signs were flashing red in plain view.

Trump repeatedly stated publicly during the campaign that he would not accept the results of the election if he lost, and his attempted coup the last time out underscores his determination.[177] Trump announced that he would rule as a dictator on day one of his second term, and perhaps longer.[178] He has also made no secret of his admiration for dictators around the world.[179] He has chillingly implied that 2024 will be our last election: "In four years, you won't have to vote again."[180]

The following comment made during oral argument, prompted by Trump's counsel, may signal an early effort to *qualify* Trump for a *third* term:

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172. The recent decisions of the Supreme Court noted above give new meaning to Arthur Schlesinger's conception. *See generally* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (Houghton Mifflin, 1973).

173. *See generally Anderson*, 601 U.S. 100 (2024).

174. *See* Trump v. United States, 603 U.S. 593 (2024).

175. *See* Loper Bright, 603 U.S. at 369 (overturning *Chevron* deference to administrative agencies and thus charting the dismantling of the modern state).

176. SNYDER, *supra* note 19, at 18. By way of example, the liberal hosts of *Morning Joe* on MSNBC traveled to Mar-a-Lago for a "fence-mending" meeting with Trump (who has repeatedly threatened retaliation against critical media outlets and political opponents) immediately after the election. Brian Stelter, *'Morning Joe' Meeting with Trump Was Driven by Fears of Retribution from Incoming Administration, Sources Say*, CNN BUS. (Nov. 19, 2024), https://www.cnn.com/2024/11/19/media/morning-joe-trump-mar-a-lago-meeting-fears/index.html [https://perma.cc/JG5Q-G6LK]. Both owners of the *Washington Po*st and *LA Times* blocked endorsements of Kamala Harris. *Id.*

177. Rashard Rose & Kate Sullivan, *Trump Says He Will Only Accept 2024 Election Results "If Everything's Honest,"* CNN POL. (May 2, 2024), https://www.cnn.com/2024/05/02/politics/donald-trump-accept-2024-election-results/index.html [https://perma.cc/U6FE-48KB].

178. *See* David A. Graham, *Trump Says He'll Be a Dictator on "Day One,"* ATLANTIC (Dec. 6, 2023), https://www.theatlantic.com/ideas/archive/2023/12/trump-says-hell-be-a-dictator-on-day-one/676247/ [https://perma.cc/M9LK-XB3S].

179. Ryan Cooper, *Donald Trump Loves Dictators*, AM. PROSPECT (Sept. 12, 2024), https://prospect.org/politics/2024-09-12-donald-trump-loves-dictators/ [https://perma.cc/2ZXP-C77Q].

180. Nick Robertson, *Biden's Former Communications Director: Trump Wasn't Saying "There Will Be No More Elections,"* HILL (July 29, 2024), https://thehill.com/homenews/campaign/4797737-trump-threat-elections-bedingfield/ (quoting Donald Trump).

> JUSTICE SOTOMAYOR: I'm wondering why the Term Limits qualification is important to you. Are – are you setting up so that if some president runs for a third term, that a state can't disqualify him from the ballot?[181]

Candidate Donald Trump refused to sign an Illinois ballot loyalty oath that he would not support the overthrow of the government. The Biden campaign condemned his decision to sidestep the pledge, but to no avail. "For the entirety of our nation's history, presidents have put their hand on the Bible and sworn to protect and uphold the Constitution of the United States—and Donald Trump can't bring himself to sign a piece of paper saying he won't attempt a coup to overthrow our government."[182]

Trump could not be admitted to the Bar of any state, as an oath of allegiance to the Constitution is typically required in each of them.[183] Nor could Trump be employed in a civil service position, nor serve in Congress, without swearing allegiance to the Constitution.[184]

Now he has taken the presidential oath again, despite having already proven his disloyalty to the Constitution that he once swore to preserve and defend when he conspired to prevent the peaceful transfer of power, for the first time in our history.[185] And he is protected by a Republican supermajority on the Supreme Court, including three of his own choices.

The cost of pretending January 6 was anything other than a violent attempt to seize power can be seen in the experiences of other countries where leaders of unsuccessful coups have later come to power. Juan Peron in Argentina and Hugo Chavez in Venezuela are two notable examples. Each destroyed the existing constitutional systems when they returned as

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181. Transcript of Oral Argument at 24–25, Trump v. *Anderson*, 601 U.S. 100 (2024) (No. 23-719). *See also* Peter Baker, *President's Third Term Talk Defies Constitution and Tests Democracy,* NEW YORK TIMES (Apr. 6, 2025), https://www.nytimes.com/2025/04/06/us/politics/trump-third-term-constitution.html.

182. Cate Cadell, *Trump Skips Illinois Loyalty Oath Promising Not to Overthrow Government*, WASH. POST (Jan. 6, 2024), https://www.washingtonpost.com/elections/2024/01/06/donald-trump-loyalty-pledge/; Nina Lakhani, *Donald Trump did not Sign Illinois Pledge not to Overthrow Government*, THE GUARDIAN (Jan. 7, 2025), https://www.theguardian.com/us-news/2024/jan/07/donald-trump-illinois-loyalty-oath-overthrow-government.

183. *See Oaths of Admission of All Fifty States*, CDN, https://cdn.ymaws.com/www.inbar.org/resource/resmgr/litigation/Oaths.pdf [https://perma.cc/TRT3-AWPU].

184. *See* Jeff Neal, *The Oath of Office and What It Means*, FED. NEWS NETWORK (Oct. 24, 2019), https://federalnewsnetwork.com/commentary/2019/10/the-oath-of-office-and-what-it-means/ [https://perma.cc/EZ9C-7B4F].

185. Boston Globe columnist Renee Graham observed that Trump "might as well have crossed his fingers behind his back" when he took the oath a second time." Renee Graham, *His Speech was About Excluding and Punishing Swathes of the Population*, BOSTON GLOBE, January 21, 2025, at A9. He also returns to office as a convicted felon (thirty-four felonies to be exact). Michael R. Sisak, Jennifer Peltz, Jake Offenhartz, & Michelle L. Price, *Trump Becomes First U.S. President Sentenced as a Felon*, L.A. TIMES (Jan. 10, 2025), https://www.latimes.com/world-nation/story/2025-01-10/trump-hush-money-felony-case-sentencing.

dictators.[186] Trump friend, Jair Bolsonaro, however, is under indictment in Brazil for his attempted coup (one year after Trump's) to remain in the Presidency after losing his election; and he is barred from running again until at least 2030.[187]

Donald Trump has now normalized violence, threats, and intimidation as part of our political process.[188] *Trump v. Anderson* is sadly a window into the transformation of a formerly respected Supreme Court into a rubber stamp for a President who has shown contempt for the law.[189] The decision makes a mockery of our founding document, as well as the Rule of Law itself, and foretells more affronts to the Republic to come. The constraints on the Chief Executive, so carefully constructed in the Constitution and its Fourteenth Amendment, have been removed, and accountability abandoned.

Will Benjamin Franklin's prophetic fear—that we might not be able *to keep* our Republic—come to be?[190]

As a wise person once observed: "Wherever law ends, tyranny begins."[191]

186. Brief of Amici Curiae Professors David M. Driesen, Malcom M. Freeley, Gabor Halmai, Andrea Scoseria Katz, Karl Manheim, & Rogers M. Smith in Support of Respondents at 17, *Anderson*, 601 U.S. at 100 (No. 23-719). S*ee also* Brief of Experts in Democracy as Amici Curiae in Support of Respondents at 6–13, *Anderson*, 601 U.S. at 100 (No. 23-719) [hereinafter Brief of Experts] (noting international experiences of democratic erosion where leaders use violence to achieve or remain in power).

187. Rachel Dobkin, *Former Brazilian President Bolsonaro Indicted Over Alleged Coup Attempt*, NEWSWEEK (Nov. 21, 2024), https://www.newsweek.com/jair-bolsonaro-indictment-brazil-coup-attempt-1989826.

188. Brief of Experts, *supra* note 186, at 25–31; Peter Baker, *Trump, Outrage and the Modern Era of Political Violence*, N.Y. TIMES (Sept. 16, 2024), https://www.nytimes.com/2024/09/16/us/politics/trump-violence-assassination-attempt.html.

189. The present Court is the least trusted Supreme Court in recent times. According to the latest polling by Annenberg Public Policy Center, support for the Court stands at 44%, with only 8% expressing a "'great deal of trust' in the court." This is the lowest level of trust since Annenberg began surveying the public on this issue in 2005 when 75% of the American public trusted the court. *Trust in U.S. Supreme Court Continues to Sink*, ANNENBERG PUB. POL'Y CTR. (Oct. 2, 2024), https://www.annenbergpublicpolicycenter.org/trust-in-us-supreme-court-continues-to-sink/ [https://perma.cc/42W8-2KT6].

190. Robert M. Hauser, *"A Republic If You Can Keep It,"* AM. PHIL. SOC'Y (Aug. 21, 2020), https://www.amphilsoc.org/blog/republic-if-you-can-keep-it.

191. JOHN LOCKE, TWO TREATISES OF GOVERNMENT Ch. 18, No. 202 (1689).