The Supreme Court's Oral Argument in *Trump v. Anderson*: The Court's Seeming Failure to Understand Some Basic Starting Points

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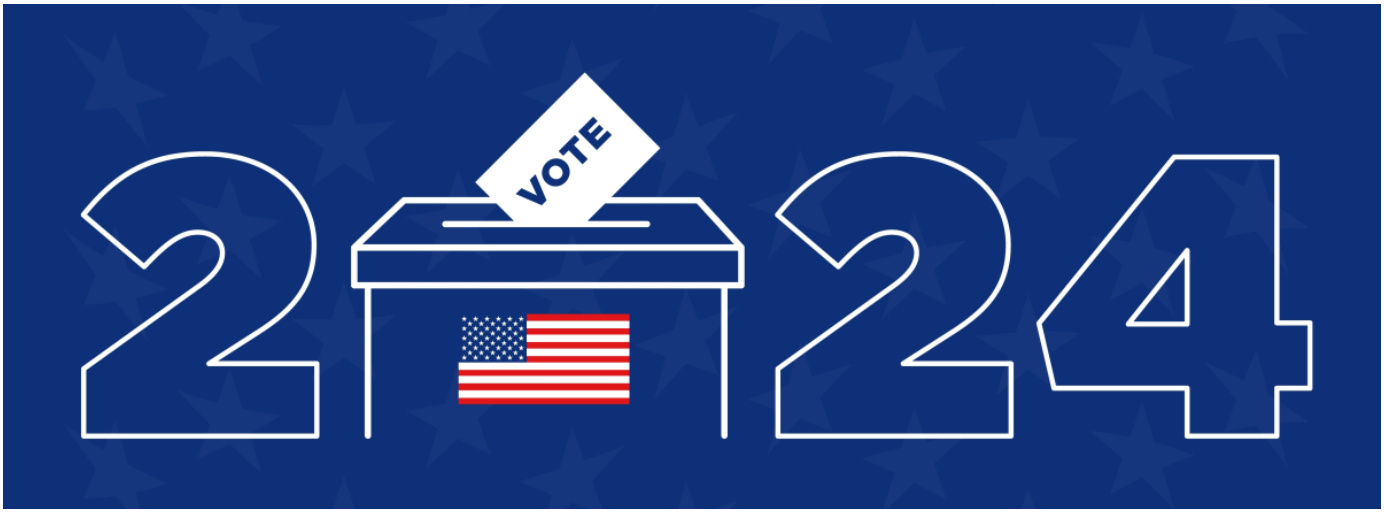

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Last week's Supreme Court oral argument in *Trump v. Anderson* was disconcerting. Perhaps, given the complexity of the case and the relatively little time the Justices had to prepare, we all ought not to be overly surprised or disappointed by the generally poor quality of the Justices' lines of oral inquiry, but the stakes of the case (both

symbolically and substantively) should have led to more careful interrogation. A low-quality oral argument does not mean, of course, that the Court will generate subpar written opinions, but because of the felt need to resolve the case soon (hence the expedited briefing and argument) the Court has limited time to do the more careful thinking that the case warrants. After all, putting aside the ultimate outcome of the case, no one wants a set of opinions that look worse with each passing year the way many of the writings in *Bush v. Gore* do.

Particularly troubling were many of the questions posed by the Justices about the effects that the decision of the Colorado Supreme Court, if allowed to stand, would have on other states. I am not suggesting that such effects on interstate federalism are "consequentialist" in the sense that the Court cannot properly take them into account in deciding and implementing constitutional first principles; instead I am arguing that the Court's apparent impression of the potentially harmful effects itself reflects failure to deeply appreciate the basic constitutional structure surrounding presidential selection.

For example, at one point Chief Justice John Roberts, undoubtedly one of the smartest lawyers in the land, suggested that if Colorado were allowed to exclude Donald Trump from competition for Colorado's electoral college votes, then other states would do the same thing for other (perhaps Democrat) candidates, and "[i]t'll come down to just a handful of states that are going to decide the presidential election. That's a pretty daunting consequence." Perhaps that's a daunting consequence, but it's one we already have, regardless of what the Court does. This

"daunting consequence" *is* the modern electoral college. Given the (entirely rational, if selfish) winner-take-all approach almost every state uses to allocate electors, and given the resulting (again, rational) decision by candidates to spend time and money only in states that are "in play," the election for the last several election cycles has "come down to just a handful of states." And there is nothing any state or the federal government can do to change other states' decisions about how to appoint electors in this regard, so this "daunting" feature is not likely to change anytime soon, unless we eliminate the electoral college system itself.

In another exchange, Justice Samuel Alito, coming from the other direction, wondered not whether states would engage in tit-for-tat retaliation, but instead whether, if Colorado's decision were allowed to stand, other states would be unduly constrained from doing what they want. That is, he asked whether, when Section Three litigation against Mr. Trump ensues in other states, those states would be *required* by the Colorado ruling (if it were to stand) to remove Donald Trump from consideration, because ordinarily once a person has lost a lawsuit in one state, he is prevented (that is, precluded) from relitigating in other states the matters (in this case Trump's having taken an oath and been an insurrectionist) on which he lost in the first case. This question by Justice Alito was quite insightful, but is also quite answerable. The doctrine of non-mutual collateral estoppel (the idea that a person who loses in a lawsuit once cannot keep litigating over and over) would not apply in these circumstances. The lawyers at oral argument said it would not apply because Colorado law does not embrace non-mutual collateral

estoppel, but that answer (even if accurate) wouldn't address Justice Alito's bigger concern if another state besides Colorado (whose law does embrace non-mutual collateral estoppel) were to do what Colorado had done. The answer to this bigger concern about non-mutual collateral estoppel in these circumstances relates to public-policy exceptions the Supreme Court has itself repeatedly recognized concerning the non-mutual collateral estoppel doctrine. For starters, precluding a party from re-litigating an issue may be justified only if that party had adequate incentive and opportunity to fully contest the issue in the original litigation. Candidates (and their supporters, who have rights too) may not have adequate incentive to spend time and money to litigate to try to stay on the ballot in states where the other party is likely to win the general election in any event, and that lack of incentive argues against non-mutual collateral estoppel. Relatedly, even if a candidate litigated hard (and lost) in one state, his supporters in other states were not parties to the first lawsuit and thus may not have had an adequate chance to fully protect their own rights. Finally, as the Supreme Court recognized in *United States v. Mendoza* (where it held that the U.S. government is not bound by non-mutual collateral estoppel), there are certain kinds of actors—and presidential candidates would seem to be among them—that need substantial flexibility in litigating issues of pressing public importance such that these actors should not have to risk being bound to any particular case. There is much more here to be said about this topic, and it is a shame that the Court and the oral advocates did not develop this issue (and none of the parties even cited much less discussed *Mendoza*) more thoroughly.

One substantial reason this important topic received inadequate attention is that (and here I pull the lens back a bit) the Justices at argument generally seemed to act as if we have a truly national election for President that an election that Colorado might unduly influence. But under our originalist Constitution we have no such election—we have 51 separate procedures for appointing 51 different sets of presidential electors. I say "procedures" *because states don't even have to have popular elections to select electors*. In a part of *Bush v. Gore* that commanded easy majority support and that is even more secure in the two decades since during which the Court has committed more forcefully to originalism, the Court casually (because there is really no debate on this question) reminded us all that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state . . . chooses a statewide election as the means to implement its power to appoint members of the electoral college." In other words, unlike the process for selecting U.S. House members and Senators (whom the Constitution commands be elected by the people directly), the process for selecting electors is left entirely to each state, and the federal government is given no power to override. It is true, as the Court has observed, that "[h]istory has now favored the voter, [in that] in each of the several States the citizens themselves vote for Presidential electors," but any state could, if it wanted, confer power, for example, to its elected state legislature or governor to decide who the electors from that state (and which candidate those electors are pledged to support) shall be.

This uncontroverted flexibility that states have means that, no matter

what the Court says about Colorado's power to implement Section 3 of the Fourteenth Amendment and its prohibition on oath-breakers holding office under the United States, each state could, *under state law rather than Section Three*, disqualify someone who did what Donald Trump did from competing for that state's set of pledged electors. For example, suppose later this month the Supreme Court reverses the Colorado Supreme Court, and then the voters of Colorado put an initiative on their ballot for later this year that makes clear that *under the state constitution* no election for presidential electors shall include on the ballot electors pledged to support any candidate who has engaged in insurrection, a term that coincidentally mirrors Section Three of the Fourteenth Amendment but which is defined under the Colorado initiative as having done what the Colorado trial court found Donald Trump did. What result then? There is nothing the U.S. Supreme Court could (or should) do. Because Colorado's action would rest on adequate and independent state-law grounds, Section Three of the Fourteenth Amendment would irrelevant (even if Colorado law used the word "insurrection.") Colorado's power to implement its duty to appoint presidential electors is undeniably self-executing, and Congress need not (indeed could not) do anything to facilitate or second-guess exercise of such state authority. And just as Colorado need not have an election for electors at all, the people of Colorado can certainly have an election, but choose to conduct it within certain state-law-prescribed parameters.

If the U.S. Supreme Court doesn't firmly understand this basic starting point—that the electoral college framework the Constitution sets up confers incredibly broad and decentralized powers on each state—then I

fear for the quality of the opinions that *Trump v. Anderson* might generate. The Court's manipulation of the meaning of Section Three can't address the basic reality that states can (and ultimately will) do whatever they want as long as we have an electoral college model for picking Presidents, something on which our originalist Constitution is (for better or worse) quite clear.

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