RESIDUAL STATE POWER TO REGULATE PRESIDENTIAL QUALIFICATIONS IN THE WAKE OF *TRUMP V. ANDERSON* AND *MOORE V. HARPER*

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In *Trump v. Anderson*, the Supreme Court refused to permit states to implement Section 3 of the Fourteenth Amendment and disqualify candidates for federal office under that provision. Yet under Article II of the Constitution, states as entities enjoy wide latitude to pick electors who in turn select Presidents. This latitude has been confirmed by the Court in *Chiafalo v. Washington* and (implicitly) in *Moore v. Harper*, and is in no way constrained by *U.S. Term Limits, Inc. v. Thornton* (insofar as the latter deals specifically with congressional elections, a matter over which states do not enjoy the same discretion they enjoy concerning presidential selection). Because, this Article argues, the *Anderson* ruling, however dubious, does nothing to cut back on state power to exclude, *as a matter of state law*, persons who have engaged in rebellion from being considered for a state's support in a presidential contest, states can accomplish via state law what the Court said Colorado could not do under Section 3. This reality in turn makes the *Anderson* ruling, and its rationale (emphasizing the need for uniformity among states), even more unconvincing.

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INTRODUCTION

In the aftermath of (or even run-up to) *Trump v. Anderson*,[1] imagine Coloradans had amended their state constitution in the following way: Colorado Constitution schedule section 20 (which currently provides that "[t]he general assembly shall provide that . . . the electors of the electoral college shall be chosen by direct vote of the people"[2]) is replaced with the following provision, to be housed in article VII, section 12 of the main constitution:

> As of the date of ratification of this provision, henceforth the general assembly shall provide that the presidential electors allocated to the State of Colorado shall be chosen by direct vote of the people on the date prescribed by Congress, provided each candidate for elector shall be required to pledge support for a particular presidential aspirant, and provided also that no one shall be chosen as an elector who has pledged support for any presidential aspirant who, after having taken an oath to defend or support the United States Constitution, shall have been found by the executive and judicial branches of this state to have undertaken substantial steps to frustrate the lawful transfer of power from one presidential administration to the next.

Imagine further that, based on this state-law enactment, the Colorado Secretary of State in the fall of 2024, relying upon trial court findings regarding the actions of Donald Trump that were affirmed on appeal by the Colorado Supreme Court, refuses to include Trump's name or proposed slate of electors on the state's November 2024 presidential ballot. (The Secretary of State also refuses to count the votes of any voters who express support for Trump or his electors via a write-in mechanism.) Mr. Trump challenges his exclusion, and the Colorado Supreme Court, explicitly invoking the newly enacted state constitutional provision as an "adequate and independent" ground separate from Section 3 of the Fourteenth Amendment, affirms the exclusion. Trump then asks the U.S. Supreme Court to reverse this decision. On the merits, what outcome could, would, and should the U.S. Supreme Court reach?

These are the questions this Article explores. Its bottom line is that while the Supreme Court has been far from clear, consistent, and principled in the way it has approached state regulation of the presidential selection process over the last hundred years, no self-respecting Court that purports to take even minimally seriously the text, structure, history, and

1. 144 S. Ct. 662 (2024) (per curiam).
2. COLO. CONST. sched. § 20.

tradition of the Constitution could overturn what the people and courts of Colorado have decided in the scenario that I posit. As I wrote in a brief I submitted for myself and Professor Akhil Amar in *Trump v. Anderson*:

> States can have even stricter standards than Section Three provides, so long as such standards meet global federal constitutional principles . . . as construed by this Court, and state constitutional requirements as understood by the states' supreme courts. See *Moore v. Harper*, 600 U.S. 1 (2023). There is no federal constitutional requirement that any state even hold a popular presidential election. Each state's greater power to not hold a binding election subsumes a lesser power to structure its presidential election in its own way, within a broad range.[3]

I. WHAT THE JUSTICES IN *TRUMP V. ANDERSON* SAID AND HELD[4]

The Court in *Trump v. Anderson* reversed a ruling of the Colorado Supreme Court denying former President Donald Trump access to the state's primary election ballot on grounds of ineligibility under Section 3 of the Fourteenth Amendment of the U.S. Constitution.[5] Section 3 bars from holding office any past government officeholder who swore an oath to support the Constitution and who, in violation of that oath, later engaged in insurrection or rebellion against the United States.[6] Ratified in 1868, this provision was certainly intended to prevent former Confederates from returning to power after the Civil War, but its text sweeps beyond that original context.

The Supreme Court's performance in *Anderson* was disconcerting all the way around. Oral argument portended bad things. Perhaps, given the

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3. Amicus Curiae Brief of Akhil Reed Amar and Vikram David Amar in Support of Neither Party at 5, *Trump v. Anderson*, 144 S. Ct. 662 (2024) (per curiam) (No. 23-719).

4. This Part expands on several previous online articles. *See* Vikram David Amar, *Recent Headlines Confirm the Inadequacy of the Supreme Court's Reasoning in* Trump v. Anderson, JUSTIA: VERDICT (Apr. 12, 2024), https://verdict.justia.com/2024/04/12/recent-headlines-confirm-the-inadequacy-of-the-supreme-courts-reasoning-in-trump-v-anderson [https://perma.cc/Q536-4HE8] [hereinafter Amar, *Recent Headlines*]; Vikram David Amar & Jason Mazzone, *The Supreme Court's Misplaced Emphasis on Uniformity in* Trump v. Anderson *(and* Bush v. Gore*)*, JUSTIA: VERDICT (Mar. 25, 2024), https://verdict.justia.com/2024/03/25/the-supreme-courts-misplaced-emphasis-on-uniformity-in-trump-v-anderson-and-bush-v-gore [https://perma.cc/W6W3-LMM3]; Vikram David Amar, *The Supreme Court's Oral Argument in* Trump v. Anderson*: The Court's Seeming Failure To Understand Some Basic Starting Points*, JUSTIA: VERDICT (Feb. 13, 2024), https://verdict.justia.com/2024/02/13/the-supreme-courts-oral-argument-in-trump-v-anderson [https://perma.cc/YBW6-ERUL].

5. *Anderson*, 144 S. Ct. at 664–65.

6. U.S. CONST. amend. XIV, § 3.

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' oral lines of inquiry, but the stakes of the case (both symbolically and substantively) should have led to more careful interrogation. A low-quality oral argument did not have to mean, of course, that the Court would generate subpar written opinions, but because of the practical need (due to the pending Colorado primary) to resolve the case quickly (hence the expedited briefing and argument) the Court had limited time to do the more careful thinking that the case warrants.

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 improperly "consequentialist" in the sense that the Court cannot legitimately take them into account in gleaning and implementing constitutional principles. Instead, I am arguing that the Court's apparent impression of the potentially harmful effects itself reflects a 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 Democratic) 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."[7] Perhaps that's a daunting consequence, but it's one we already have, regardless of what the Court does. This "daunting consequence" *is* the Electoral College, both originally and modernly. Given the (entirely rational, if selfish) winner-take-all approach almost every state has come to use 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 last several election cycles have "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.[8]

In another exchange, Justice Samuel Alito, coming from the other direction, wondered not whether states would engage in tit-for-tat

7. Transcript of Oral Arguments at 85–86, *Trump v. Anderson*, 144 S. Ct. 662 (2024) (per curiam) (No. 23-719) (statement of Roberts, C.J.); Amar & Mazzone, *supra* note 4; *see also* Amar, *Recent Headlines*, *supra* note 4.

8. *See* Vikram David Amar, *The Constitution as Client*, 58 U.C. DAVIS L. REV. 643, 651–54 (2024).

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 3 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.[9] This question by Justice Alito was actually insightful but was also quite answerable. The doctrine of nonmutual 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 lawyer for Colorado at oral argument said it would not apply because Colorado law does not embrace nonmutual collateral estoppel,[10] but that answer (even if accurate) would not address Justice Alito's bigger concern if another state whose law *does* embrace nonmutual collateral estoppel were to do what Colorado had done. The answer to this bigger concern about nonmutual collateral estoppel in these circumstances relates to public-policy exceptions the Supreme Court has itself repeatedly recognized concerning the applicability of preclusion doctrine.

For starters, precluding a party from relitigating an issue under nonmutual collateral estoppel is permitted only if that party had adequate incentive and opportunity to fully contest the issue in the original litigation.[11] 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 political party is likely to win the general election in any event, and that lack of incentive argues against nonmutual 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*[12] (where it held that the Federal Government is not bound by nonmutual 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.[13] There is much more to be said about this topic, and it is a shame

9. Transcript of Oral Arguments at 21, *Anderson*, 144 S. Ct. 662 (No. 23-719) (statement of Alito, J.).

10. *Id.* (statement of Jonathan F. Mitchell, attorney for Petitioner).

11. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330–31 (1979).

12. 464 U.S. 154 (1984).

13. *Id.* at 162–64.

that the Court and the oral advocates did not develop this issue more thoroughly (and that none of the parties even cited, much less discussed, *Mendoza*).

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, one that Colorado might unduly influence. But under our originalist Constitution we have no such election—we have fifty-one separate procedures for appointing fifty-one 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*[14] that commanded easy and uncontroversial 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."[15] In other words, unlike the process for selecting U.S. House members and now 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, and 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 shall be (and which candidate those electors are pledged to support).[16]

If the *Anderson* Court didn't appreciate this basic starting point—that the Electoral College framework the Constitution sets up confers incredibly broad and decentralized powers on each state—there was ample reason to be concerned about the quality of the opinions that might ensue. Unfortunately, the resulting set of opinions tracked the fallacies of oral argument.

On the positive side, the Court in its several opinions refrained from suggesting in any way that Mr. Trump's alleged involvement in the

14. 531 U.S. 98 (2000).

15. *Id.* at 104; *see also Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020) ("Article II, § 1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint. . . . [E]ach State may appoint electors 'in such Manner as the Legislature thereof may direct.' This Court has described that clause as 'conveying the broadest power of determination over who becomes an elector.'") (citations omitted) (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)).

16. *Bush*, 531 U.S. at 104.

January 6 events did not legally amount to engaging in an insurrection, and the Court also did not say anything to question the applicability of Section 3 to the presidency. Also positive, in the big picture, was that the Court did not break down on purely partisan lines. As to outcome, the Court was unanimous in holding that states have no authority to enforce the Section 3 bar with respect to the President.[17] That job, the entire Court concluded, is entrusted solely to the federal government.

But was this unanimous outcome justified? One reason the Court offered was that another part of the Fourteenth Amendment, Section 5, explicitly gives Congress the "power to enforce, by appropriate legislation," all the provisions of the Fourteenth Amendment.[18] Yet this conferral of power, without more, does not go very far in preempting states from also enforcing the Fourteenth Amendment in the circumstance of congressional inaction. After all, Congress undeniably enjoys power under Article I "[t]o regulate Commerce . . . among the several States," and yet states also can generally regulate such activities, provided Congress has not affirmatively acted to oust states from the field.[19] Likewise, Congress's unquestioned power to levy taxes on Americans does not mean that states lack a similar power. Even in the realm of the Fourteenth Amendment, the Court has seemed to accept that states have the power to enforce the Equal Protection Clause (housed in Section 1 rather than Section 3 of the Amendment) so long as state laws don't run afoul of federal enactments.[20] Indeed, the Court has pointed out that Section 5 doesn't give the federal government power to do anything with respect to Section 1 that states can't also do under equal protection, and for that reason race-based affirmative action undertaken by the federal government is subject to the same level of scrutiny as similar affirmative action by states.[21] Moreover, as a general rule, states have the power to do anything that is not forbidden by state or federal constitutions. In this regard, the Court in *Anderson* didn't seem to question a state's power to exclude persons from the state's ballot when those persons are not thirty-five years old or are not United States citizens.

So the Court really needed to say more about why federal power under Section 5 is exclusive of state enforcement authority, rather than concurrent with it, with respect to Section 3.

Historical practice matters as to constitutional meaning. In its determination that only Congress has enforcement power, the *Anderson*

17. *Trump v. Anderson*, 144 S. Ct. 100, 668–69 (2024) (per curiam); *id.* at 671–72 (Barrett, J., concurring); *id.* at 672–73 (Sotomayor, J., concurring).

18. *Id.* at 666.

19. U.S. CONST. art. I, § 8, cl. 3.

20. *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 491–92 (1989) (opinion of O'Connor, J., joined by Rehnquist, C.J., and White, J.).

21. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 212–31, 235–39 (1995).

Court did observe that there exists no tradition of state-government enforcement of Section 3 against would-be federal officeholders in the years immediately after ratification of the Fourteenth Amendment, even though some states seemingly disqualified persons from holding state office.[22] Of course, any absence of state enforcement of Section 3 as to federal elected officials might not mean such state enforcement was impermissible but instead might reflect the view that each chamber of Congress, in judging the qualifications of its members, could prevent insurrectionists from being seated. Moreover, as I explained in a co-authored amicus brief in *Anderson*, during Reconstruction, enforcement of Section 3 in the South did not depend upon congressional action: Federal military officers enforced the Section 3 bar against candidates from secessionist states because there was federal military rule in much of the vanquished former Confederacy.[23] Yet the *Anderson* Court did not ask, much less examine, whether some military leaders did, without congressional authorization, seek to disqualify some rebels from federal office.

All of this leads up to what I take as the primary grounds for the *Anderson* decision, the Court's seeming belief in the need for some level of national ballot uniformity, given that people in all states have input in choosing the President, as well as the President's role as chief executive for the entire nation. Echoing the Chief Justice's oral argument questioning, the Court expressed its belief and concern that chaos would result if presidential candidates were deemed ineligible by some states but not by others, such that voters in different states would face different choices on election day and the ultimate winner might be a candidate who wasn't even on the ballot in some states. Adding to the problem, the Court reasoned, different states would likely employ different procedural mechanisms and different standards to determine ineligibility. "The result," the Court worried, "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)."[24] Further, the Court thought, as eligibility determinations unrolled across an election season, there would emerge "[a]n evolving electoral map" that could "dramatically change the behavior of voters, parties, and States across the country, in different ways and at different times."[25]

These concerns with uniformity generate the fundamental (and I mean no disrespect here) question: Does the Supreme Court actually understand how presidential elections are run? Ballot uniformity would

22. *Anderson*, 144 S. Ct. at 669.
23. Amicus Curiae Brief, *supra* note 3, at 13–14.
24. *Anderson*, 144 S. Ct. at 671.
25. *Id.*

make sense as a key element of Section 3 if we picked Presidents through a national popular election run entirely by the federal government. But as noted above, we don't pick Presidents that way. Instead, the originalist Constitution assigns *states* the responsibility for choosing electors, and these electors, in turn, vote for the President and Vice President. Under the Constitution, states are not even required to hold popular elections to pick their electors: A state legislature (or a governor) could itself make the choice, provided that it was consistent with the state constitution. When states do hold elections (or election-like mechanisms for gathering popular input), they have very broad constitutional authority over how the election is run, and, as a result, there are large variations across the states. In every presidential election, therefore, different candidates appear on the ballots of different states. Robert F. Kennedy, Jr. was on the ballot in some states in 2024 but not in others.[26] Cornel West was on the ballot in Wisconsin and several other swing states, but not in the vast majority of the nation.[27] Ralph Nader did not appear on the ballot in several states in 2000,[28] and if he had not satisfied Florida's state-specific ballot-access rules, Al Gore would have won the presidency, and the world would look very different.[29]

Nor is any of this disparate messiness a particularly modern phenomenon only. The two defining features of the earliest post-Constitution practice (bearing on original understandings as to what was allowed) were the very two features the *Anderson* Court found constitutionally suspect: disuniformity and partisanship. Different states went back and forth in the earliest decades after the Constitution on two basic issues: which body or individuals should choose electors, and, if a popular vote was to be involved, would it be conducted on a district-by-district basis or a statewide "general ticket" model.

As Alex Keyssar's wonderfully rich book documents, states were all over the map on both questions.[30] If we aggregate states in the first five presidential selections—1789, 1792, 1796, 1800, and 1804—which provide the most direct evidence of what the Founders considered

26. Amy Howe, *Supreme Court Leaves RFK, Jr., on Ballots in Wisconsin, Michigan*, SCOTUSBLOG (Oct. 29, 2024, 5:41 PM), https://www.scotusblog.com/2024/10/supreme-court-leaves-rfk-jr-on-ballots-in-wisconsin-michigan/ [https://perma.cc/L4WN-XCX9].

27. Alyce McFadden, Taylor Robinson, Leanne Abraham & Rebecca Davis O'Brien, *Where Independent and Third-Party Presidential Candidates Are on the Ballot*, N.Y. TIMES (Oct. 16, 2024), https://www.nytimes.com/interactive/2024/us/politics/presidential-candidates-third-party-independent.html.

28. *2000*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/elections/2000 [https://perma.cc/BP75-QKJW].

29. Joel Roberts, *The Nader Effect*, CBS NEWS (Feb. 23, 2004, 4:49 PM), https://www.cbsnews.com/news/the-nader-effect/ [https://perma.cc/B926-R82V].

30. *See* ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 27–28, 31–38 (2020).

permissible, we see thirty-six had their elected legislatures pick electors directly, fifteen used a statewide (winner-take-all) general-ticket popular election, fifteen used district-by-district elections, and eight used some combination of methods.[31] For example, Massachusetts and New Hampshire gave the task to the elected legislature, but the legislators were constrained to choose from among the highest vote-getters in popular elections.[32] New Jersey, by contrast, gave the job to the Governor, in coordination with a three-member privy council.[33] It is hard to imagine more disuniformity.

Nor were the earliest decisionmakers unaware of the partisan consequences of their choices as to these different kinds of systems. The party with the most popular support in each state favored the elected-legislature or the general-ticket models, whereas the minority party lobbied in favor of district-by-district methods. And neither party was above changing—flip-flopping, really—its preferences when its popularity among voters grew or declined; as Keyssar puts the point:

> [S]tates took advantage of the flexible constitutional architecture to switch procedures from one election to the next. Delaware, for example, shifted from district elections to legislative selection between 1789 and 1792; Maryland and North Carolina [moved to] the district method in 1796; four states [changed course by] turn[ing] the matter over to their legislatures in 1800, while Virginia abandoned district elections in favor of the general ticket [to become one of six states that changed its method leading into that election]. . . .
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> These shifts reflected . . . more than an impulse to experiment with a new institution; electoral strategizing was clearly at work. Although popular elections by district were often heralded, especially by Republicans, as the method most consistent with principles of republican government [even though elections of any type were used by only six of the sixteen states in 1800], it quickly became evident to all participants that a party with majority support in a state or its legislature would gain an advantage if it utilized the general ticket or had the legislature itself choose electors. . . . In Pennsylvania in 1796 the Republicans, who were pessimistic about their chances of winning the state, [unsuccessfully] tried to get the Federalist legislature to agree to district elections . . . . Four years later, when the state's Republicans were more upbeat about their

31. *Id.* at 32 tbl.I.I.
32. *Id.* at 27.
33. *Id.* at 27–28.

> prospects, they altered their stance and declared themselves in favor of the general ticket.
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> Most famously, of course, partisan advantage was the motive behind Virginia's decision to switch from district elections to the general ticket in 1800. . . . Jefferson had lost the 1796 election by three electoral votes, one of which had come from the Virginia district that had chosen Federalist Leven Powell as an elector. Jefferson's supporters were determined that this scenario not be repeated in 1800, and a legislative committee that included Madison, an eloquent advocate of district elections, recommended a switch to the general ticket. Notably the legislature formally acknowledged that the change was grounded in political pragmatism rather than principle, declaring that the action was warranted "until some uniform mode for choosing a President and Vice President shall be prescribed by an amendment to the Constitution." Despite the apologetic rationale and to no one's surprise, Adams's home state of Massachusetts reacted to Virginia's decision by retaliating: it abandoned district elections in favor of choice by the legislature.[34]

As "daunting" (to use the Chief Justice's word at oral argument) as it might be to have elections come down to a few states making decisions on how electors are selected in tit-for-tat partisan ways, that *is* how our presidential elections have been decided throughout history. This narrowing of the relevant battleground continues in earnest today both because states can have different ballot-access rules (consider Florida's allowance of Ralph Nader in 2000) and because partisan-population skews among states (combined with winner-take-all Electoral College voting) virtually guarantee that just a few states are ever actually in play.

Is there nothing, then, to the Court's concern with ballot uniformity? Other provisions of the Fourteenth Amendment have a uniformity theme. Section 1 adopts a uniform definition of federal and state citizenship (displacing prior state power and thus variation) and protects uniformly a set of rights against state governments. Perhaps, then, Section 3 should be read as a similar effort in the direction of national uniformity in presidential elections, achieved, as the Court thought, by only Congress having enforcement authority under Section 5. The problem is there is just no historical evidence (or at least none the Court marshalled) indicating that ballot uniformity explains Section 3. Such evidence would seem to be

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34. *Id.* at 31–35.

required given that uniformity does not fit comfortably with the rest of the Constitution's overall treatment of presidential elections in Article II. The Fourteenth Amendment left intact all of these other provisions of the Constitution that accord states the primary role in running presidential elections. In the absence of evidence to the contrary, it is hard to read Section 3 in the way the Court does as a ballot-uniformity provision.

In *Anderson*, the Supreme Court would have done well to recall its own earlier ballot-uniformity misadventure. In 2000, in *Bush v. Gore*, the Court ended the recount being conducted in Florida on the ground that differences in the ways that ballots were being counted there violated the Equal Protection Clause.[35] That reasoning (based on intrastate, rather than interstate, uniformity) made no sense at the time—it would mean every election ever held was unconstitutional because ballot-counting processes vary enormously within states and across states—and the decision, rendered the day after oral argument, has not aged well.[36] In *Anderson*, the Court took longer—nearly a month—to issue its ruling, and it had the benefit of extensive briefing and submissions from experts. Even so, the Court's decision, while resolving the immediate question, comes across as hasty, inattentive to the Constitution's overall design, and lacking careful thought about the full implications of the rationale.

The weeks directly following *Anderson* featured more illustrations of its basic conceptual folly. In Ohio, a question arose whether President Joe Biden (or any ultimate presidential nominee of the Democratic Party) would qualify for access to the general-election ballot since the Democratic Convention was not scheduled to formally pick a party nominee until after the deadline that Ohio imposes for major parties to name their nominees to ensure ballot access.[37] An Ohio law mandates that party nominees, in order for their names to be included on the general election ballots, be certified at least ninety days before the general election. In 2024, that deadline to certify fell on August 7, but the Democratic National Convention, at which the party's nominee was to be formally selected, was not scheduled to begin (much less conclude) until twelve days later.[38] (This problem was later circumvented when Democratic Party

35. *Bush v. Gore*, 531 U.S. 98, 110 (2000).

36. *See* Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1 (2022).

37. Jonathan Entin, *An Obscure Provision of Ohio Law Could Keep Biden off the Ballot in November*, OHIO CAP. J. (May 20, 2024, 4:30 AM), https://ohiocapitaljournal.com/2024/05/20/an-obscure-provision-of-ohio-law-could-keep-biden-off-the-ballot-there-in-november/.

38. *Id.*

delegates were allowed to nominate Kamala Harris and her running mate by remote voting shortly before Ohio's deadline.[39])

Even though Ohio was likely to give all of its presidential electors to the Republican candidate in any event (because Ohio is no longer a swing state but an increasingly reliable red state), for a Democrat not to be on the ballot in that state would have been a symbolic blow, reduced Harris's national-popular-vote total (something people look to as a marker of legitimacy), and also probably hurt down-ticket Democratic candidates. In spite of these consequences, there is (rightly) general agreement that Ohio is entitled to have such a law as this, even if Ohio lawmakers know that such a deadline might ensnare one party or one candidate in particular in a given election. And this would be true even if Ohio were a key swing state (as it has been in many past elections) whose outcome could tip the Electoral College balance one way or the other.

A second recent episode involves Nebraska. Lawmakers there, harkening back to the Founding generation's odious but constitutionally permissible machinations, were considering a proposal (backed by Republican candidate Donald Trump) to alter the way the state allocates electors and move to a winner-take-all scheme.[40] Right now, Nebraska (along with Maine) does not allocate presidential electors in a winner-take-all fashion. Under winner-take-all regimes, if a presidential candidate earns more votes than any other candidate in the state, that winning candidate earns the pledged support of all that state's electors; a winner-take-all jurisdiction does not split its electoral votes between the various presidential tickets.

The prevalence of this winner-take-all approach to the Electoral College around the nation should not come as any surprise if we take as a premise each state's desire to maximize its own importance in the presidential election process. By providing each presidential candidate with a large return (in the form of the state's entire Electoral College bloc) for the candidate's promises and platform planks targeted to the state's electorate, the state increases the likelihood that all candidates will take the state seriously and address its needs and concerns.

But Nebraska currently (and historically) has eschewed a winner-take-all approach in favor of a district-by-district approach. Nebraska has five presidential electors (because it has two Senators and three

39. Jo Ingles, *Democrats File Paperwork To Put Harris on Ohio Ballot Before Newly Extended Deadline*, IDEASTREAM PUB. MEDIA (Aug. 7, 2024, 11:08 PM), https://www.ideastream.org/2024-08-07/democrats-file-paperwork-to-put-harris-on-ohio-ballot-before-newly-extended-deadline [https://perma.cc/AL4T-79FB].

40. *A GOP Push To Change how Nebraska Awards Its Electoral Votes Appears To Have Stalled*, NPR (Sept. 23, 2024, 7:55 PM), https://www.npr.org/2024/09/23/nx-s1-5123961/nebraska-electoral-college [https://perma.cc/V8TG-VBKD].

congressional districts).[41] Under the current rules, three of the Nebraska's electors would be awarded according to which presidential candidate wins the most votes in each of the state's three congressional districts, with the remaining two electoral votes going to the candidate who wins the most votes statewide.[42]

Such a district-by-district approach can allow a minority party (in Nebraska, the Democrats) to nonetheless earn one or more of the state's electors in spite of the state's overwhelming redness statewide (because, say, Democrats are concentrated in one urban congressional district). This happened in 2008, 2020, and again in 2024; the Republican candidate (John McCain and Donald Trump (twice), respectively) won the statewide vote handily, but the Democratic nominee (Barack Obama, Joe Biden, and Kamala Harris, respectively) picked up one of the five electors, for having won one of the three congressional districts.[43]

Nor is this the first time this century Republicans have tried to revise a state's method of elector allocation in order to enhance the prospects for the Republican party. For example, similar efforts were made prior to the 2012 election.[44] At that time there was also an effort to get Pennsylvania, a winner-take-all state that was likely (at that time) to vote for the Democrat in the presidential election but that also had an elected state legislature controlled by Republicans, to move to a district-by-district method.[45] Had Pennsylvania gone from a winner-take-all to a district-by-district approach, Republicans might have picked up a significant number of electors (on account of winning several congressional districts). Indeed, especially because of partisan gerrymandering, it was possible for Republicans in the state to garner more than half the state's electors (if they won enough congressional districts) even if the Democratic candidate got more votes (that were packed into a smaller number of congressional districts) statewide.

Whatever one thinks of the virtues of winner-take-all versus district-by-district electoral systems as a general matter, it would be good if states decided on their methods of presidential-elector allocation without regard to partisan outcomes (and it would be similarly good if states didn't change

41. *Id.*

42. *Id.*

43. *Nebraska*, 270TOWIN, https://www.270towin.com/states/nebraska [https://perma.cc/4KQV-5BSP].

44. Alexander Burns, *Neb. GOP: No Vote for Obama in '12*, POLITICO (Sept. 19, 2011, 8:15 AM), https://www.politico.com/story/2011/09/neb-gop-no-vote-for-obama-in-12-063819.

45. *Pennsylvania Electoral College Proposal Divides GOP Officials, Public*, PBS NEWS (Sept. 28, 2011, 1:00 PM), https://www.pbs.org/newshour/politics/republican-officials-divided-over-pennsylvania-electoral-college-proposal-slim-majority-of-public-op [https://perma.cc/XMX4-VFCV].

their rules each election cycle based on partisan predictions). But whether proposals to change the method of elector allocation are motivated purely by partisan zeal in ways that strike many as unseemly or unfair (as did the proposal in Pennsylvania in 2011), they are not open to federal constitutional challenge, because Article II of the Constitution allows each state to appoint presidential electors more or less any way it chooses. Thus, like the Ohio-specific deadline for ballot access, state-specific (and thus disuniform) rules concerning elector allocation will persist under our decentralized Electoral College framework.

A third recent reminder (for me) of the extent of decentralization was the application for a stay that Missouri sought[46] in the U.S. Supreme Court to block the sentencing of President Trump in New York, insofar as his sentence might affect the presidential election and thus affect Missouri's interest in helping select a President. Put to one side the fact that, even had Trump been sentenced to an immediate jail term, he still would have remained eligible to be President. The big flaw with Missouri's theory was simply the notion that it could stick its nose into what New York may or may not be doing. This recent gambit was an even weaker version of what Texas attempted after the 2020 election, when Texas and other states filed for review in the U.S. Supreme Court invoking the now-discredited "Independent State Legislature Theory" (ISLT) to challenge the decision of Pennsylvania courts to enforce the state constitution over the state election code during the 2020 presidential election.[47] Although it didn't address and debunk ISLT on the merits (as it later did in 2023 in *Moore v Harper*[48]), the Court in *Texas v. Pennsylvania*[49] dismissed Texas's filing on the ground that Texas lacked standing under Article III because "Texas has not demonstrated a judicially cognizable interest in the manner in which another state conducts its [even presidential] elections."[50]

Each of these three episodes highlights how underexplained the Court's *Trump v. Anderson* decision was. Whether we are talking about ballot access (as both *Trump v. Anderson* and the Ohio deadline law involve) or how votes are counted and used to allocate electors (at issue in Nebraska), variations among states guarantee that voters in some states are not treated the same way as are voters in others states, even though who is elected President affects people in each and every state. Moreover, unfolding decisions by Ohio and Nebraska in the crafting and enforcement

46. Motion for Leave To File Bill of Complaint, *Missouri v. New York*, No. 159, 2024 WL 3643573, at *1 (U.S. July 3, 2024) (mem.).

47. Motion for Leave To File Bill of Complaint, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.) (No. 155).

48. 143 S. Ct. 2065, 2079–81 (2023).

49. 141 S. Ct. 1230 (2020) (mem.).

50. *Id.* at 1230.

of their rules could easily "change the behavior of voters, parties and States across the country" in an evolving way.

To be sure, each of the episodes discussed above could arguably be constitutionally distinguished from the Section 3 question at issue in *Trump v. Anderson*. In Ohio, for example, the ballot access question did not involve individual-candidate entitlement but rather party entitlement. But query why that should matter—parties and their nominees are closely intertwined, and excluding a party has the effect of excluding its (and its members') preferred candidate. Ohio's determination of when a party declares its nominee might also seem less discretionary than Colorado's factual determinations concerning Mr. Trump, but many key ballot-access determinations in many states (concerning, say, signature validity, volume, and timing) are far from mechanical, and yet we still allow states to do what they want in this regard.

With respect to the *Texas v. Pennsylvania* dismissal, perhaps it is not technically inconsistent to say a state lacks a cognizable interest for purposes of Article III in how other states administer presidential elections, and also say a state's voters are protected against the specter of chaos arising from interstate disuniformity, but there is clearly a tension there (especially in light of the Court's recent willingness to let states represent their voters and citizens, as in, for example, *Massachusetts v. EPA*[51]).

The bigger distinction between the Ohio episode (along with the *Texas v. Pennsylvania* episode and the Nebraska situation as well), on the one hand, and the *Trump v. Anderson* case, on the other, is that the former all involve only a state's exercise of power under Article II, over which the federal government has no supervisory authority in the text of the Constitution, whereas the latter involves the Fourteenth Amendment, Section 5, which confers federal implementation power. But as pointed out above, this grant of federal power alone does not explain why states are cut out of the enforcement loop. Section 5 power of the federal government does not, for example, foreclose a state from providing remedies against state officials who violate the Equal Protection or Due Process Clauses of Section 1 of the Fourteenth Amendment.

The $64,000 question (and criticism of *Anderson*) remains: If disuniformity in presidential ballot access (or presidential election administration more generally) is a big constitutional problem such that Section 3 of the Fourteenth Amendment requires congressional action, then why does Article II continue to permit such consequential disuniformity as reflected in the examples above? Of course it is *possible* that the enactors of Section 3 didn't want to *add* to the already-existing

51. 549 U.S. 497 (2007).

potential for disuniformity, but the Court didn't offer any real evidence of such a concern by the drafters or ratifiers.

All of this brings us to a key point. As wrongheaded as *Trump v. Anderson*'s reasoning seems to be, we must remember that it was no more than an interpretation of Section 3; whether the Court adequately justified its reading of that provision (and I submit that it did not), the holding in *Anderson* has no effect on the power states have enjoyed under Article II, and which they have exercised in undeniably disparate and disuniform ways. *To put the point crisply, even as the Court made clear in* Anderson *that nothing in Article II delegated power to the states to implement Section 3 of the Fourteenth Amendment, nothing in Section 3 (even as the Court read it) modified or limited the powers that states had already been delegated or enjoyed and had been exercising under Article II.*

II. BUT DOES STATE POWER UNDER ARTICLE II EXTEND TO PERMIT WHAT IS EFFECTIVELY THE IMPOSITION OF ADDITIONAL QUALIFICATIONS ON THOSE WHO VIE FOR A STATE'S ELECTORS? AND DOESN'T *U.S. TERM LIMITS, INC. V. THORNTON* FORBID A STATE FROM DOING SO?

Certainly some people think/assume that the *U.S. Term Limits, Inc. v. Thornton*[52] case forecloses states from acting under avenues other than Section 3 in this arena.[53] But with all due respect, those who invoke the *Term Limits* as a big hurdle in this context are not being careful about logic, history, or doctrine.

As for logic, while *Term Limits* did strike down an Arkansas voter-enacted initiative that sought to prevent long-term congressional incumbents from having their names appear on congressional election ballots,[54] it does not stand for the proposition that no additional qualification requirements can be imposed by anyone on federally elected officials absent a federal constitutional amendment. For example, take a closer look at even the House member candidates who were at issue in *Term Limits*. If a particular individual voter announced that she was not going to consider any long-term incumbents for re-election—not that past office-holding would be a *Bakke*-like factor in her analysis but instead that she would literally set aside long-term incumbents and not consider them—no one would suggest that she was impermissibly adding qualifications to the office. And the reason wouldn't simply relate to questions about whether she was a state actor. To see this, consider a President who needs to fill a vice-presidential vacancy under the Twenty-

52. 514 U.S. 779 (1995).

53. See *infra* notes 62–63 and accompanying text.

54. *Term Limits*, 514 U.S. at 783.

Fifth Amendment. Like Presidents, Vice Presidents under the Constitution need only satisfy prescribed qualifications relating to age, natural-born citizenship, et cetera. But if a President announced publicly that she would not consider nominating any candidate who violated a prior oath to uphold the Constitution (or if Congress announced it would not consider and vote on any such person who were nominated), no one would ever think that additional qualifications were being impermissibly imposed. *That is because, as a logical matter, the person or persons to whom the Constitution delegates authority to make a selection can (as a general matter limited only by other constitutional provisions) adopt and act on limitations concerning the kinds of persons to be considered.* Another illustration involves the nomination and appointment of federal judges. If a President proclaims she will consider for Supreme Court nomination/appointment only persons who have demonstrated a commitment to respecting the text, history and structure of the written Constitution, no one would complain that she is adding impermissible qualifications to the job of Supreme Court Justice. That is because the Constitution gives her (along with the Senate) the power to make selections to the Court, and the power to select includes the power to impose qualifications for selection (subject to contemporaneous or later-enacted limitations on permissible criteria, such as those embodied in the Reconstruction Amendments). The problem in *Term Limits* owed to the fact that under Article I, Section 2 and the Seventeenth Amendment, the persons who are constitutionally charged with picking Representatives (and later Senators) are, at least according to the five-person majority that may not even reflect the views of the current Court, the *individual voters* in each state, not the legislature or people of each state collectively, the body that adopted the term limits.[55]

But with respect to presidential elections, under Article II it is the states—*and clearly no particular person or body within them*—that are

55. *See id.* at 847 (Thomas, J., dissenting). Indeed, as to presidential selection and even assuming a broad reading of *Trump v. Anderson*'s ruling concerning Section 3 of the Fourteenth Amendment, if an individual voter in a state that provides for popular election of presidential electors were to announce that she had decided a particular presidential aspirant was "disqualified under Section 3 of the Fourteenth Amendment," and announced that accordingly she "would not consider that candidate or the electors pledged to support him in the ballot booth," no one would suggest that she would be flouting Congress's exclusive control over rebellion-based disqualification. The same would be true if appointed electors from a state made the same kind of determination and announcement (that they would not consider voting for a presidential aspirant based on that aspirant's having violated Section 3), even if it meant the electors would be backing away from any pledge or promise they had made prior to Election Day and prior to their appointment (assuming state law permitted such elector independence). Nor would these examples be easily deflected on the ground that individual citizen-voters or appointed electors are not "state actors"; under the reasoning of *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020), the electors at least certainly would seem to be.

charged with the task of choosing and appointing electors. That is why, as an historical matter, states *did* impose additional qualifications on presidential electors, beyond the one qualification in the Constitution that they not be members of Congress or holders of federal office. For example, "[i]n some states . . . (e.g., New York in 1792), legislators were required to choose electors who came from different parts of the state."[56] An intrastate residency requirement, where the Constitution requires *nothing* about the residency of presidential electors—unlike House members and Senators, they need not be residents of the state, much less residents of particular parts of the states—is an example of an early qualification requirement. And over the last one hundred–plus years, the vast majority of states have imposed another qualification on would-be electors: that they pledge support for one party or one presidential aspirant *prior* to being appointed as an elector.[57] As the Court held in *Cook v. Gralike*[58] (which involved required pledges of congressional candidates), insisting that a candidate take a pledge is tantamount to imposing an additional qualification, because those unwilling to take the pledge (in my present example would-be electors who want to be selected as completely free agents, constrained neither legally nor morally to choose as President anyone other than the candidate they deem most fit in December) simply are not allowed to be considered.[59]

Remarkably, those who have invoked *Term Limits* in the context of discussions of states' participation in presidential selection barely even mention the key distinctions between Articles I and II. What *Term Limits* might or might not teach us about presidential qualifications has been considered perhaps most meaningfully in recent years in connection with a 2019 law enacted in California that denies ballot access to presidential candidates who have chosen not to release their tax returns.[60] While the law ultimately was struck down by the California Supreme Court on state (not federal) constitutional grounds,[61] it was also enjoined on federal grounds by a district court judge in Sacramento, Judge Morrison England (in a case that was mooted by the California Supreme Court's action and

56. KEYSSAR, *supra* note 30, at 33 n.56; *see also Chiafalo*, 140 S. Ct. at 2318 ("A State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period.").

57. This state practice of insisting on pledges by would-be electors was upheld by the Supreme Court in *Ray v. Blair*, 343 U.S. 214 (1952); *see also Chiafalo*, 140 S. Ct. 2316 (discussed *infra* note 85).

58. 531 U.S. 510 (2001).

59. *See id.* at 525.

60. Presidential Tax Transparency and Accountability Act, CAL. ELEC. CODE §§ 6880–84 (West 2019).

61. *Patterson v. Padilla*, 451 P.3d 1171 (2019).

that thus was never heard by the Ninth Circuit or Supreme Court).[62] And some conservative (but apparently not originalist) law professors, such as Professors John Yoo and Thomas Delahunty, embraced such federal challenges.[63] But their arguments do not hold up,[64] because such arguments derive from a setting—legislative contests—in which the Constitution requires that states hold elections by the people themselves, for example, to select House members and (now, since the Seventeenth Amendment) Senators. When popular elections are constitutionally mandated, the requirements state legislatures can impose on ballot access are necessarily constrained. A constitutionally prescribed election "by the people" presupposes that the people—and not the elected state legislatures—do the choosing. But of course, the Constitution does not require states to hold popular elections with regard to the presidency at all. Consider again the words of the Supreme Court in *Bush v. Gore* (in a part of the opinion that *did not* generate huge legal criticism or controversy):

> The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.

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62. *Griffin v. Padilla*, 417 F. Supp. 3d 1291 (E.D. Cal. 2019). Judge England in a single footnote (and only there) did acknowledge that *Term Limits* involved Congress and not the presidency, but the judge seized on a quote (from revered Justice Joseph Story's influential nineteenth-century constitutional law treatise) in the Court's opinion in *Term Limits* to the effect that "states 'have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president.'" *Id.* at 1299 n.9 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995) (quoting 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. Boston, Little, Brown & Co. 1858))). This quotation led Judge England to conclude there was no difference between congressional and presidential selection processes for these purposes. *Id.* But Judge England wrenched the quote out of context; in both *Term Limits* and Story's treatise, the observation was made simply to deflect the notion that states enjoyed power reserved under the Tenth Amendment to regulate the selection of federal officials. What Story and the Court were saying was merely that states enjoy no residual or "reserved" power to regulate federal selection methods because federal officials did not exist prior to the Constitution's adoption. Indeed, at the end of the passage in Story's treatise from which the quote comes, Story (rightly) observed that the key inquiry is this: "Before a state can assert [power over a federal selection process], it must show the constitution has delegated and recognized it." 1 STORY, *supra*, § 627. And Article II does delegate power (as even the *Term Limits* majority acknowledged) to "Each State." U.S. CONST. art. II, § 1.

63. John Yoo & Thomas Delahunty, Opinion, *Why Trump Will Win His Challenge to California's Tax Return Law*, L.A. TIMES (Aug. 9, 2019, 4:00 AM), https://www.latimes.com/opinion/story/2019-08-08/california-law-trump-tax-returns-lawsuit [https://perma.cc/UXA7-WZH9].

64. I should make clear that I do not think the enactment of laws like California's is a good idea. But whether opening "a Pandora's box of state electoral meddling," as Professors Yoo and Delahunty put it in their op-ed, violates the Constitution is a very different matter. *Id.*

> U.S. Const., Art. II, §1. This is the source for the statement in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that the State legislature's power to select the manner for appointing electors is plenary; it may [even today], if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. . . . The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *id.*, at 35 ("[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated") (quoting S. Rep. No. 395, 43d Cong.,1st Sess.).[65]

And when we compare other nuances in Articles I and II, we see further ways in which the Constitution delegated very different powers to states. In Article I, with regard to congressional contests, popular elections are required, and states are given the provisional power to regulate only the "Times, Places and Manner"—but not the substance—of these constitutionally required elections. Moreover, Congress is given power to override states even regarding times, places, and manner of the elections.

By contrast, in Article II, states are given the *entire* power/duty to appoint presidential electors in any way they choose. Again, popular elections are not required; states are given power over not just the manner of *e*lection, but the manner of *se*lection. And Congress is denied any authority to second-guess whatever means states settle on as ways to pick their electors—Congress's power is instead limited to prescribing the timeline for picking the electors and having them vote.

To see all this clearly, imagine a state (say California) decided to empower its elected legislature to appoint electors without use of any popular vote or other electorate-sentiment-gathering device. If the California legislators announced they would meet on National Election Day to interview presidential aspirants, each represented by a proposed slate of electors, to decide which group of electors to appoint, and made clear that only Democratic Party aspirants would be invited to interview, that would be completely permissible. Or imagine the legislators announced that "no one adjudicated to have interfered with an election will be considered and interviewed." That too would be unassailable. Indeed, it is hard to imagine the early state legislatures that picked electors themselves were open to all comers and actually "considered" people of every political, ideological, or experiential stripe. They undoubtedly imposed "qualifications" (or requirements) with respect to the presidential aspirants they would consider, whether those qualifications were overt or

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65. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

just clearly understood by the key players. And no one would suggest these legislatures had even technically to be open to supporting everyone who met the minimal qualifications laid out in Article II. As Justice Thomas has correctly observed, "the right to choose may include the right to winnow."[66]

Judge England's (and Professors Yoo and Delahunty's) failure to discuss any of the differences between congressional and presidential selection is all the more surprising and troubling because all of the logical and historical observations I just made are evident, if one reads carefully, in what the various Justices in *Term Limits* actually said. That is, *Term Limits*' explicit logic—both of the majority and the four-member dissent[67]—clearly make its holding inapplicable to the selection of presidential electors.

First. The Court says the rejection of state power to impose qualifications on House/Senate members follows from "the text and structure of the Constitution, the relevant historical materials, and, most importantly, the 'basic principles of our democratic system'. . . ."[68] That text is the words of Article I, which delegate power to choose congresspersons to "the People,"[69] words notably absent in Article II, which explicitly confers appointment power on "each state" to appoint electors.[70] The history that the majority adduces focuses almost exclusively on "that part" of the federal government (*i.e.*, the House of Representatives) as to which there was direct election by the people.[71] And, most crucially, the "basic principle[] of our democratic system"[72] that Justice Stevens' opinion refers to is the sovereignty of the people who—as *individuals*—"should choose whom they please to govern them"[73] with respect to congressional elections. The majority quotes *Federalist 15* for the idea that the central vice of the Articles of Confederation was its location of power exclusively in "states or governments, in their corporate or collective capacities, and *as contradistinguished from the individuals* of

66. *Term Limits*, 514 U.S. at 881 (Thomas, J., dissenting).

67. Of course, as noted in the text, today's Court might not even continue to adhere to the *Term Limits* ruling itself. Of the current Justices, only Justice Thomas was on the Court in 1995, and he penned the incredibly voluminous and detailed dissent for himself and the three other dissenters—Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia—whose views on states' autonomy, generally speaking, align with the current conservative majority.

68. *Term Limits*, 514 U.S. at 806 (quoting *Powell v. McCormack*, 395 U.S. 486, 548 (1969)).

69. U.S. CONST. art. I, § 2.

70. *Id.* art. II, § 1.

71. *E.g.*, *Term Limits*, 514 U.S. at 806, 808 (focusing on THE FEDERALIST NOS. 52, 57 (James Madison), both of which analyze the House exclusively).

72. *Id.* at 793 (quoting *Powell*, 395 U.S. at 548).

73. *Id.* at 783 (quoting *Powell*, 395 U.S. at 547).

whom they consist."[74] None of this applies in settings where popular elections are not required, as they clearly are not under Article II.

Second. The Court distinguishes the Senate from the House at the Founding, saying that it was not until the ratification of the Seventeenth Amendment in 1913 that "this ideal [of popular sovereignty by individual voters] was extended to elections for the Senate."[75] The majority reasons that the absence of popular elections by the individual voters for the Senate explains why an early draft that made explicit that additional qualifications for House members could not be added contained no such provision for Senators, insofar as "the draft contemplated that Senators, unlike Representatives, would not be chosen by popular election."[76]

Third. The Court relies as well, for the idea that states have no power to add qualifications in the realm of congressional qualifications, on the fact that Article I, Section 4's backup provision of Congressional power was a reflection of concern over the "abuse" of states with regard to congressional-election regulation.[77] Of course, no such backup provision exists with regard to the Electoral College, nor could "abuse" by states explain a presidential election system that so overtly delegates power directly to the states.

Fourth. The Court deflects the district-residency requirements some early states imposed for House members as not illustrating a state's power to add House-member qualifications because "[s]tates may simply have viewed district residency requirements as the necessary analogy to [constitutionally required] state residency requirements."[78] This argument is unavailable to explain early state intrastate residency requirements with respect to presidential electors (as in Maryland) since the Constitution does not impose *any* residency requirements on presidential electors.[79]

Fifth. Despite addressing Justice Thomas's dissenting opinion at length, the majority does not dispute either of two key passages from the dissent. One is:

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74. *Id.* at 821 (original emphasis omitted) (emphasis added) (quoting THE FEDERALIST NO. 15, at 108 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

75. *Id.*

76. *Id.* at 815 n.27.

77. *Id.* at 808.

78. *Id.* at 826 n.41.

79. This is a point made later by the Court in *Chiafalo*, when all members of the Court recognized that states have effectively added qualifications, in the form of residency requirements, on presidential electors, even though the Constitution provides no such requirements. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020). *Compare id.*, *with Schaefer v. Townsend*, 215 F. 3d 1031, 1037 (9th Cir. 2000) (holding that a residency requirement at the time of filing for congressional candidacy imposes impermissible qualifications).

> [T]he right to choose may include the right to winnow. To appreciate this point, it is useful to consider the Constitution as it existed before the Seventeenth Amendment was adopted in 1913. The Framers' scheme called for the legislature of each State to choose the Senators from that State. Art. I, § 3, cl. 1. The majority offers no reason to believe that state legislatures could not adopt prospective rules to guide themselves in carrying out this responsibility . . . . [Since] there is no reason to believe that the Framers' Constitution barred state legislatures from adopting prospective rules to narrow their choices for Senator, then there is also no reason to believe that it barred the people of the States from adopting prospective rules to narrow their choices for Representative.[80]

The only portion of the majority opinion that addresses this point is the majority's conclusion that "people" in Article I means *individuals*, not people acting in a collective lawmaking capacity.[81]

Sixth. The second passage, one quite on point for present purposes and one that the majority never disputes at all, which would be quite surprising had the majority opinion been intended to cover selection of presidential electors, is this:

> [T]he Constitution's treatment of Presidential elections actively contradicts the majority's position. While the individual States have no "reserved" power to set qualifications for the office of President [insofar as states can't dictate which presidential candidates *other* states support], we have long understood that they do have the power (as far as the Federal Constitution is concerned) to set qualifications for their Presidential electors—the delegates that each State selects to represent it in the electoral college that actually chooses the Nation's chief executive. Even respondents do not dispute that the States may establish qualifications for their delegates to the electoral college, as long as those qualifications pass muster under other constitutional provisions . . . .[82]

So the very reasoning of *Term Limits* distinguishes congressional elections from presidential selection processes. And the Court's conception of the power states enjoy over their electors to the Electoral

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80. *Term Limits*, 514 U.S. at 881–82 (Thomas, J., dissenting) (internal citations omitted).

81. *Id.* at 805.

82. *Id.* at 861 (emphasis added).

College has been expanded, not contracted, since *Term Limits*. In *Chiafalo* and its companion case, *Baca*,[83] the Court held that a state could enforce a pledge would-be electors are required to take before appointment by punishing and replacing a faithless elector, and also by undoing the legal effect of a faithless vote.[84] As I have explained elsewhere, I think *Chiafalo* is poorly reasoned and inconsistent with original understandings of elector independence.[85] But while the power to control electors, once appointed, is not necessary to establish the power to attach qualifications for electors prior to appointment (such that even had *Chiafalo* come out the other way, my hypothetical Colorado amendment and California's enactment would be permissible), the presence of such a power to control (which the Court believes exists) certainly supports a power to impose qualifications before selection.[86] Indeed, *Chiafalo* explicitly blesses qualifications imposed on electors:

> A State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period. Or more substantively, a State can insist (as *Ray* allowed) that the elector pledge to cast his Electoral College ballot for his party's presidential nominee, thus tracking the State's popular vote. See

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83. *Colo. Dep't of State v. Baca*, 140 S. Ct. 2316 (2020) (per curiam).

84. *Chiafalo*, 140 S. Ct. at 2322 (describing Washington's law); *id.* at 2323–24 (upholding Washington law punishing faithless electors); *Baca*, 140 S. Ct. at 2316 (upholding Colorado law providing for replacement of faithless electors "for the reasons stated in *Chiafalo*").

85. *See* Vikram David Amar, *A Backward- and Forward-Looking Assessment of the Supreme Court's "Faithless Elector" Cases: Part One in a Two-Part Series*, JUSTIA: VERDICT (July 14, 2020), https://verdict.justia.com/2020/07/14/a-backward-and-forward-looking-assessment-of-the-supreme-courts-faithless-elector-cases [https://perma.cc/Q5NV-LLN6]. Here's just one example of the Court's poor reasoning: *Chiafalo* says pledges are enforceable because "the power to appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect." *Chiafalo*, 140 S. Ct. at 2324. Yet appointment power does not invariably bring with it the power to extract *enforceable* promises, and in *Chiafalo* and *Baca* the states are doing more than conditioning the appointments on the making of a pledge; they are regulating and sanctioning post-appointment discharge of power. A President's power to appoint federal judges allows the President to add (permissible) qualifications (that align with her views on various legal issues) prior to the appointment, see *infra* p. 118, but the particular nature of the judicial role forbids the extraction of promises about how a judge, once appointed, will rule, and *certainly* does not permit the President to punish the judge once he is on the bench for changing his mind. The fact that *Ray* and accepted practice permits states to require electors to make pledges suggests the elector role is not quite the same as the judicial role, but the nature of an elector's role doesn't come, as the Court tried to suggest, from the general meaning of the word "appoint."

86. *Cf. Term Limits*, 514 U.S. at 810 & n.20 (arguing that state power to impose qualifications would be incongruous given the fact that states were denied the power to instruct or recall members of Congress).

> *Ray* [*v. Blair*], 343 U.S. [214, 227 (1952)] (A pledge requirement "is an exercise of the state's right to appoint electors in such manner" as it chooses). Or—so long as nothing else in the Constitution poses an obstacle—a State can add, as Washington did, an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty. Which is to say that the State's appointment power, barring some outside constraint, enables the enforcement of a pledge like Washington's.
>
> And nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion as Washington does. The Constitution is barebones about electors. Article II includes only the instruction to each State to appoint, in whatever way it likes, as many electors as it has Senators and Representatives (except that the State may not appoint members of the Federal Government).[87]

So *Chiafalo* makes the notion that *Term Limits* forbids states from adding qualifications in the presidential selection process all the more untenable.

To say that Article II delegates broad power to states themselves (and not to individual state voters), and that such power is unaffected by the analysis in *Term Limits*, is not to say that such state power has no bounds. As the Court pointed out in *Williams v. Rhodes*[88] (a case whose particular outcome may be questionable today, as discussed in the next Part), a state's exercise of Article II power might violate other cross-cutting and post-1787 equality rights.[89] This observation was itself reaffirmed in *Chiafalo*.[90] Thus, a state may not discriminate on the basis of race, sex,

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87. *Chiafalo*, 140 S. Ct. at 2324 (footnote omitted); *see also* U.S. CONST. art. II, § 1.

88. 393 U.S. 23 (1968).

89. *Id.* at 29.

90. *See Chiafalo*, 140 S. Ct. at 2324 n.4 ("Checks on a State's power to appoint electors, or to impose conditions on an appointment, can theoretically come from anywhere in the Constitution. A State, for example, cannot select its electors in a way that violates the Equal Protection Clause. And if a State adopts a condition on its appointments that effectively imposes new requirements on presidential candidates, the condition may conflict with the Presidential Qualifications Clause . . . .").

With regard to the last (and quite cryptic) part of the passage in footnote 4 that might be read to disclaim any views on the question I am exploring today: To the extent that the Court was suggesting that the power to add requirements for electors may be distinguished from the power to add requirements for presidential candidates themselves, that suggestion would be an analytic non-starter. What the Court did mean is, of course, hard to know. "May" is a weasel word. Its use could suggest that while states are free generally to add qualifications for presidential aspirants and their electors such that the Constitution does not, in the parlance of preemption, occupy the entire field of additional qualifications per se, states may be constitutionally preempted from adding qualifications that relate to the

class, or age. States must also respect due process and the religion-discrimination provisions of the First Amendment and the original Constitution's ban on religious tests for office-holding, because these other constitutional provisions kick in whenever office-holding selections are made.

Age qualifications may provide a good illustration, since age has been such a salient topic in the current presidential election cycle. Recently, North Dakota adopted an amendment to its state constitution—Initiated Measure 1—that prohibits any North Dakotan from serving in the U.S. House or Senate (or appearing on a congressional ballot) if the individual in question would turn eighty-one (or older) near the very end of her elected or appointed term. No doubt Measure 1 runs afoul of *Term Limits*. In fact, advocates of Measure 1 may very well hope the measure is a vehicle for overturning *Term Limits*; in this regard it bears noting that the same U.S. Term Limits organization from *Term Limits* (which in the 1990s orchestrated a nationwide, state-by-state campaign to accomplish term limitations), contributed to the Measure 1 campaign.[91]

But Measure 1's problems transcend the *Term Limits* ruling: The measure runs afoul of the Constitution's carefully crafted provisions concerning the relevance, *vel non*, of age when it comes to so-called "political rights" such as voting and office-holding. So even if the Court were to overrule *Term Limits*' general holding that states cannot add qualifications beyond those listed in Article I of the Constitution for House members and Senators, Measure 1 (and other similar measures in other

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specific areas of qualification already mentioned in Article II. So, for example, a state refusing to consider all presidential aspirants who have not attained forty years of age (rather than the thirty-five required by Article II) might violate the Constitution even before and apart from the Twenty-Sixth Amendment, just as today a state's refusal to consider Black aspirants would violate the Fifteenth Amendment. Or "may" could suggest simply the Court (or a law clerk) had not thought through any of this and was doing no more than flagging a question someone might raise.

In this vein, it is notable that the *Chiafalo* Court, in footnote 4, did not cite, even with a "compare" or "cf" signal, the *Term Limits* case, even though in the very next footnote *Term Limits* is cited to support the textual assertion that Article II delegates broad powers to states with respect to elector selection. *Id.* at 2324 n.5 (noting that "Article II, § 1 [is] an 'express delegation[ ] of power to the States'" (quoting *Term Limits*, 514 U.S. 779, 805 (1995))). If *Term Limits* in any way spoke to state power *vel non* to add qualifications with regard to presidential aspirants or their slates of electors, one would have thought the *Chiafalo* Court would have cited it in footnote 4. In any event, given that the Court in *Chiafalo* upholds a qualification on electors requiring that they be faithful to a political party, and faithful to their word, it is hard to understand why a state cannot also insist that they be people who are faithful to the idea of orderly and peaceful transfers of power (or faithful, as in California, to the idea of providing more key information to voters).

91. *North Dakota Initiated Measure 1, Congressional Age Limits Initiative (June 2024)*, BALLOTPEDIA, https://ballotpedia.org/North_Dakota_Initiated_Measure_1,_Congressional_Age_Limits_Initiative_(June_2024) [https://perma.cc/JU4U-QR9M].

states that Measure 1's enactment might spur) would nevertheless be invalid, *and would also be invalid if it sought to cover presidential selection, something that (as I argue above) falls outside of the* Term Limits *case.*

First, were the Court to agree with me and reject the idea that states cannot add qualifications for Presidents as a general matter—that Article II does not occupy the whole field of qualifications, so to speak—a strong argument could still be made that because Article II speaks *specifically to age* requirements for Presidents, states are barred from adding age qualifications in particular, even if they can permissibly add other kinds of qualifications. Indeed, could anyone imagine a state being able to say (perhaps because of a belief in the immaturity of young adults today) that a President needs to be at least forty-five?

But there is an even more foundational problem under the specific terms of the Constitution, namely the words and meaning of the Twenty-Sixth Amendment. That provision explicitly prohibits federal and state discrimination among persons eighteen or older "on account of age" with respect to the "right to vote." That Amendment was passed and ratified in 1971, a year after the Court in *Oregon v. Mitchell*[92] held, by a 5–4 vote, that a federal statute could not constitutionally prohibit age discrimination against persons over eighteen voting in elections for state offices, for lack of federal power.[93]

But, a skeptic might ask, does the Twenty-Sixth Amendment's protection of the "right to vote" include the right to be voted for?[94]

Certainly the leading proponents of the Fifteenth Amendment (which prohibits race discrimination in voting and on whose words the nearly identical Twenty-Sixth Amendment was patterned) thought there is a strong constitutional presumption that the right to vote subsumes the right to hold office. Thus, when the Fifteenth Amendment was written, many of its backers said repeatedly and publicly that it covered race-based exclusion from office-holding. As Congressman Benjamin Butler of Massachusetts put the point during the deliberations over the Amendment:

> I had supposed if there was anything which was inherent as a principle in the American system and theory of government, . . . it was this: that the right to elect to office

92. 400 U.S. 112 (1970).

93. *Id.* at 118, 125.

94. *See generally* Vikram David Amar, *Taking (Equal Voting) Rights Seriously: The Fifteenth Amendment as Constitutional Foundation, and the Need for Judges To Remodel Their Approach to Age Discrimination in Political Rights*, 97 NOTRE DAME L. REV. 1619 (2022) [hereinafter Amar, *Taking (Equal Voting) Rights*].

> carries with it the inalienable and indissoluble and indefeasible right to be elected to office.[95]

This issue was especially important to Fifteenth Amendment advocates at the time they were acting, given a recent episode in the reconstructed state of Georgia. That state had been readmitted to the Union after the Civil War on the promise that it would not racially discriminate with respect to suffrage.[96] Georgia, in the summer of 1868, adopted a state constitution that prohibited racial discrimination concerning suffrage, but then later that year expelled its newly elected Black legislators based on their race.[97] Backers of the Fifteenth Amendment took the position that Georgia had flouted its promise, and thus the state's reconstruction ought to be reopened.[98] Accordingly, they argued in 1869 when the text of the Fifteenth Amendment was finalized, the words of the Amendment didn't need to (and indeed shouldn't) mention office-holding specifically because the right to vote already presumptively included the right to be voted for.[99] If there were no such presumption in the meaning of the right to vote, then Georgia would not have flouted its promise and there would be no basis for reconsidering its readmission to the Union.

The Nineteenth Amendment guaranteeing women's suffrage, which was ratified in 1920 and which features the precise same "[t]he right . . . to vote shall not be denied or abridged . . . on account of" formulation, was similarly understood prior to and after enactment to include, as a presumptive matter, the right to hold office free from sex discrimination.[100] To be sure, some states took a few decades after 1920 to fully permit women to hold public offices (just as some states took decades to comply with other constitutional amendments dealing with equality).[101] But that does not mean their foot-dragging was plausibly supported by prevailing legal understandings surrounding the implications of women's suffrage. Even prominent people who would have preferred the Nineteenth Amendment to explicitly refer to office-holding would acknowledge that

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95. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 1426 (1869) (statement of Rep. Benjamin Butler).

96. Andrew Glass, *Georgia Readmitted to Union, July 15, 1870*, POLITICO (July 15, 2014, 5:05 AM), https://www.politico.com/story/2014/07/georgia-civil-war-108886.

97. William Harris Bragg, *Reconstruction in Georgia*, NEW GA. ENCYCLOPEDIA, https://www.georgiaencyclopedia.org/articles/history-archaeology/reconstruction-in-georgia/ [https://perma.cc/5Z4J-N9RW] (Sept. 30, 2020).

98. Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 228–33 (1995) [hereinafter Amar, *Jury Service*].

99. *Id.*

100. U.S. CONST. amend. XIX.

101. *See* Elizabeth D. Katz, *The History of Women's Right To Hold Office*, ST. CT. REP. (Sept. 23, 2024), https://statecourtreport.org/our-work/analysis-opinion/history-womens-right-hold-office [https://perma.cc/3KLA-PPQC].

the majority of enactors understood (both because the right to vote generally includes the right to be voted for and because office-holding eligibility had generally and historically been keyed to voter eligibility) that adoption of the Nineteenth Amendment's specific prohibitions would permit women to hold office free of sexist exclusion. (That, by the way, is why no self-respecting constitutional interpreter, originalist or otherwise, would credibly argue today that women are ineligible to become President even though a contrary general implication might otherwise be drawn from the Constitution's repeated use, all the way from the Founding to the Twenty-Fifth Amendment adopted in 1965, of masculine pronouns only to refer to the President.)

But should age be treated the same as race and sex? After all, under the Fourteenth Amendment's Equal Protection Clause, age is not a problematic classification, which means, for example, that states can require civil service employees to retire at a certain age or subject older drivers to additional scrutiny when licenses are renewed, even as states could obviously not have race- or sex-based rules for mandatory retirement or the issuance of driving privileges.

Yet while the Equal Protection Clause applies to access to employment and travel, it does not govern political rights like voting and office-holding. During Reconstruction, it was generally agreed that nothing in the Fourteenth Amendment applied to political rights, a consensus that explains why the Fifteenth Amendment was needed in the first place.[102] For a Court with even a passing interest in originalism, the Fourteenth Amendment is simply not a tenable basis on which to ground political rights.

Instead, when it comes to political rights, the Fifteenth, Nineteenth, and Twenty-Sixth Amendments are key. And they are identically worded (save for the respective reference to race, sex, and age), using the same constitutional formulation. That strongly suggests, as an intratextualist matter, that these provisions generally ought to be construed the same way.

Two aspects of the Twenty-Sixth Amendment's text—"[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age"[103]—cannot be overemphasized. First, as just suggested, the striking parallelism between it and the Fifteenth Amendment (and the Nineteenth as well) was obviously intentional. That is, the Twenty-Sixth self-consciously tracks the language of the Fifteenth and Nineteenth Amendments (and with a long formulation, not just a word or two), with the same intended consequences.

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102. Amar, *Jury Service*, *supra* note 98, at 222–27.

103. U.S. CONST. amend. XXVI, § 1.

Unsurprisingly, the public legislative history corroborates this. As prominent Representative Claude Pepper announced in an uncontested statement explaining the Twenty-Sixth Amendment's scope: "What we propose to do . . . is exactly what we did in . . . the 15th amendment and . . . the 19th amendment. Therefore, it seems to me that this proposed amendment is perfectly in consonance with those precedents."[104] And certainly by the early 1970s when the Twenty-Sixth Amendment was debated and ratified, it was clear that government could not use racial or sex-based classifications with regard to office-holding.

Representative Richard Poff likewise amplified the connections between all three, functionally identically worded, amendments:

> What does the proposed constitutional amendment accomplish? . . . [I]t guarantees that citizens who are 18 years of age or older shall not be discriminated against on account of age. Just as the 15th amendment prohibits racial discrimination in voting and just as the 19th amendment prohibits sex discrimination in voting, the proposed amendment would prohibit age discrimination in voting . . . . [T]he proposed amendment would protect not only an 18-year-old, but also the 88-year-old.[105]

Second, as these passages make clear and as was true with the Fifteenth and Nineteenth, the Twenty-Sixth Amendment does not merely confer the franchise on any particular group of people, but instead outlaws discriminatory treatment based on a particular criterion. Thus, the operative text of the Twenty-Sixth Amendment does not say merely that each state shall reduce its voting age to eighteen (just as the operative words of the Fifteenth do not merely say that adult Black men shall enjoy the franchise) but instead provides that the right of persons eighteen or older to vote cannot be denied or abridged on account of age: Textually, then, age cannot be used as a criterion for withholding the core political rights.

Relatedly, as to what attentive folks at enactment understood as to the amendment's reach, the text of the Twenty-Sixth Amendment's reference to the "right to vote" was, as was true of the Fifteenth and Nineteenth before it, shorthand for a broad package of political participation rights. For anyone who may not have been sure, Representative Poff was explicit about how the Amendment was meant to facilitate the fullest possible

104. 117 CONG. REC. 7539 (1971) (statement of Rep. Claude Pepper).
105. *Id.* at 7534 (statement of Rep. Richard Poff).

political participation.[106] Addressing the House and quoting the committee report, he described the Amendment as "confer[ring] a plenary right on citizens 18 years of age or older to participate in the political process, free of discrimination on account of age."[107] Representative Poff also explained that "[t]he 'right to vote' is a constitutional phrase of art whose scope embraces the entire process by which the people make their political choices."[108] Thus, noted Representative Poff, unlike the federal statute at issue in *Oregon v. Mitchell*, the Amendment was not limited to particular kinds of voting, but rather applied even to voting by which individuals make law—which on its face would include voting to enact an initiative or voting done by an elected assembly like Congress.

What about the fact that elsewhere in the Constitution, age requirements for federal office (above eighteen) are specified? These are specific exceptions to the general rule in the Twenty-Sixth Amendment that age should not be considered in setting qualifications for the exercise of political rights. And the presumptive linkage between voting and office-holding illustrated above can be broken by clear constitutional text to the contrary. But like all exceptions, they should be construed so as not to swallow the rule. The requirements that House members must be at least twenty-five, Senators thirty, and Presidents thirty-five are minimums, not maximums.

Just as people cannot be denied the right to vote for federal office because they are too old, neither can they be denied the right to run for those offices on the same ground. States can set their own age restrictions for state offices that mirror the federal age floors, and both the backers and opponents of the Twenty-Sixth Amendment explicitly and publicly recognized this limitation to the otherwise "plenary" nature of the Twenty-Sixth Amendment's conferral of rights.

So there are limits on what states can do, to be sure. But neither my imaginary Colorado constitutional amendment nor California's tax-return disclosure law implicates, let alone violates, any of these restrictions.

III. WHAT ABOUT THE "BALLOT ACCESS" CASES?

There is one additional line of cases to be considered, even though present word-count limitations do not permit affording this doctrinal branch full treatment. Beginning in the 1960s through the early 1980s, the

106. For further discussion, *see* Amar, *Taking (Equal Voting) Rights Seriously*, *supra* note 94, at 1629.

107. 117 CONG. REC. 7535 (1971) (statement of Rep. Poff) (quoting H.R. REP. NO. 92-37, at 7 (1971)).

108. *See id.* (statement of Rep. Poff); *see also* Amar, *Taking (Equal Voting) Rights Seriously*, *supra* note 94, at 1630.

Court handed down a series of so-called "ballot-access" cases invalidating state laws imposing filing-fee and signature-gathering requirements that limited the ability of various candidates, often minor-party candidates, from appearing on popular-election ballots. For example, in 1968, the Court in *Williams v. Rhodes*[109] deployed strict scrutiny under the Equal Protection Clause to invalidate an Ohio law that required new political parties to satisfy rigorous requirements demonstrating their popular support as a condition for allowing their presidential candidates to appear on the ballot.[110] A year later, the Court struck down in *Moore v. Ogilvie*[111] an Illinois law that required, as a condition of ballot access, independent candidates for President and Vice President to gather a large number of signatures from throughout the state.[112] And in perhaps the most ambitious and free-wheeling of these cases, the Court in 1983 in *Anderson v. Celebrezze*[113] rejected an Ohio law that required independent candidates for President to file their election papers more than seven months before the general election.[114] Some might read some of these cases, to the extent that they limit state power over election administration, as calling into question the broad discretion states have to add qualifications with respect to presidential contests. Candor compels the recognition that some rulings in this grouping of cases, to the extent they apply to presidential selection and not just constitutionally required legislative elections,[115] are hard to harmonize with much of what the Constitution itself says, what Founding-era practice reveals, and what the Court has said and done in recent decades. The cases make use of quintessentially *ad hoc* balancing tests, and the Court in these rulings makes no effort at all to explain why the Equal Protection Clause, which was assuredly not, as an originalist matter, intended to govern voting (else why would the Fifteenth Amendment have been needed?[116]) should be understood to apply at all, especially to realms like presidential selection, where no popular elections of any kind are required. The Court in *Rhodes*, a seminal case in the line, *does* say that the state power to appoint electors does not free states from the commands of the Equal Protection Clause, but then makes no argument about why the

109. 393 U.S. 23 (1968).

110. *Id.* at 31, 34.

111. 394 U.S. 814 (1969).

112. *Id.* at 815, 819.

113. 460 U.S. 780 (1983).

114. *Id.* at 782, 805–06.

115. While these three cases explicitly involve state laws relating to presidential contests, many other cases in this line of "ballot-access" rulings involve state laws concerning state and federal legislative contests. *See, e.g.*, *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 175–77 (1979); *Lubin v. Panish*, 415 U.S. 709, 710 (1974); *see also* Amar, *Taking (Equal Voting) Rights Seriously*, *supra* note 94, at 1632–34.

116. Amar, *Jury Service*, *supra* note 98, at 226.

Equal Protection Clause was supposed to command anything in this realm, thus ignoring the difficult originalist question.[117]

In assessing the modern relevance of some of these ballot-access cases, we should note that the most relevant of them all predate *Bush v. Gore*, *Rucho v. Common Cause*[118] (which rejects the notion that the First Amendment or the Fourteenth Amendment speaks to and prohibits partisan regulation of elections), and *Chiafalo v. Washington*, much less the ascendance of an originalist-leaning Court majority. It should be prominently observed in this regard that the Court has not struck down a state regulation of presidential selection under this line of cases in over four decades. (*Anderson v. Celebrezze*, whose free-form balancing test is perhaps the most inscrutable, was a 5–4 decision, with the conservative Justices, save for Chief Justice Burger, in the dissent.[119]) The results in some of the cases in this line can perhaps be rightly justified as rulings about socio-economic or racial equality[120] that would implicate the Twenty-Fourth[121] or Fifteenth[122] Amendments, or about impingement on Congress's undeniable powers to regulate the *timing* of presidential contests,[123] even if that is not how the Court overtly explained them. Others may be justified on the ground that in *choosing* to involve citizen voters in the selection process (even when such popular input is not constitutionally required), states are required (perhaps by due process and Guarantee Clause principles) to be minimally transparent with the voters in ways the states in these cases were not; that is, states, to placate citizens, were promising open elections but not really providing them. Others of these cases, which tend to focus on eliminating partisan entrenchment, seem particularly hard to reconcile with Founding-era practice and many other cases in which aggressive partisan machinations are permitted.[124]

117. *See Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

118. 139 S. Ct. 2484 (2019).

119. *See Anderson v. Celebrezze*, 460 U.S. 780, 782, 789, 806 (1983).

120. *See Bullock v. Carter*, 405 U.S. 134, 144, 149 (1972) (invalidating substantial filing fees in part because the challenged "system falls with unequal weight on voters, as well as candidates, according to their economic status").

121. U.S. CONST. amend. XXIV, § 1 (prohibiting discrimination in voting on account of inability to pay poll taxes).

122. *Id.* amend. XV, § 1 (prohibiting discrimination in voting on account of race).

123. *E.g.*, *Anderson*, 460 U.S. at 806.

124. Nor could anyone imagine the First Amendment's general prohibition on viewpoint-based discrimination on the grounds of political partisanship to apply to the appointment of federal government officials. Presidents discriminate on the ground of partisanship all the time when making appointments to the executive and judicial branch. Even if partisanship need be regulated where elections are required and the people are supposed to be given the direct power to choose, when elections are not required the idea that the First Amendment constrains processes of selection is unworkable. *See* Akhil Reed Amar & Vikram David Amar, *Judicial Elections and the First Amendment: The Sensible Middle Path the Supreme Court Missed*, FINDLAW (Aug. 9, 2002), https://la.utexas.edu/

Yet whatever one thinks of these cases—and there is a great deal of internal inconsistency within the line of cases itself[125]—the Colorado hypothetical offered here and the statute that California actually passed fall outside this line of cases; neither of those measures is about discriminating on the basis of class or race, or regulating the timing of presidential contests, or misleading voters, or, for that matter, partisan entrenchment.[126] Instead, the Colorado statute is in full keeping with the state-law tradition, going back many decades, of enacting so-called "sore-loser laws"[127] (and the California statute is in keeping with the traditional requirements of disclosure of financial entanglements for public officials).

IV. DOES THE LAST PART OF *MOORE V. HARPER* HAVE ANYTHING TO SAY ABOUT ANY OF THIS?

Finally, there is *Moore v. Harper*,[128] and its admonition towards the end of the opinion (an admonition on which other participants in this symposium are writing)[129] that state courts do not have "free rein" when interpreting state laws that affect federal contests.[130] This last section of *Moore v. Harper* says only that *state courts* don't have a completely free hand—not that *states* don't. That is why, as a logical matter, there is nothing left of the so-called independent state legislature theory (ISLT), which (unsuccessfully) posited that elected state *legislatures* have unique powers; if state courts go rogue, it does not matter whether they are disrespecting elected legislatures, popularly enacted initiatives, or duly empowered administrative bodies. As I explain in very careful detail elsewhere,[131] the last section of *Moore* simply means that overly zealous and generative state courts cannot speak for or in the name of the state.

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users/jmciver/357L/P2/Findlaw_Judicial%20Elections%20And%20The%20First%20Amendment_080902.htm [https://perma.cc/4NT5-6ZWN].

125. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 904 (3d ed. 2006) (discussing "obvious tension among these cases").

126. *See Griffin v. Padilla*, 417 F. Supp. 3d 1291, 1302 (E.D. Cal. 2019) ("While this case [involving California's requirement that presidential candidates disclose tax returns] concerns a law passed by a Democratic majority in the California Legislature, and while it fundamentally targets a Republican presidential candidate, in a different political climate or a different state the roles and putative requirements could easily be reversed.").

127. On the permissibility of such laws, see, *e.g.*, *Storer v. Brown*, 415 U.S. 724 (1974).

128. 143 S. Ct. 2065 (2023).

129. *See* Quinn Yeargain, *State Executive Branches Under* Moore v. Harper, 2025 WIS. L. REV. ____; Jane S. Schacter, *"Quite Literally, Our Job":* Moore v. Harper *and the Fragility of Judicial Federalism*, 2025 WIS. L. REV. ____.

130. *Moore*, 143 S. Ct. at 2088.

131. *See* Vikram David Amar, *The* Moore *the Merrier: How* Moore v. Harper*'s Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country, and Commentators*, 2022–2023 CATO SUP. CT. REV. 275, 299.

But that would be true for state as well as federal elections, and in any event has nothing to do with the presidential qualification scenario I offer at the outset; I styled my example so that the state constitutional text was clear. But it doesn't have to be. As long as the state court's construction is not outlandish, then there would be no problem under *Moore v. Harper*.

In that regard, I have seen no evidence that the main teaching of *Moore v. Harper*—that states are allowed to apply state constitutions and utilize state courts to regulate federal elections—is being disregarded by lower federal courts. I am aware of no federal case since *Moore v. Harper* in which a federal court has sought to undo a state court ruling involving a federal election.[132]

132. The Court recently denied certiorari in *Montana Democratic Party v. Jacobsen*, No. 24-220, 2025 WL 247449 (U.S. Jan. 21, 2025) (mem.), even though various conservative amici urged the Court to use this case to revisit and expand the scope of the last section of *Moore*.