Originalism as Novelty and Originalism as Authentic: *Trump v. Anderson* v. the Reconstruction's Fourteenth Amendment

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INTRODUCTION

The Supreme Court in *Trump v. Anderson*[1] was originalist only in the sense that the Justices offered an original, as in novel, interpretation of the Constitution—unmoored from history and the text. The judicial majority chartered four new "original" paths when concluding that states, under Section Three of the Fourteenth Amendment,[2] could not disqualify candidates for federal office. First, the per curiam opinion misleadingly insisted that the Fourteenth Amendment limited the power of state governments when the text, in approximately equal degrees, limits the power of the state and federal governments alike. Second, the majority's superfluous emphasis on whether the Fourteenth Amendment augmented state power ignored the states' pre-Civil War and current powers to make policies that prevent candidates for federal office from appearing on state election ballots. Third, rather than examine whether the Colorado state court decision disqualifying President Trump[3] was "unjust" in law or fact, the

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1 Trump v. Anderson, 601 U.S. 100 (2024) (per curiam).

2 U.S. CONST. amend. XIV, § 3.

3 Anderson v. Griswold, 543 P.3d 283 (2023) (per curiam), *rev'd*, Trump v. Anderson, 601 U.S. 100 (2024) (per curiam).

majority prohibited all state efforts to remove from the ballot candidates for federal office ineligible under Section Three. Fourth, the Roberts Court maintained that judicially approved congressional legislation was the only means for implementing the Fourteenth Amendment, a claim that prominent Republicans during Reconstruction asserted would threaten the goals of constitutional reform.[4]

Trump v. Anderson has little virtue as an authentic reproduction of what the persons responsible for Section Three would have done when confronted with the events of January 6, 2021. They hoped Republicans in the states and federal judiciary would disqualify "oathbreaking insurrectionists"[5] when Democrats in the national government refrained. Still, as an effort to articulate novel principles of constitutional law that no Republican in 1866 championed, the opinion is a stunning judicial success.

I. THE FOURTEENTH AMENDMENT AS A LIMIT ON STATE, FEDERAL, AND JUDICIAL POWER

The *Trump v. Anderson* Court engaged in deceptive judicial practices when it claimed that "the Fourteenth Amendment restricts state power"[6] and that "Section 3 of the Amendment likewise restricts state autonomy."[7] No matter how one slices and dices the Fourteenth Amendment, no reading exists under which the Amendment as a whole, or Section Three in particular, is accurately described primarily as a limit on state power. The privileges and immunities, due process, and equal protection clauses of Section One are the only clauses in the Fourteenth Amendment that restrict state power exclusively.[8] The citizenship clause of Section One, the entirety of Section Three, the state debt clause of Section Four, and the clause banning compensation for emancipated slaves in Section Four limit both state and federal power.[9] Section Two and the federal debt clause in Section Four restrict only federal power.[10] States never had the authority to apportion seats in the House of Representatives, allocate votes in the Electoral College, or determine whether to honor the federal debt.

Republicans during Reconstruction trusted states to implement Section Three faithfully throughout the late 1860s.[11] When Congress did not trust

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4 *See infra* note 85 and accompanying text.

5 *Anderson*, 601 U.S. at 118 (Sotomayor, Kagan, and Jackson, JJ., concurring in the judgment).

6 *Id.* at 109 (majority opinion).

7 *Id.* at 108.

8 *See* U.S. CONST. amend. XIV, § 1, cl. 2–4.

9 *See id.* § 1, cl. 1; *id.* § 3; *id.* § 4, cl. 2.

10 *See id.* § 2; *id.* § 4, cl. 1.

11 *See infra* notes 14–18.

states to implement faithfully the Reconstruction Amendments, the national legislature did not permit those states to be represented in Congress.[12] No former Confederate State was represented in Congress when the Fourteenth Amendment was sent to the states in 1866.[13] Many were not represented when the Fourteenth Amendment was ratified in 1868.[14] Tennessee aside,[15] Congress allowed former Confederate States to be represented in the national legislature only on the condition that African American men voted.[16] Former Confederate State constitutions during Reconstruction enfranchised persons of color.[17] More than half of these states disfranchised persons who played an active role in the rebellion.[18] The reality of the resulting southern electorate in 1870 considerably blunts the force of the per curiam's observation that no congressional officeholder was disqualified in the wake

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12 *See* MARK A. GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR 16–42 (2023).

13 *See The Civil War: The Senate's Story*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/civil_war/CivilWar.htm [https://perma.cc/7TF5-DVBK].

14 *See Intro.6.4 Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments)*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/intro.3-4/ALDE_00000388 [https://perma.cc/LD34-Z3TA].

15 H.R.J. Res. 73, 39th Cong., 14 Stat. 364 (1866).

16 *See* Act of June 22, 1868, ch. 69, 15 Stat. 72, 73 (readmitting Arkansas); Act of June 25, 1868, ch. 70, 15 Stat. 73, 73–74 (readmitting North Carolina, South Carolina, Louisiana, Georgia, Alabama, Florida); Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63 (readmitting Virginia); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68 (readmitting Mississippi); Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 80–81 (readmitting Texas).

17 *See* ALA. CONST. of 1867, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHATERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 144–45 (Francis Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS]; ARK. CONST. of 1868, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS 320–21; FLA. CONST. of 1868, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS 719–20; GA. CONST. of 1868, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS 825; LA. CONST. of 1868, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS 1462; MISS. CONST. of 1868, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS 2079; N.C. CONST. of 1868, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS 2814; S.C. CONST. of 1868, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS 3297–98; TENN. CONST. of 1870, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS 3460; TEX. CONST. of 1868, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS 3608; VA. CONST. of 1870, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS 3875–76.

18 *See* ALA. CONST. of 1867, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 144–45; ARK. CONST. of 1868, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 320–21; LA. CONST. of 1868, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 1462; MISS. CONST. of 1868, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 2079–80; S.C. CONST. of 1868, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3297–98; TEX. CONST. of 1868, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3608; VA. CONST. of 1870, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTION, *supra* note 17, at 3876.

of Section Three's ratification.[19] African Americans and their allies voted for Republicans, not for former federal officeholders who violated their oath of office when supporting the Confederacy.[20] The *Anderson* Court did not point to a single member of a former Confederate State's congressional delegation or anyone else who could have been disqualified under Section Three. If Congress had the power to disqualify candidates for federal offices and federal officeholders, and such persons existed in any number, one would expect to see many petitioners to Congress asking that such persons be disqualified. No one has yet pointed to one.

Hinds' Precedents, a historical record of House procedures, confirms the absence of federal officials subject to Section Three disqualification from the time the Fourteenth Amendment was ratified until the passage of the Amnesty Act of 1872[21] enabled the vast majority of former Confederates to hold state and federal office.[22] The *Anderson* Court cited the first volume for the proposition that "[i]n the years following ratification, the House and Senate exercised their unique powers under Article I to adjudicate challenges contending that certain prospective or sitting Members could not take or retain their seats due to Section 3."[23] *Hinds' Precedents* provides only five congressional adjudications.[24] The first adjudication was of a candidate disqualified by state officials that was reviewed by Congress.[25] At no point did any member of Congress question that state disqualification per se, provided the decision was subject to congressional review.[26] Three other challenges brought by losing candidates for office were rejected.[27] The fifth adjudication concerned whether a candidate who received the second highest total of votes in the state legislature could take office when the person chosen by that legislature did not meet Section Three standards.[28] The Senate refused to seat the runner-up on the ground that he was also disqualified under Section Three and that runners-up had no right to hold office when the winner was disqualified.[29] These five instances, one of which was adjudicated in the state and another of which—the Senate election—could

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19 Trump v. Anderson, 601 U.S. 100, 113–14 (2024) (per curiam).

20 *See* Travis Crum, *The Unabridged Fifteenth Amendment*, 133 YALE L.J. 1039, 1108 (2024).

21 Act of May 22, 1872, ch. 193, 17 Stat. 142 (1872).

22 *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87 (2021); *see* 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 459–463, at 470–86 (1907).

23 *Anderson*, 601 U.S. at 113–17.

24 *See* HINDS, *supra* note 22, §§ 459–463, at 470–86.

25 *Id.* § 459, at 470–72.

26 *Id.*

27 *Id.* §§ 460–462, at 472–78.

28 *Id.* § 463, at 478–86.

29 *Id.*

not have been adjudicated in the state, hardly demonstrate a broad consensus that only Congress could disqualify candidates for federal office.

Significantly, there is no history of any proceeding in a state or federal setting determining whether a federal executive branch official was disqualified from holding office under Section Three of the Fourteenth Amendment. Thus, whatever this history may reveal about the impact of Section Three on congressional power to determine the qualifications of Representatives and Senators under Article I, Section Five, the history the Court cites has no bearing on who determines whether presidents lack the constitutional qualifications for office.

The *Anderson* Court's failure to discuss how the Fourteenth Amendment limits federal judicial power further obscures the institutional impact of that nineteenth-century constitutional reform. Courts were limited as much, if not more, than states. The Citizenship Clause of the Fourteenth Amendment[30] reversed the result in the Supreme Court's *Dred Scott v. Sandford* decision.[31] That text of the Fourteenth Amendment prohibits federal courts from holding—as they did in *Dred Scott*—that former slaves are not American citizens and have no rights that "a white man was bound to respect."[32] The Fourteenth Amendment does not permit federal courts to order states to pay off Confederate obligations, to order any government official to compensate the owner of an emancipated slave, or to allow the federal government to repudiate the federal debt. Section Five implies that Congress may enforce the Fourteenth Amendment in ways forbidden to federal judges.

Federal courts would not be the favorite in an institutional authority sweepstakes operated by the persons who framed the Fourteenth Amendment. Leading Republicans in the Thirty-Ninth Congress defended legislative supremacy. Representative Thaddeus Stevens of Pennsylvania maintained, "The legislative power is the sole guardian of [constitutional] sovereignty."[33] Many Republicans in the late 1860s supported bills stripping the Supreme Court of jurisdiction, reversing judicial decisions in constitutional cases, and sharply limiting or abolishing the Supreme Court's power to declare laws unconstitutional.[34] Given the low status of the Supreme Court in 1866,[35] an originalist opinion aimed at producing an

30 U.S. CONST. amend. XIV, § 1, cl. 1.

31 60 U.S. (19 How.) 393 (1857) (enslaved party).

32 *Id.* at 407.

33 CONG. GLOBE, 39th Cong., 2d Sess. 252 (1867); *see* CONG. GLOBE, 39th Cong., 2d Sess. 255 (1867) (speech of Rep. James Ashley of Ohio). *See generally* STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 66 (1968).

34 *See* KUTLER, *supra* note 33, at 35–36, 66–84.

35 *Id.*

authentic reproduction of post-Civil War constitutional thought would have certainly deleted the passages in *Anderson* that insist on rigorous federal judicial supervision of congressional implementation of Section Three[36] and probably would have concluded that federal courts have even less business implementing the Fourteenth Amendment than states with a substantial African American electorate.

The disingenuous analysis of how the Fourteenth Amendment impacted the allocation of constitutional authority provided the foundation for the *Anderson* majority's conclusion that Congress was the only institution empowered to disqualify candidates for federal office. The five justices who joined the per curiam opinion bluntly stated that "to enforce Section 3 against federal officeholders and candidates" would "[g]rant[] the States [the] authority" that "would invert the Fourteenth Amendment's rebalancing of federal and state power."[37] With the exception of the three clauses in Section One, however, nothing in the Fourteenth Amendment discusses the "rebalancing of federal and state power."[38] Certainly, nothing in Section Three of the Fourteenth Amendment, which is a restriction on state, federal, and judicial power, empowers any institution at the expense of another. The more obvious inference from the text and history is that institutional authority for enforcing Section Three of the Fourteenth Amendment is the same as the previous institutional authority over federal elections. Whether states have the power to disqualify candidates for federal office under Section Three depends on whether states have the power to disqualify candidates for federal office who do not meet other constitutional qualifications for federal officeholding.

II. STATE POWER TO PREVENT CANDIDATES FOR FEDERAL OFFICE FROM APPEARING ON STATE ELECTION BALLOTS

The Roberts Court answered the wrong question when concluding that Section Three "does not affirmatively delegate . . . to the States"[39] the power to prevent candidates for federal office from being on the state election ballot. The Thirteenth, Fourteenth, and Fifteenth Amendments do not empower states.[40] Each amendment limits some state and federal powers while adding new federal powers. After 1872, states could no longer make slavery legal, abridge the rights of citizens of the United States, or

36 Trump v. Anderson, 601 U.S. 100, 115–16 (2024) (per curiam).

37 *Id.* at 111–12.

38 *Id.*

39 *Id.*

40 *See* U.S. CONST. amend. XIII; *id.* amend. XIV; *id.* amend. XV.

enfranchise only white voters. A state that could not do *X* before 1865 could not do *X* after 1865.

The right question to ask is whether states have other powers under particular state constitutions and the Constitution of the United States that authorize states to adopt policies that further the rules, principles, and aspirations of the Reconstruction Amendments. The answer to this question obviously is yes. States could "implement" provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments by passing legislation under state constitutions or passing state constitutional amendments that outlawed slavery, forbade payment of the Confederate debt, or enfranchised persons of color. No one claimed that the state bans on slavery and state prohibitions on repaying the Confederate debt, that President Andrew Johnson insisted upon as a condition for former Confederate States[41] to be represented in Congress, became unconstitutional after states ratified the Thirteenth and Fourteenth Amendments. Each was an exercise of normal state police powers. Such state laws might be preempted by federal legislation, but they are not unconstitutional in the absence of conflicting federal law.

Under Article I, Section Four, states had the power, both before and after the Civil War, to pass laws, adopt policies, and make decisions that prevent some candidates for the presidency and other federal offices from being on the state election ballot. Before the Civil War the presidential candidates on the ballot routinely depended on the state responsible for the ballot. Abraham Lincoln was not on the ballot in most southern states.[42] The contemporary Supreme Court routinely sustains state laws that prevent candidates for the presidency from being on the ballot in that state. States may forbid candidates for the presidency from running as an independent if they were a member of a political party the year before[43] or do not obtain a sufficient number of signatures on their nominating petition.[44] In the spring of 2024, for example, the real possibility existed that voters in different states would be given a ballot with the names of different candidates. Robert F. Kennedy, Jr. was likely to meet the qualifications for being on the ballot in only a few states.[45] Joseph Biden, had he been the nominee of the Democratic Party in

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41 CONG. GLOBE, 39th Cong., 1st Sess. App., 2 (1866); *see* GRABER, *supra* note 12, at 27.

42 *See* MICHAEL F. HOLT, THE ELECTION OF 1860: A CAMPAIGN FRAUGHT WITH CONSEQUENCES 135 (2017) (noting Republicans distributed ballots only in the North and "a few counties in the border slave states").

43 Storer v. Brown, 415 U.S. 724 (1974).

44 Jenness v. Fortson, 403 U.S. 431 (1971).

45 *See* Oren Oppenheim, Will McDuffie & Kelsey Walsh, *RFK Jr.'s Ability to Sway 2024 Election Depends on Ballot Access: Where He Stands*, ABC NEWS (Apr. 2, 2024, 5:27 PM), https://abcnews.go.com/Politics/rfk-jrs-ability-sway-2024-election-depends-ballot/story?id=108753511 [https://perma.cc/49YS-3PR4].

late August 2024, would not have met the standards as of April 2024 for being on the ballot in Ohio and Alabama.[46]

Lower federal court precedents acknowledge existing state power to disqualify presidential candidates who do not meet the citizenship, residency, and age qualifications enumerated in Article II, Section One, Paragraph Five.[47] Justice Neil Gorsuch, when serving on the Tenth Circuit in *Hassan v. Colorado*,[48] sustained a state decision preventing candidates who lack Article II qualifications for the presidency from being on the ballot. "[A] state's legitimate interest in protecting the integrity and practical functioning of the political process," he stated, "permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office."[49] The federal district court in *Greene v. Raffensperger*[50] agreed when considering whether a member of Congress was subject to Section Three disqualification in a state. "Consistent with the State's obligations under Article I, Section 4, which charges it with regulating the time, place, and manner of elections," Judge Amy Totenberg wrote, citing *Hassan* and other cases, "the State has an 'important and well-established interest in regulating ballot access and preventing fraudulent or ineligible candidates from being placed on the ballot.'"[51]

The *Anderson* Court made no effort to distinguish, overrule, or even comment on these precedents, permitting states to disqualify indirectly or directly candidates ineligible for federal office under provisions in the original Constitution of the United States and Section Three of the Fourteenth Amendment. Had the United States followed the practice in some regimes, the federal provisions of Section Three would have been added to Article II, Section Four, rather than appended to the end of the Constitution.[52]

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46 *See* Bill Redpath, *Alabama Secretary of State Says Democratic Convention Too Late for Its Presidential Ticket to be Included on Alabama General Election Ballot*, BALLOT ACCESS NEWS (Apr. 9, 2024), https://ballot-access.org/2024/04/09/alabama-secretary-of-state-says-democratic-convention-too-late-for-its-presidential-ticket-to-be-included-on-alabama-general-election-ballot [https://perma.cc/BF47-CSTF]; Richard Winger, *For the Third Time, Ohio Deadline for Parties to Certify Their Presidential Nominees is a Problem for One of the Major Parties*, BALLOT ACCESS NEWS (Apr. 6, 2024), https://ballot-access.org/2024/04/06/for-the-third-presidential-election-ohio-deadline-for-parties-to-certify-their-presidential-nominees-is-again-a-problem-for-one-of-the-major-parties [https://perma.cc/FHC4-WD2N].

47 *See, e.g.*, Socialist Workers Party of Ill. v. Ogilvie, 357 F. Supp. 109 (N.D. Ill. 1972) (upholding a state electoral board disqualification of a presidential candidate who did not meet the age requirement established in the Constitution).

48 495 F. App'x 947 (10th Cir. 2012).

49 *Id.* at 948.

50 599 F. Supp. 3d 1283 (N.D. Ga. 2022).

51 *Id.* at 1311.

52 *See* RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 236–40 (2019).

This would have presented the justices with the impossible task of distinguishing those presidential qualifications states were empowered to implement from those they were not. No reason exists for permitting states to determine Article II, Section Four but not Fourteenth Amendment qualifications for federal office. That Section Three was part of a constitutional amendment with some provisions that "rebalanced" federal and state power hardly distinguishes the Fourteenth Amendment from the original constitutional qualifications for federal officeholding. Article II, after all, was part of the new constitution that rebalanced the previous federal-state relationship under the Articles of Confederation far more than the Reconstruction Amendments rebalanced antebellum federal-state relationships.[53]

III. UNJUST DISQUALIFICATION FROM STATE ELECTORAL BALLOTS

The persons responsible for the Reconstruction Amendments sought to empower Congress to rectify state policies inconsistent with new constitutional commitments. Senator Jacob Howard of Michigan, when introducing what became the final version of the Fourteenth Amendment, declared that Section Five "enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment."[54] Representative Stevens stated that Section One of the Fourteenth Amendment "allows Congress to correct the unjust legislation of the States."[55] The emphasis was on the supervisory role of Congress. Nowhere did any supporter of the Fourteenth Amendment even hint that courts could strike down state legislation or state court decisions that were not "unjust"[56] and did not "conflict with the principles of the amendment."[57]

Republicans set out these principles when debating Section Three of the Fourteenth Amendment. The main principle was that power should be confined to loyal citizens who accepted the results of elections.[58] Disqualification from office, Senator Jacob Howard of Michigan stated, would "ostracize the great mass of the intelligent and really responsible

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53 *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (2005).

54 CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866).

55 *Id.* at 2459.

56 *Id.*

57 *Id.* at 2768.

58 *Id.*

leaders of the rebellion."[59] Congress limited the ban on officeholding to former Confederate officeholders partly because Republicans maintained that persons who had taken an oath to support the Constitution and then engaged in insurrection or rebellion could not be trusted with future office.[60] Senator James W. Grimes of Iowa asserted, "the man who has once violated his oath will be more liable to violate his fealty to the Government in the future."[61] State courts agreed.[62] The court in *Worthy v. Barrett*[63] declared: "*The oath to support the Constitution is the test.* The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress."[64]

The members of Congress who framed Section Three, when debating what became the Enforcement Act of 1870, understood that congressional power under Section Three was a means for supervising and supplementing existing state powers to remove government officials disqualified under the Fourteenth Amendment. Senator Lyman Trumbull of Illinois, when calling for federal legislation to enforce Section Three, acknowledged the existence and legitimacy of existing state means of enforcement.[65] The problem, he insisted, was that state measures were ineffective and needed federal correction.[66] Trumbull described his proposal as "afford[ing] a more efficient and speedy remedy to prevent persons from holding office who are not entitled to take office under the Constitution of the United States."[67] Senator Howard thought federal legislation unnecessary.[68] He declared:

> If the person claiming to hold an office is in fact as well as *de jure* no office, if instead of being in office he is actually out of office by virtue of that clause of the Constitution, then it is somewhat difficult to see the propriety of instituting the proceeding of *quo warranto* for the purpose, in the language of the first section, of removing him from office.[69]

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59 *Id. See generally* HAROLD MELVIN HYMAN, ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION 26 (1954) (quoting Charles Sumner making the same claim for the Ironclad Oath).

60 *See* Magliocca, *supra* note 22, at 87.

61 CONG. GLOBE, 39th Cong., 1st Sess. 2916 (1866).

62 *See, e.g.*, Worthy v. Barrett, 63 N.C. 199, 204 (1869).

63 *Id.*

64 *Id.* (emphasis added); *see In re Secession Convention*, 12 Fla. 651, 651 (1868) (advisory opinion) (members of secession conventions are not subject to Section Three because they did not take an oath of office).

65 CONG. GLOBE, 41st Cong., 1st Sess. 626–27 (1869).

66 *Id.*

67 *Id.* at 627.

68 *Id.* at 628.

69 *Id.*

No member of Congress in 1870 even hinted that candidates for federal office or existing federal officeholders could not be disqualified from office unless Congress passed implementing legislation.[70] Congressional power was preemptive, not exclusive.

The Supreme Court edited Trumbull's speech on the Enforcement Act of 1870 to give the false impression that Trumbull was defending the exclusive right of Congress to enforce Section Three.[71] A crucial passage in *Anderson* stated, "[t]he Constitution, Trumbull noted, '*provide[d] no means for enforcing*' the disqualification, necessitating a '*bill to give effect to the fundamental law embraced in the Constitution*.'"[72] Trumbull actually said "[t]he Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution."[73]

The per curiam's edits are disingenuous in two ways. First, the majority gave the impression that Trumbull thought the problem of enforcement was distinctive to Section Three when the actual quotation indicates that the Constitution does not explicitly state how any constitutional provision is to be implemented. Trumbull gave no reason for thinking that the process for implementing Section Three is any different than the process for implementing other constitutional provisions—most of which may be implemented by federal courts and the states in the absence of federal legislation.[74] Second, the majority gave the impression that Trumbull thought federal legislation was necessary to implement Section Three when all the Senator declared was that his proposal implemented Section Three. As noted in previously, Trumbull and other Senators acknowledged the legitimacy of previous state efforts to implement constitutional disqualification.[75] The problem was that states were not disqualifying many persons subject to constitutional disqualification,[76] not that states had no business implementing constitutional disqualification provisions.

In the spirit of "fool me once, fool me again," the per curiam opinion quotes Trumbull as stating that "'hundreds of men [were] holding office in violation of' the Constitution"[77] without making clear that Trumbull was

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70 *See generally* CONG. GLOBE, 39th Cong., 1st Sess. (1866); CONG. GLOBE, 41st Cong., 1st Sess. (1869).

71 *See* Trump v. Anderson, 601 U.S. 100, 110 (2024) (per curiam).

72 *Id.* (emphasis added).

73 CONG. GLOBE, 41st Cong., 1st Sess. 626 (1869).

74 *Id.* at 626–27.

75 *See supra* notes 65–70 and accompanying text.

76 *The Precedent for 14th Amendment Disqualification*, CITIZENS FOR RESP. & ETHICS IN WASH. (July 7, 2023), https://www.citizensforethics.org/reports-investigations/crew-reports/past-14th-amendment-disqualifications [https://perma.cc/ZW6B-LHLN] ("Section 3 adjudications against former Confederates were rare in the aftermath of the Civil War.").

77 Trump v. Anderson, 601 U.S. 100, 110 (2024) (per curiam) (alteration in original).

almost certainly referring to state officeholders.[78] No person, then or now, has identified even a handful of federal officeholders who at that time were disqualified by the Constitution.[79] Disqualified persons holding state office, by comparison, was a serious problem in states that were not actively preventing disqualified persons from holding state office.[80] President Grant's call for federal legislation in his first annual message explicitly mentioned the failure of the Georgia legislature to expel disqualified state representatives as the reason for congressional action.[81]

Several scholars and Trump's lawyers offered possible grounds for thinking that Trump was a victim of a state constitutional wrong.[82] These individuals suggested that when the Supreme Court of Colorado concluded that the January 6, 2021, event was an insurrection and that Donald Trump participated in that insurrection, it did an injustice to Trump and to Trump supporters in several ways: The state justices were wrong as a matter of constitutional law; they relied on an incorrect standard for determining whether an insurrection took place on January 6th[83] and whether Trump engaged in that insurrection;[84] more far-fetched, the state supreme court erroneously concluded that presidents and the presidency are subject to disqualification and that disqualification under Section Three is not limited to former Confederates;[85] the state justices relied on a constitutionally insufficient fact-finding process for determining whether January 6th was an insurrection or whether Trump engaged in that insurrection.[86] If these claims are correct, then the Colorado court's finding that January 6th was an insurrection and that Donald Trump participated in that insurrection was sufficiently wrong to warrant judicial overruling.[87]

The Supreme Court's *Trump v. Anderson* majority made no pretense of correcting unjust state legislation or a state judicial decision that was "in

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78 *See* CONG. GLOBE, 41st Cong., 1st Sess. 626 (1869).

79 *See supra* notes 21–29 and accompanying text.

80 *See, e.g.*, Ulysses S. Grant, First Annual Message (Dec. 6, 1869), *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 28 (James D. Richardson ed., 1898).

81 *Id.*

82 *See generally* Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 HARV. J.L. & PUB. POL'Y 309 (2024); Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350; Brief for the Petitioner, *Anderson*, 601 U.S. 100 (No. 23-719).

83 *See* Anderson v. Griswold, 543 P.3d 283, 329–31 (Colo. 2023); Lash, *supra* note 82, at 30.

84 *See Griswold*, 543 P.3d at 331–36; Brief for the Petitioner, *supra* note 82, at 33–38.

85 *See Griswold*, 543 P.3d at 319–26.

86 *See Griswold*, 543 P.3d at 326–29; Brief for the Petitioner, *supra* note 82, at 11.

87 *See supra* notes 82–85.

conflict with the principles of the amendment."[88] The per curiam opinion did not consider whether Colorado had passed an unconstitutional law that inhibited loyal rule or whether the Colorado decision conflicted with the Constitution's ambition to prevent traitors—who violated their oaths—from holding future office.[89] Although the opinion hardly makes this point explicit, the United States Supreme Court, in effect, ruled that no state could kick Trump off the ballot even if he attempted to overthrow the government by murdering every Democratic Party officeholder in Washington, DC., leaving Congress without the quorum necessary to pass legislation implementing Section Three.[90]

IV. SUPPLEMENTING AND SUPERVISING CONGRESS

The *Anderson* Court—under the guise of implementing Section Three of the Fourteenth Amendment—provided a roadmap for insurrectionists committed to finding constitutional "workarounds"[91] for evading constitutional disqualification. The very few Reconstruction framers who spoke of judicial power were concerned with implementing the Fourteenth Amendment in light of congressional inaction.[92] The *Anderson* Court limited judicial review to cases of congressional action.[93] Section Three can be enforced after *Anderson* only when Congress passes implementing legislation.[94] The sole role of the federal judiciary is to determine whether that legislation is unconstitutional.[95] In practice, all insurrectionary forces must do to repeal Section Three is to gain the control over national institutions necessary to repeal existing legislation implementing constitutional disqualification, or, at present, to merely gain the control over one elected branch of the national government necessary to prevent the passage of existing legislation.

Representative Giles Hotchkiss of New York gave a speech that is often credited with providing the foundation for judicial review under the Fourteenth Amendment.[96] That speech raised questions about a standalone

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88 CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866).

89 *See generally* Trump v. Anderson, 601 U.S. 100 (2024) (per curiam).

90 *See Anderson*, 601 U.S. at 110.

91 *See generally* Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009).

92 *See supra* notes 88–91 and accompanying text.

93 *Anderson*, 601 U.S. at 109–10.

94 *Id.*

95 *Anderson*, 601 U.S. at 118 (Sotomayor, J., concurring).

96 Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1390–91 (2009); *see also* WILLIAM

version of Section One that empowered only Congress.[97] The proposed amendment declared:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States and to all persons in the several States equal protection in the rights of life, liberty, and property.[98]

Hotchkiss wanted protection against a national legislature hostile to Republican party commitments. He asked Congress:

> Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as a part of the organic law of the land, subject only to be defeated by another constitutional amendment. We may pass laws here to-day, and the next Congress may wipe them out. Where is your guarantee then?[99]

The judiciary and state role under proposal was institutional back-up. Hotchkiss's proposed Fourteenth Amendment enabled other governing institutions to protect rights even when Congress abdicated that legislative responsibility.[100] His short speech said nothing about the judicial responsibility to prevent states from passing legislation that advanced constitutional goals or about federal judicial power to curb congressional understandings of how best to implement the Fourteenth Amendment.[101]

A few Republicans hinted at a similar division of institutional labor during the debates over the Fourteenth Amendment. Stevens celebrated the constitutional protections for fundamental rights enumerated in Section One because he acknowledged that the Civil Rights Act and other exercises of congressional power under Section Two of the Thirteenth Amendment were "repealable by a majority."[102] Representative John Broomall of Pennsylvania was one of several members of Congress who claimed that Section One of the Fourteenth Amendment would "prevent a mere majority from repealing the [Civil Rights Act]."[103] Neither these comments nor any other comments made during the debates over the Fourteenth Amendment distinguish between state power to pass laws that advance the purposes of the

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E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 55 (1988).

97 *See* Curtis, *supra* note 96, at 1390–91.

98 CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

99 *Id.* at 1095.

100 *See supra* note 96.

101 *See generally* CONG. GLOBE, 39th Cong., 1st Sess. (1866).

102 *Id.* at 2459; *see also id.* at 2462 (speech of Rep. James Garfield of Ohio).

103 CONG. GLOBE, 39th Cong., 1st Sess. 2498 (1866).

Reconstruction Amendments and federal power to enforce the Reconstruction Amendments.[104] The point was only that Section Five was not intended as a bar on institutional action outside of Congress—action that would be necessary to implement the Fourteenth Amendment should Congress be slow to, or uninterested in, passing relevant legislation. Neither these congressional comments nor any other comment made by a Republican supporter of the Fourteenth Amendment even hinted that the federal judiciary was authorized by the Fourteenth Amendment to supervise federal legislation or supervise state laws that were consistent with the Fourteenth Amendment on grounds other than preemption by existing federal law.

Consider a hypothetical state law fining persons one hundred dollars for an attempt to collect on Confederate notes. The justices might hold that a federal law fining persons fifty dollars for attempting to collect on a Confederate note preempted the state law. They would certainly reach that conclusion if the federal law explicitly preempted the state law. Nevertheless, no one would think such a state law unconstitutional in the absence of a federal law. The same would be true of state laws imposing fines or terms of imprisonment for persons convicted of enslaving others. The same would be true of state laws disqualifying candidates for federal office that would have been constitutional if passed by Congress and were not inconsistent with any existing federal law.

The Republicans responsible for Section Three of the Fourteenth Amendment were concerned with Congressional abdication of Section Three responsibilities. An editorial in the *Milwaukee Sentinel* responded to Chief Justice Chase's claim in *Griffin's Case*[105] that Section Three required congressional legislation by noting:

> If this is sound doctrine, then a future Democratic Congress, should we ever have one, has only to repeal all laws for the enforcement of the amendment, and it is absolutely null. And the same is true of every other provision of the Constitution, including the amendment abolishing slavery. In fact this decision makes Congress superior to the Constitution, and concedes to that branch of the government the power and the right to disregard and annul the entire instrument by simply neglecting to enforce it by legislation, or by repealing all existing laws for its enforcement.[106]

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104 *See generally* CONG. GLOBE, 39th Cong., 1st Sess. (1866).

105 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815).

106 *The Fourteenth Amendment—Chase's Decision*, MILWAUKEE SENTINEL, May 17, 1869, at 1.

"[I]t is most lamentable," the editorial continued, "that we have a Chief Justice to pave the way to the accomplishment of these Democratic purposes by such decisions as the one under review."[107]

Anderson and the cases *Anderson* relied on subvert the framing division of institutional labor. The *Anderson* Court cited *Boerne v. Flores*,[108] a case concerned with the implementation of Section One of the Fourteenth Amendment, for the proposition that the justices must supervise congressional legislation under Section Three for consistency with a "congruence and proportionality" test.[109] *Boerne* quoted Hotchkiss when justifying judicial supervision of congressional efforts to implement the Reconstruction Amendments.[110] The justices misrepresented quotations to support the Court's view of institutional authority rather than the point the speaker was making when using those words.[111] The majority opinion in *Boerne* declared:

> Some radicals, like their brethren "*unwilling that Congress shall have any such power . . . to establish uniform laws throughout the United States upon . . . the protection of life, liberty, and property*," . . . also objected that giving Congress primary responsibility for enforcing legal equality would place power in the hands of changing congressional majorities".[112]

This edit is also disingenuous in two ways. First, in *Boerne* the Court implied that Republicans thought judicial power was necessary to prevent Congress from passing "uniform laws throughout the United States upon . . . the protection of life, liberty, and property."[113] No member of the Thirty-Ninth Congress who supported the Fourteenth Amendment made that claim.[114] Hotchkiss and the other Republicans wanted Bingham's proposal redrafted in ways that reduced federal power, not that the proposal be redrafted to provide for judicial supervision of federal legislation.[115] Second, in *Boerne* the Court indicated that Hotchkiss objected to "giving Congress primary responsibility for enforcing legal equality."[116] No fair reading of his speech on January 28, 1866, leads to that conclusion. As the quotations above

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107 *Id.*

108 521 U.S. 507 (1997).

109 Trump v. Anderson, 601 U.S. 100, 115 (2024) (per curiam) (quoting *Boerne*, 521 U.S. at 520).

110 *Boerne*, 521 U.S. at 520–21.

111 *Id.*

112 *Id.* (emphasis added) (citation omitted) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866)).

113 *Id.*

114 *See generally* CONG. GLOBE, 39th Cong., 1st Sess. (1866).

115 *See* CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

116 *Boerne*, 521 U.S. at 521.

indicate, Hotchkiss and his allies wanted to make sure other institutions were not debarred from acting when Congress failed to pass relevant legislation. They said nothing about judicial power to act when members of Congress passed what they believed was relevant legislation.

This deceptive editing leaves federal courts and states debarred from acting when the framers wanted them to act. Hotchkiss and other Republicans wanted other institutions to fill the void when Congress failed to pass legislation implementing provisions of the Fourteenth Amendment.[117] After *Anderson* that is legally impossible. No governing institution is empowered to act when Congress refuses to implement Section Three. Had the mob on January 6th murdered enough congresspersons to leave both the House and Senate in control of members supporting the insurrection, federal courts and states would be powerless to disqualify those former officeholders who ordered the killings or personally executed those who opposed their coup.

Anderson instead renews and expands the judicial license granted in *Boerne* for courts to act when the framers were skeptical of judicial action. The persons responsible for Section One emphasized that Congress was primarily responsible for implementing the Fourteenth Amendment.[118] Senator Howard, when introducing the omnibus Fourteenth Amendment to the Senate, asserted that Section Five "gives to Congress power to enforce by appropriate legislation *all the provisions* of this article of amendment."[119] Representative George Miller of Pennsylvania made the same use of the plural noun when stating that Section Five "is requisite to enforce the foregoing *sections*.[120] The scholarship on Section Five supports congressional primacy.[121] Jack Balkin writes, "Congress gave itself these powers because it believed it could not trust the Supreme Court to protect the rights of the freedmen."[122] Robert Post and Reva Siegel point out that Trumbull, when defending the Civil Rights Act of 1866 as an exercise of congressional Thirteenth Amendment power, declared "it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end."[123] One looks in vain through the record for any quotation endorsing a judicial power to police Congress as opposed to a

117 *See supra* note 96 and accompanying text.

118 *See supra* notes 96–97 and accompanying text.

119 CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866) (emphasis added).

120 *Id.* at 2511 (emphasis added).

121 *See, e.g.*, Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010).

122 Balkin, *supra* note 121, at 1805.

123 Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2035 (2003) (citing Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)).

judicial power to step in when Congress did not act.[124] No person who supported the Fourteenth Amendment explicitly supported judicial oversight of congressional efforts to implement constitutional disqualification.[125] The best that can be said is that the record is silent on this matter.

CONCLUSION: ORIGINALISM REVISITED

Consider grading a student who, when asked to develop an originalist perspective on the Fourteenth Amendment, produces the following thesis: The Republicans responsible for the Fourteenth Amendment wanted federal legislation under the Fourteenth Amendment strictly supervised by the Supreme Court. The paper acknowledges that, at the time, the Supreme Court consisted of three members of the *Dred Scott* majority (James Wayne, John Catron, and Robert Grier), a Democrat who concurred in *Dred Scott* and wrote the dissent in *The Prize Cases*[126] (Samuel Nelson), a Buchanan appointee with a record as a proslavery Democrat (Nathan Clifford),[127] another Democrat with a history of anti-Chinese racism (Stephen Field),[128] and three Republicans (Samuel Miller, David Davis, and Salmon Chase). The paper then argues that the Republicans who framed and ratified the Fourteenth Amendment sought to ensure that Republicans in the federal and state judiciaries could do nothing should Democrats in control of the Congress refuse to lift a finger when traitors ran for, were elected to, or were appointed to important federal offices. If the goal of the originalist exercise is novelty, this student merits an A+. Not a single framer or ratifier anticipated the paper's thesis. If, however, the goal of the originalist exercise is an authentic reproduction of Reconstruction thought on disqualification, this paper suggests that student and *Trump v. Anderson* merit a much lower grade.

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124 For further reading on the argument in the rest of this paragraph, see Mark A. Graber, *Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment* 49–67 (Univ. of Md. Legal Stud. Rsch. Paper No. 2014-37, 2005), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483355 [https://perma.cc/8LZQ-DDB9]; CONG. GLOBE, 39th Cong., 1st Sess. (1866).

125 *See* CONG. GLOBE, 39th Cong., 1st Sess. (1866).

126 67 U.S. (2 Black) 635 (1863).

127 PHILIP GREELY CLIFFORD, NATHAN CLIFFORD, DEMOCRAT (1803–1881) at 244–46 (1922).

128 *See* PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 134–35 (1997).