ADMINISTERING PRESIDENTIAL ELECTIONS AND COUNTING ELECTORAL VOTES AFTER *TRUMP V. ANDERSON*

Derek T. Muller[*]

In the landmark case Trump v. Anderson*, the Supreme Court unanimously held that states lack the unilateral power to exclude presidential candidates from the ballot on the basis of Section 3 of the Fourteenth Amendment. But while the Court was united in its essential holding, the Justices fractured in their reasoning, leaving significant questions about Congress's role in enforcing Section 3 against presidential candidates.*

This Article examines the fault lines in Trump v. Anderson *and analyzes how Congress's power to count electoral votes under the Twelfth Amendment intersects with its authority to enforce Section 3 of the Fourteenth Amendment. It argues that while Congress holds the power to refuse to count electoral votes cast for a candidate it deems ineligible, it should refrain from exercising that power in presidential elections in contentious cases unless it has provided a clear rule to ascertain ineligibility well before the election. This Article further contends that if Congress does exclude a winning candidate on the basis of Section 3, it cannot simply declare the second-place candidate the winner; instead, the election would go to the House of Representatives for a "contingent election." Exploring the intricacies and implications of the Electoral Count Reform Act of 2022, this Article offers timely insights into a high-stakes issue with the potential to affect the 2024 presidential election and beyond.*

---

* Professor of Law, Notre Dame Law School. Special thanks to participants at the Stanford Constitutional Law Center Spring Conference 2024, and to Will Baude, Ned Foley, Rick Pildes, Michael Rosin, and Neil Siegel, as conversations with them were extremely helpful as I drafted this piece. Portions of this Article were inspired by amicus briefs I filed in state and federal cases relating to congressional or presidential candidates, along with excerpts from posts at the Election Law Blog. In the interest of full disclosure, I filed amicus briefs in support of no party in Section 3 cases in the Fourth Circuit, the Eleventh Circuit, the Minnesota Supreme Court, the Colorado Supreme Court, and the United States Supreme Court between 2022 and 2024.

TABLE OF CONTENTS

INTRODUCTION

In *Trump v. Anderson*,[1] the United States Supreme Court unanimously reversed the Colorado Supreme Court's decision to exclude Donald Trump from the Republican presidential primary ballot under Section 3 of the Fourteenth Amendment. While the Justices issued three separate opinions, they converged on a core constitutional holding: States lack independent authority to enforce Section 3 against federal candidates for elective office.

This apparently straightforward holding is, admittedly, somewhat misleading. Members of the Court disputed how far the majority's holding reached and whether it extended beyond this essential holding. And it left a major question unanswered: To what extent may Congress enforce Section 3 of the Fourteenth Amendment through its power to count (or to refuse to count) electoral votes cast for a candidate Congress deems to be ineligible?

This Article examines the interpretive challenges of *Trump v. Anderson*. Part I provides background on the events surrounding the 2020 election, challenges filed against federal candidates after the 2020 election under Section 3, and the path to the Supreme Court's decision in *Trump v. Anderson*.

1. 144 S. Ct. 662 (2024) (per curiam), *rev'g*, Anderson v. Griswold, 543 P.3d 283 (Colo. 2023).

Part II analyzes the Court's splintered opinions in *Trump v. Anderson*, examining the points of agreement and disagreement among the Justices. While the Justices achieved unanimity on the absence of state power to enforce Section 3 against presidential candidates, they diverged in their reasoning about the scope of congressional authority. Through close textual analysis of the majority opinion, this Section maps the precise contours and limitations of the Court's holding.

Part III confronts the unresolved question at the intersection of Section 3 and Congress's power to count electoral votes under the Twelfth Amendment. It examines how the Electoral Count Reform Act of 2022 updated the procedures for counting electoral votes, and it explores the potential scenarios that could unfold if Congress refuses to count votes cast for a candidate based on Section 3. The Article argues that Congress should abstain from such rejections absent pre-election legislation establishing clear procedures for adjudicating qualification disputes. Moreover, if Congress did exclude a winning candidate's electoral votes, constitutional principles would require a House contingent election rather than defaulting to the second-place finisher.

The Article concludes that the stakes for a future presidential election would demand advance establishment of transparent procedures for resolving Section 3 qualification challenges. Congressional rejection of electoral votes without such procedures would not only undermine recently enacted electoral count reforms but would likely precipitate a constitutional crisis.

I. BACKGROUND

Former Vice President Joe Biden defeated incumbent President Donald Trump in the 2020 presidential election. But in the days leading up to Congress counting electoral votes on January 6, 2021, a variety of legal theories were promulgated by supporters of Trump to suggest that he could still win the election. These theories exhibited notable evolution over time, driven both by their analytical weaknesses and by intervening events that foreclosed certain arguments. By January 6, Trump's diminishing circle of advisors had coalesced around a novel constitutional theory: that Vice President Mike Pence, in his capacity as President of the Senate presiding over the joint session of Congress, possessed unilateral authority to postpone the counting of electoral votes.[2] This delay, proponents argued, would facilitate additional litigation or state legislative

2. Donald J. Trump stated, "All Vice President Pence has to do is send it back to the states to recertify." Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial*, NAT'L PUB. RADIO (Feb. 10, 2021), https://perma.cc/WN69-JG7C.

intervention that might ultimately enable Congress to count votes for Trump and declare him the victor.

Trump actively promoted this theory in the days leading up to January 6, most notably during his speech at the Ellipse near the Capitol minutes before Congress convened to count electoral votes. He urged supporters to "stop the steal" and march to the Capitol to "make your voices heard."[3] He claimed, "the only way that can happen is if Mike Pence agrees to send it back."[4] By that time, Pence had already told Trump that he lacked the constitutional power to do what Trump believed he could do.[5]

Minutes after the conclusion of the speech, a riot broke out at the Capitol as Congress was in the process of counting electoral votes.[6] The riot that delayed counting for several hours.[7] In the end, Congress counted all 538 electoral votes cast in the 50 states and the District of Columbia, and it formally ascertained that Joe Biden would be the next President of the United States.[8]

In the aftermath of the riot, some wondered whether the storming of the Capitol by violent means during an official proceeding could rise to the level of an "insurrection" under Section 3 of the Fourteenth Amendment. That section provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[9]

The clause, almost entirely unused since Reconstruction, prompted new academic exploration. What is an "insurrection" or a "rebellion"? What does it mean to "have engaged" in it?

In 2022, litigants initiated novel constitutional challenges to test whether certain members of Congress had engaged in "insurrection" through their speech and conduct surrounding January 6, 2021. The cases centered on two new members of Congress, Madison Cawthorn

---

3. *Id.*

4. *Id.*

5. *See* Letter from Vice President Michael R. Pence to Members of Cong. (Jan. 6, 2021), https://perma.cc/34D9-AJ8Y.

6. Kat Lonsdorf et al., *A Timeline of the Jan. 6 Capitol Attack—Including When and How Trump Responded*, NAT'L PUB. RADIO (Jan. 5, 2024), https://perma.cc/2YPC-S8TD.

7. *Id.*

8. *Id.*

9. U.S. CONST. amend. XIV, § 3.

of North Carolina and Marjorie Taylor Greene of Georgia. Challengers sought to exclude them from appearing on their respective states' primary ballots.[10] Lengthy procedural wrangling followed,[11] but neither resulted in disqualification. The challenge to Cawthorn was rendered moot after he lost his primary election.[12] And after a one-day hearing in Georgia, at which Greene testified in her own defense, an administrative law judge found that Greene could appear on the ballot, and that decision was ratified by the Secretary of State and the Georgia courts.[13]

These early challenges presaged more significant litigation following Trump's November 15, 2022, announcement of his presidential candidacy. The academic discourse crystallized in summer 2023 with the circulation of a comprehensive analysis by Professors William Baude and Michael Stokes Paulsen examining the historical scope and contemporary application of Section 3.[14] And in the ensuing months, challenges were filed against Trump in several states. Initial attempts in states like Michigan and Minnesota were thrown out when courts found that there was no state law that authorized courts to exclude a candidate in a presidential primary on this basis.[15]

In Colorado, the challenge proceeded differently. There were reasons to doubt whether Colorado law empowered the Colorado courts to make this determination in the first place.[16] Nevertheless, a trial court held a week-long hearing and found that while Trump had engaged in insurrection and ought to be barred from the ballot, Section 3 did not extend to the presidency.[17] The Colorado Supreme

---

10. *See* Cawthorn v. Amalfi, 35 F.4th 245, 249–50 (4th Cir. 2022); Greene v. Sec'y of State for Ga., 52 F.4th 907, 909 (11th Cir. 2022).

11. Cawthorn v. Circosta, No. 22-cv-00050-M, 2022 WL 1641293, at *1–2 (E.D.N.C. Mar. 30, 2022), *rev'd in part sub nom.* Cawthorn v. Amalfi, 35 F.4th 245 (4th Cir. 2022); Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1287, 1290–92 (N.D. Ga. 2022).

12. Plaintiff's Stipulation of Rule 41 Dismissal at 1, *Cawthorn*, No. 22-cv-00050-M, 2022 WL 1641293 (E.D.N.C. Mar. 30, 2022).

13. Rowan v. Greene, No. 2222582 (Ga. Office of State Admin. Hearings, May 6, 2022), *aff'd*, Rowan v. Raffensperger, No. 2022CV364778, 2022 Ga. Super. LEXIS 557 (July 25, 2022).

14. *See generally* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605 (2024).

15. Growe v. Simon, 997 N.W.2d 81, 83 (Minn. 2023); Davis v. Wayne Cnty. Election Comm'n, No. 368615, 2023 WL 8656163, at *16 (Mich. Ct. App. Dec. 14, 2023).

16. *See* Anderson v. Griswold, 543 P.3d 283, 366–70 (Colo. 2023) (Berkenkotter, J., dissenting).

17. Anderson v. Griswold, No. 2023CV32577, 2023 WL 8006216, at *4, *43, *46 (Colo. Dist. Ct. Nov. 17, 2023).

Court reversed and held that Section 3 did cover the presidency, ordering Trump off the ballot.[18]

The decision from the Colorado Supreme Court effectively forced the United States Supreme Court to take the case. The decision to exclude a major political party's frontrunner from the ballot in one state, if left untouched, would leave significant questions in the months ahead. It would have a destabilizing effect in the primaries that could carry over to the general election if voters wondered about the eligibility of the candidate. Indeed, one week after Colorado's decision, the Maine Secretary of State reached a conclusion similar to the Colorado Supreme Court and blocked Trump from the ballot there, too.[19]

So, the United States Supreme Court took the case. Major questions confronted the Justices. Was January 6, 2021, an "insurrection?" Did Donald Trump, by his speech and his action (or inaction), "engage" in an insurrection? Might some of Trump's speech receive First Amendment protection?[20]

Perhaps unsurprisingly, the Court would not answer any of these questions.

II. THE DECISION IN *TRUMP V. ANDERSON*

The Supreme Court accepted the case on an expedited briefing schedule.[21] At oral argument, the Court sounded broadly skeptical of the Colorado plaintiffs. The Justices, however, expressed a range of reasons for their skepticism, and it remained unclear what basis would form the underpinning of a likely unanimous decision. That range of views presaged an inability for the Court to coalesce around a single opinion, even if everyone agreed that Trump should remain on the ballot.

On March 4, 2024—the day before Colorado's presidential primary and "Super Tuesday"—the Court issued its decision in *Trump v. Anderson*.[22] Six Justices—Chief Justice John Roberts, and Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—all agreed with the heart of the

18. *Anderson*, 543 P.3d at 297.

19. *In re* Challenges of Kimberley Rosen et al. to Primary Nomination Petition of Donald J. Trump (Me. Dep't of the Sec'y of State, Dec. 28, 2023), https://perma.cc/K36Y-QYGZ.

20. *See, e.g.*, Mark A. Graber, *Section Three of the Fourteenth Amendment: Insurrection*, 33 WM. & MARY BILL RTS. J. 1, 48–49, 56 (2024).

21. The petition for writ of certiorari was filed January 3, 2024. *Trump v. Anderson*, SCOTUSBLOG (2025), https://perma.cc/4L4T-6QB6. The Court granted the petition January 5 and held oral argument February 8. *Id.*

22. 144 S. Ct. 662 (2024).

reasoning in a *per curiam* opinion.[23] Justice Barrett wrote separately to explain she only agreed with part of the majority *per curiam* opinion.[24] And there was an opinion concurring only in the judgment, jointly authored by Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson.[25] But they, too, agreed with the heart of the reasoning of the majority, if not the express language.

In short, all nine Justices agreed that states do not have the independent power to apply Section 3 to keep a presidential candidate off the ballot.[26] The heart of the decision across opinions focused on this overall constitutional point, through an examination of text, structure, context, and consequences.

A. The Consensus Opinion

The Court's *per curiam* opinion opened with a quotation from *U.S. Term Limits, Inc. v. Thornton*,[27] a 1995 case that concluded states lack power to add term limits or additional qualifications for congressional candidates.[28] The *Term Limits* Court had drawn upon Justice Joseph Story's influential *Commentaries on the Constitution*, which articulated the framing principle that state authority over

---

23. *Id.* at 664; *see id.* at 671 (Barrett, J., concurring in part and concurring in the judgment); *id.* at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in judgment).

24. *Id.* at 671–72.

25. *Id.* at 672–75.

26. Some disputes arose in the case whether the president was an office covered in Section 3, either as an "office . . . under the United States" or as an "officer of the United States." *See, e.g.*, Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 HARV. J.L. & PUB. POL'Y 309, 313 (2024); Baude & Paulsen, *supra* note 14, at 725–30. The Court did not directly address the issue, but it repeatedly referred to "federal officeholders and candidates," *Trump*, 144 S. Ct. at 665, 667, 668, 670, 671, "federal offices, especially the Presidency," *id.* at 667, "federal officers," *id.*, "federal officeholders," *id.* at 668, 669, and "federal office" or "offices," *id.* at 668, 669, 670, 671, when speaking about presidential candidates. It also implicitly referred to the sitting president as an officeholder. *See id.* at 668 ("As an initial matter, not even the respondents contend that the Constitution authorizes States to somehow remove *sitting* federal officeholders who may be violating Section 3."); *id.* at 669 ("Instead, it is Congress that has long given effect to Section 3 with respect to would-be or existing federal officeholders."). It is possible the Court simply assumed without deciding these issues about "office" and "officer," but that it failed to note that assumption. And it is possible that the emphasis is more on "federal" than on "office," as the opinion takes pains to emphasize that states still retain power to apply Section 3 to state officeholders and candidates. Nevertheless, the overwhelming framing in the majority opinion and the assumptions underlying that opinion point toward a tacit acceptance that the presidency is covered by Section 3, both as an "office . . . under the United States" and as an "officer of the United States."

27. 514 U.S. 779 (1995).

28. *Id.* at 837–38.

federal elections must derive from some explicit constitutional source.[29]

Under this framework, the Court's analysis centered on identifying the constitutional source of state power to enforce Section 3 in presidential elections. The majority systematically examined potential constitutional sources but found none sufficient. The Fourteenth Amendment itself could not serve as this source, the Court reasoned, because that amendment functions as a limitation on state power rather than a grant of authority.[30] Moreover, while Section 5 explicitly empowers Congress to enforce the Amendment, it confers no parallel authority on states.[31] The Court's review of other constitutional provisions likewise yielded no alternative basis for state enforcement against presidential candidates. While Articles I and II establish state regulatory authority over elections—with Article I empowering state legislatures to regulate the "times, places and manner of holding elections"[32] and Article II authorizing states to "appoint, in such manner as the Legislature thereof may direct, a number of electors"[33]—the majority found these provisions insufficient to support an implicit power to enforce Section 3, particularly given its enactment decades after the ratification of these original constitutional provisions.[34]

The majority's structural analysis situates Section 3 within a framework of federal enforcement authority for federal officeholders. The Court's interpretation suggests that the constitutional architecture contemplates nationally uniform mechanisms for disqualification determinations and remedial measures, rather than a decentralized system of state-level enforcement.[35] This reading emphasizes Section 3's inherent demand for standardized federal processes to establish disqualification criteria and to implement a consistent remedial scheme across jurisdictional boundaries.

While states can and do administer presidential elections differently from one another, that is true only to a limited extent. States may rightly choose the manner of ballot access restrictions, which political parties to recognize, how many signatures are needed to appear on the ballot, how to organize the names of candidates, whether to award electors winner-take-all or by district, and so on. These are the typical mechanics of election administration as a part

29. *Id.* at 802 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 627 (1833)).

30. *Trump*, 144 S. Ct. at 668.

31. *Id.* at 670.

32. U.S. CONST. art. I, § 4, cl. 1.

33. *Id.* art. II, § 1, cl. 2.

34. *Trump*, 144 S. Ct. at 668.

35. *See id.* at 670–71.

of the state legislature's power to "direct" the "manner" of appointing electors.[36]

But there is something materially different about a state saying that it is independently interpreting and applying a different provision of the federal Constitution—an age limit, for instance, or a residency requirement. States do not have the flexibility to interpret what those provisions mean in different ways. Those provisions are fixed by the federal Constitution and cannot be altered by the states.[37] And because those provisions are federal law, states may not provide varying or contradictory definitions—and if they do, the Supreme Court can provide a uniform interpretation and rein in varying interpretations across jurisdictions.

The Court expressed significant institutional reservations about assuming a role of constitutional interpretation absent congressional guidance.[38] The majority identified serious practical impediments to state-level enforcement of federal qualifications for presidential candidates. While acknowledging state authority to enforce Section 3 for state candidates, the Court drew a critical distinction for federal offices.[39] Congress's constitutional power to remove Section 3 disabilities by two-thirds vote would be materially compromised by unilateral state disqualification determinations. Such state action, the majority reasoned, would effectively compel congressional intervention rather than preserve Congress's discretionary authority.[40] This interpretation finds additional support in the historical record, as the Court noted the absence of precedent of states enforcing Section 3 against federal candidates.[41]

The Court's analysis ended with an examination of practical federalism concerns arising from state-level enforcement of Section 3 against presidential candidates. The *per curiam* opinion emphasized that variations in state evidentiary standards and procedural frameworks could generate nationwide reverberations in presidential elections.[42] This decentralized approach would likely produce inconsistent determinations across jurisdictions, placing the Court in the problematic position of reconciling divergent state court

---

36. *See* Derek T. Muller, *Weaponizing the Ballot*, 48 FLA. ST. U. L. REV. 61, 102–05 (2021).

37. *See supra* text accompanying notes 27–28.

38. *See Trump*, 144 S. Ct. at 670–71.

39. *Id.* at 667.

40. *See id.* at 668.

41. *Id.* at 669; *cf.* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, Chiafalo*: Constitutionalizing Historical Gloss in Law & Democratic Politics*, 15 HARV. L. & POL'Y REV. 15, 18 (2020) (examining the Supreme Court's gloss of historical practices relating to the discretion of presidential electors to solve a contested interpretation of constitutional law in Chiafalo v. Washington, 591 U.S. 578 (2020)).

42. *Trump*, 144 S. Ct. at 670–71.

interpretations of federal qualifications. The majority particularly emphasized that states' diminished sovereign interest in presidential elections—given the office's inherently national character—further undermined the constitutional logic of state-level enforcement.[43] The prospect of states independently adjudicating national qualifications through disparate factual determinations and adjudicative frameworks, resulting in an inconsistent national patchwork interpreting a single federal qualification, fundamentally conflicted with the Constitution's federal architecture.

The logic, then, boiled down to a simple conclusion: If the Constitution sets forth a qualification for federal office, and the Constitution does not expressly empower the state to interpret and apply that qualification in a federal election, the state lacks the power to do so. Responding to the four Justices who did not join the entire *per curiam* opinion, the majority explained that

> it is the combination of all the reasons set forth in this opinion—not, as some of our colleagues would have it, just one particular rationale—that resolves this case. In our view, each of these reasons is necessary to provide a complete explanation for the judgment the Court unanimously reaches.[44]

B. Open Questions

Admittedly, the opinion glosses over some important details, some of which might be ripe for future litigation. To start, the opinion entirely fails to note that this dispute arose in a presidential primary, not a general election. The Court has previously recognized the breadth of a political party's power to ignore the results of a presidential primary election and affirmed a state's power to set the rules for a presidential primary when the state party disagreed with those rules.[45] But states must also be cognizant of the First Amendment interest of political parties and their desire to associate the preferred candidates of their choice.[46] It is possible, of course, to conclude that parties have no associational interest in putting forth candidates who fail to meet constitutional qualifications. But the Court made no effort to identify these associational interests or the

---

43. *Id.* at 669; *see also* Neil S. Siegel, *Narrow but Deep: The* McCulloch *Principle, Collective-Action Theory, and Section Three Enforcement*, 39 CONST. COMMENT. (forthcoming 2025) (manuscript at 5–6).

44. *Trump*, 144 S. Ct. at 671.

45. *See* Cousins v. Wigoda, 419 U.S. 477, 487–91 (1975); Democratic Party of the U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 108, 121–26 (1981).

46. *See, e.g.*, Tashjian v. Republican Party of Conn., 479 U.S. 208, 221–29 (1986); Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 229 (1989); Cal. Democratic Party v. Jones, 530 U.S. 567, 579–86 (2000); Duke v. Massey, 87 F.3d 1226, 1234–35 (11th Cir. 1996); Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 826–27, 830 n.59, 836 (2001).

unique context of the presidential primary—including the party's power to ignore the results of a presidential primary that violate the national party's rules.

Of course, if the state has no power to enforce qualifications in the general election, it would seem likewise to have no power in the general election.[47] But there is something of an incongruity of state power over presidential elections in the Court's precedents. The state's power to appoint presidential electors comes from Article II.[48] But the Court has also said there is no constitutional authority for administering a presidential primary.[49] It seems right to say that if the state lacks the power in a general election, it lacks it in a primary election, even if the source of authority is different. But this complexity is not explored in the Court's opinion.

The state power over the manner of presidential elections has historically been used to exclude candidates who lacked other constitutional qualifications in other presidential elections. Going back to at least 1968, some states have excluded ineligible candidates from the ballot because they were too young or because they were not natural born citizens.[50] Do states lack power over these qualifications, too? Of course, the presidential qualifications in Article II, Section 1, Clause 5—age, citizenship, and inhabitancy—were not in dispute in *Trump v. Anderson*. And it is possible that the Court would distinguish Section 3 from these other qualifications. If states have the power over the manner of appointing electors in Article II, perhaps they have the power to ascertain the qualifications of presidential candidates enumerated in Article II and could exclude ineligible candidates.

But there are other qualifications in the Constitution for presidential candidates outside of Article II and the Fourteenth Amendment. Consider term limits, enacted under the Twenty-Second Amendment.[51] Could states enforce term limits and bar, say, Barack

---

47. *See* Muller, *supra* note 36, at 69–70, 95.

48. U.S. CONST. art. II, § 1.

49. *Cousins*, 419 U.S. at 489–90 ("The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates."); *La Follette*, 450 U.S. at 108, 121–26, 125 n.31 ("The State attempts to add constitutional weight to its claims with the authority conferred on the States by Art. II, § 1, cl. 2, of the United States Constitution: 'Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which a State may be entitled.' . . . Any connection between the process of selecting electors and the means by which political party members in a State associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance.").

50. Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 573–74 (2015).

51. U.S. CONST. amend. XXII, § 1.

Obama or Donald Trump from appearing on the ballot again?[52] Does Article II, or some other source of power, permit states to do so? Perhaps the parts of the Court's opinion emphasizing that the Fourteenth Amendment was designed to limit state power place it on different ground from the Twenty-Second Amendment. But the Court left those matters for another day.

And what if factual disputes arise over a candidate's age? Or citizenship? While states have enforced qualifications for decades, they almost never involved disputes of fact. They have been purely disputes of law—or, in the case of, say, a twenty-one-year-old seeking the presidency, there have been no disputes about either fact or law. But questions about whether being born in the military-controlled Panama Canal Zone, or in Canada to a Cuban father and an American mother, are legal questions that courts have confronted over the years.[53] The sole alleged dispute of fact that has arisen in the last fifty years has been over whether Barack Obama was actually born in Hawaii—a fact without any *genuine* dispute.[54] Nevertheless, any factual dispute would, in theory, face all the same kinds of problems that the Court worried a Section 3 investigation in the states might face. Different evidentiary standards could lead to different outcomes, and the Court could be faced with records built on the vagaries of state evidentiary law to solve a national problem.

Each of these open questions picks at isolated items that lack clarity in the Court's opinion. Perhaps it is a reason why the majority emphasized that the "combination" of reasons carried the day[55]—any one reason in isolation might be sufficiently distinguishable in another context. The Court offered no real explanation for how these items all fit together or what weight any particular reason should receive, surely a reason the opinion might face critiques.

But this Article is not focused on these issues, beyond this cursory examination. Instead, there is a more significant question about what *Trump v. Anderson* may mean for congressional power over presidential elections, and specifically when it comes to counting electoral votes. For that, there is something else to critique.

---

52. *Id.* amend. XII ("But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."); *Id.* amend. XXII; *see also* Michael L. Rosin, *Why Did the Framers of Section 3 of the Twentieth Amendment Employ the Term* Failed *to* Qualify, S. TEX. L. REV. (forthcoming 2025) (manuscript at 8–10).

53. Muller, *supra* note 50, at 560 n.3, 561 n.7, 602; Derek T. Muller, *"Natural Born" Disputes in the 2016 Presidential Election*, 85 FORDHAM L. REV. 1097, 1097–99 (2016).

54. *Cf.* FED. R. CIV. P. 56(a).

55. Trump v. Anderson, 144 S. Ct. 662, 671 (2024).

C. The Contentious Opinion

This consensus opinion, Part II-B of the *per curiam* opinion, was joined in full by Justice Barrett, and joined in logic (but not formally) by the opinion of Justices Sotomayor, Kagan, and Jackson concurring in the judgment. Part II-B emphasized a combination of factors to hold that states lacked the power to determine whether federal candidates were disqualified under Section 3 of the Fourteenth Amendment.[56] And that could have been all—an easy and perhaps non-controversial *per curiam* opinion for all nine Justices.

But there was sharp disagreement over a different part of the opinion. The majority opinion did not only address whether states have the power to enforce Section 3. Instead, Part II-A focused on who else might enforce Section 3 and how those other actors might enforce it.

The five-justice majority in Part II-A described how Congress holds the power to enforce the provisions of Section 3.[57] Section 5 of the Fourteenth Amendment empowers Congress to enforce the Amendment with "appropriate legislation."[58] And that appropriate legislation must be, in the words of other Supreme Court precedent, including *City of Boerne v. Flores*,[59] a "congruen[t] and proportional[]" remedy for the provisions in the Fourteenth Amendment.[60]

A concern about some kind of congressional tailoring to identify an "insurrectionist" arose during oral argument. Justice Brett Kavanaugh emphasized the point:

> Well, when you look at Section 3, the term 'insurrection' jumps out, and the question is—the questions are: What does that mean? How do you define it? Who decides? Who decides whether someone engaged in it? What processes—as Justice Barrett alluded to, what processes are appropriate for figuring out whether someone did engage in that?[61]

The word "insurrection," in other words, requires some adjudication.

That conclusion is hardly remarkable. It was something that the Colorado Supreme Court recognized was necessary.[62] And in the *Trump* case, the state court felt comfortable making the adjudication of what an insurrection was and whether someone engaged in insurrection, which required judicial procedures for adjudication and factual findings. That is what courts do.

---

56. *Id.* at 667–71.
57. *Id.* at 667.
58. U.S. CONST. amend. XIV, § 5.
59. 521 U.S. 507 (1997).
60. *Id.* at 519–20.
61. Transcript of Oral Argument at 74–75, *Trump*, 144 S. Ct. 662 (No. 23-719).
62. Anderson v. Griswold, 543 P.3d 283, 329 (2023).

But Justice Kavanaugh was emphasizing the point that Chief Justice Salmon Chase made when he was riding circuit in 1869 in his decision in *Griffin's Case*.[63] That case has received some valuable (and critical) scholarly attention.[64] That opinion, regardless of the criticism, does stand for the unremarkable proposition that enforcement of Section 3 requires certain things: "proceedings, evidence, decisions, and enforcement of decisions, more or less formal, are indispensable."[65] But the next clause in *Griffin's Case* proved more contentious to the Supreme Court: "and these can only be provided for by congress."[66] Unless a court is given some guidance, especially from Congress to figure out what to do, a court is not in a position to make this adjudication on its own initiative.

Like *Griffin's Case*, Part II-A of *Trump v. Anderson* heavily emphasized Congress's role. The Fourteenth Amendment empowers Congress. Section 5 enables Congress, subject to judicial review, to pass appropriate legislation.[67] And Congress's Section 5 power is "critical" when it comes to enforcing Section 3.[68] The *per curiam* opinion provided these sorts of general statements about Congress's role before turning to the argument in Part II-B that the state lacks power.[69]

Recall, at the very end of the opinion, the *per curiam* majority wrote that all of these arguments in "combination" assist the Court in reaching its judgment.[70] One argument was that Congress holds this power to enforce Section 3; another was that states lack the explicit power to do so under the Constitution.[71] These arguments work together to suggest states lack power.

Justice Barrett wrote separately to emphasize that while she agreed states lack power, she would not decide other issues, and she did not join Part II-A (apparently believing it was not "necessary" in "combination" with other arguments to reach the conclusion she reached).[72] The concurring opinion by Justices Sotomayor, Kagan, and Jackson followed a similar path. These four Justices all seemed

63. Griffin's Case, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815).

64. *See, e.g.*, Baude & Paulsen, *supra* note 14, at 644–60; Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 102–80 (2021).

65. *Griffin's Case*, 11 F. Cas. at 26.

66. *Id.*

67. U.S. CONST. amend. XIV, § 5.

68. Trump v. Anderson, 144 S. Ct. 662, 667 (2024).

69. *Id.*

70. *Id.* at 671.

71. *Id.* at 667.

72. *Id.* at 671–72 (Barrett, J., concurring in part and concurring in judgment).

to agree that states lack power.[73] But they fractured badly about this argument on what role Congress may, or must, play.

The joint opinion concurring in the judgment strongly critiqued Part II-A of the *per curiam* opinion, saying that these "musings" about *Griffin's Case* and about congressional power are "as inadequately supported as they are gratuitous."[74] And the opinion went on to suggest that Section 3 is not special and does not require congressional enforcement.[75] Justices Sotomayor, Kagan, and Jackson pointed out that other provisions of the Constitution, including the Reconstruction Amendments, including things like Due Process, Equal Protection, and the abolition of slavery, do not require additional congressional implementing legislation.[76] They worried about how the majority opinion could be applied in the future, how the majority opinion might constrain Congress, and how it might prohibit other actors from enforcing Section 3.[77]

The only concrete example these Justices offered was the concern that forecloses judicial enforcement of that provision, the enforcement that might occur when a party is prosecuted by an insurrectionist and raises that as a defense.[78] If there were a prosecutor who had taken an oath to support the Constitution and then engaged in insurrection, it might be impossible for somebody to raise a defense to argue that this prosecutor was not authorized to hold this office, unless Congress enacted legislation to permit a defendant to do so or to identify prosecutors who engaged in insurrection.

But this summary of the dispute between the Justices skips over the truly important question. The Justices articulated different views about the need for congressional legislation: Just how essential is Congress's role? That is, do these Justices merely diverge about how to highlight the significance of congressional legislation? Or do they differ on the necessity of legislation as a precursor to enforcement?

The joint concurring opinion characterized the *per curiam* opinion as follows: "Congress, the majority says, must enact legislation under Section 5 prescribing the procedures to 'ascertain[ ] what particular individuals' should be disqualified."[79] Elsewhere, the concurring opinion lamented that the *per curiam* opinion has established a "requirement that a Section 3 disqualification can occur only pursuant to legislation enacted for that purpose."[80] Justice Barrett likewise seemed to assume the majority addressed the

---

73. *See id.*; *id.* at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in judgment).
74. *Id.* at 673.
75. *Id.* at 673–74.
76. *Id.*
77. *See id.* at 674.
78. *Id.*
79. *Id.* at 673 (alteration in original).
80. *Id.* at 674.

question of whether Congress must enact enabling legislation: "It does not require us to address the complicated question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced."[81]

The notion that "only" Congress can enforce Section 3 and that it "must" do so by legislation are potentially significant limitations on the federal government—if these characterizations are true.[82] But parsing the *per curiam* opinion makes it much harder to agree that the concurring opinion has accurately characterized the *per curiam* opinion.

Admittedly, it is hard to identify exactly what the five (or six) Justices in the majority of the *per curiam* opinion held with respect to congressional authority. Part II-A of the opinion secured only five Justices' support. That part of an already short opinion is shorter still. It includes some unobjectionable background of the Reconstruction Amendments, some descriptions justifying its claims, and, at its core, really just a handful of essential claims. These claims appear on their face quite uncontroversial—unless one reads into the statements something beyond face value.

First, Part II-A explained, "Section 3 works by imposing on certain individuals a preventive and severe penalty—disqualification from holding a wide array of offices—rather than by granting rights to all."[83] This statement is descriptively true.

Second, Part II-A stated, "It is therefore necessary, as Chief Justice Chase concluded and the Colorado Supreme Court itself recognized, to 'ascertain[ ] what particular individuals are embraced' by the provision."[84] Here, the Court cited both the Colorado Supreme Court's decision in *Anderson v. Griswold*[85] and Chief Justice Chase's opinion in *Griffin's Case*.[86] This statement, again, appears to be descriptively true.

Third, Part II-A noted, "The Constitution empowers Congress to prescribe how those determinations should be made."[87] Section 5 of the Fourteenth Amendment expressly provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of

81. *Id.* at 671 (Barrett, J., concurring in part and concurring in judgment).

82. Indeed, some scholars have adopted this interpretation. *See, e.g.*, Ilya Somin, *A Lost Opportunity to Protect Democracy Against Itself: What the Supreme Court Got Wrong in* Trump v. Anderson, 2024 CATO SUP. CT. REV. 319, 363 (2024) ("By holding that Section 5 enforcement legislation is the sole mechanism by which federal officeholders can be disqualified, the decision likely forestalls such potential scenarios as a Democratic-controlled Congress refusing to certify Trump's election.").

83. *Trump*, 144 S. Ct. at 666.

84. *Id.* (alteration in original).

85. 543 P.3d 283 (Colo. 2023).

86. 11 F. Cas. 7, 26 (C.C. Va. 1869).

87. *Trump*, 144 S. Ct. at 667.

this article,"[88] which is certainly an empowerment, and an empowerment that embraces determinations under Section 3. This sentence could be more controversial if one reads it as saying, "The Constitution empowers *only* Congress to prescribe how those determinations should be made." But the opinion does not include that adverb, and one would need to read that condition into the opinion.

Fourth, Part II-A provided, "The relevant provision is Section 5, which enables Congress, subject of course to judicial review, to pass 'appropriate legislation' to 'enforce' the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U. S. 507, 536 (1997)."[89] Even without a citation to *Boerne*, the sentence simply recites the text of Section 5 and acknowledges that legislation is subject to judicial review. Again, one could redraft this sentence to read, say, that "the *only* relevant provision is Section 5, which enables Congress, subject of course to judicial review, *only* to pass 'appropriate legislation' to 'enforce' the Fourteenth Amendment." But again, the opinion does not, on its face, condition congressional application or enforcement.

Fifth, Part II-A asserted, "Congress's Section 5 power is critical when it comes to Section 3."[90] If "critical" is read as "important," the sentence is uncontroversial. If "critical" is read as "essential," it gives a sense that Section 5 is the exclusive mechanism to enforce Section 3. The joint concurring opinion (rightly) seized on this ambiguity: "Nothing in that unequivocal bar suggests that implementing legislation enacted under Section 5 is 'critical' (or, for that matter, what that word means in this context)."[91]

Finally, the transition from Part II-A to Part II-B is awkward. There is no particular connection or segue between the two sections. It would appear that the opinion was rearranged late in the day, and perhaps some language changed in an (unsuccessful) attempt to mitigate the concerns of the other Justices.

This painstaking walk-through of Part II-A of the opinion shows how challenging it is to identify anything in this part that seems particularly controversial or contested. Only if one imputes words like "only," "exclusive," or "must" into the section does one find the Court placing conditions on how Congress and other actors may go about enforcing Section 3. This conclusion, however, raises separate questions for the majority and the dissent. If it seems so unessential to the holding, why did the majority insist on including it? And if it says so little at the end of the day, why did the joint concurring

---

88. U.S. CONST. amend. XIV, § 5.

89. *Trump*, 144 S. Ct. at 667. How *Boerne* interacts with other federal election legislation remains open to debate. *See, e.g.*, Franita Tolson, *Enforcing the Political Constitution*, 74 STAN. L. REV. ONLINE 88 (2022).

90. *Trump*, 144 S. Ct. at 667.

91. *Id.* at 673 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

opinion excoriate the majority opinion for "musings" "inadequately supported" and "gratuitous"?[92]

There is, of course, a risk that the majority opinion leaves the unmistakable impression that it *intends* for Congress to have "exclusive" power, or that it "must" do so or can "only" do so through legislation—without saying so. And while it does not hold so here, it could easily reinterpret the decision and explicitly require it in a future case. But internal logic of the opinion elsewhere suggests congressional legislation is *not* an essential precondition for enforcing Section 3 against federal officeholders, a topic to be discussed shortly.[93]

III. COUNTING ELECTORAL VOTES

The Court's analysis about the enforcement of Section 3, the role of Congress, and the absence of enabling legislation arises in a particular litigation posture. *Trump v. Anderson* was a ballot access dispute in state court months before an election.[94] But elections are lengthy processes that occur in several stages over several months. In a presidential election, the very last stage in that process under current law takes place on January 6 after an election, when Congress counts electoral votes and ascertains a winner. What does *Trump v. Anderson* have to say about counting electoral votes?

It is most useful to situate *Trump v. Anderson* in the context of how Congress goes about counting electoral votes, and places where disputes about the qualifications of a presidential candidate might arise. The Electoral Count Reform Act of 2022, which updated the Electoral Count Act of 1887, does many things with respect to how Congress counts electoral votes. The bill targeted three discrete areas of potential ambiguity and uncertainty: the date of the election, the resolution of state disputes before presidential electors vote, and the counting of votes in Congress.[95] These last two categories deserve particular attention after *Trump v. Anderson*. In short, the Electoral Count Reform Act does not create a statutory mechanism to resolve disputed qualifications before Congress counts electoral votes. But it does anticipate that Congress may refuse to count votes for a candidate who is not qualified to hold office.[96]

A. The Resolution of Disputes Before Presidential Electors Vote

The previous versions of sections 5 and 6 of Title 3—provisions of the Electoral Count Act—addressed how and when states should

92. *Id.*

93. *See infra* Section III.B.

94. *See supra* Part I.

95. *See* Electoral Count Reform Act of 2022, Pub. L. No. 117-328, 136 Stat. 5233 (codified as amended in scattered sections of 3 U.S.C.).

96. *See* 3 U.S.C. § 15(d)(2)(B)(ii).

issue certificates of election identifying which electors carried the state. Section 5 gave a state a so-called "safe harbor" if it made a "final determination of any controversy or contest concerning the appointment of all or any of the electors of such State" at least six days before the electors met.[97] That determination "shall be conclusive, and shall govern in the counting of the electoral votes."[98] The "safe harbor" meant that Congress would not second-guess the determination of the state if it wrapped up all of its disputes by that date.

Unfortunately, this language led to uncertainty, exploitation, and disregard.

As to uncertainty, it was not clear what conditions would need to exist for a state to have a "final determination" in that state under the original Electoral Count Act. Some states have clear and obligatory deadlines. In Iowa, for instance, a presidential election contest limits jurisdiction for the contest court and a "judgment shall be rendered at least six days before" the presidential electors meet without any opportunity to appeal the judgment.[99] Stripping a state court of jurisdiction is a good way to ensure finality. But some states permitted challenges after the six-day window and even entertained challenges after the electors had already cast their votes.

The Hawaii recount dispute of 1960 is a prime example. There, the recount was still pending both before and after electors cast their votes and sent them to Congress.[100] The recount was not finished until days before Congress met to count votes.[101] And in presidential elections in the early twenty-first century, states occasionally sent Congress updated notices to inform Congress that judicial challenges in the state had been resolved after presidential electors already cast their votes.[102] A firm deadline to resolve disputes would be better rather than a more ambiguous and advisory deadline.

The previous "safe harbor" provision also led some to try to exploit ambiguities. After the 2020 election, for example, Trump's campaign filed a wide range of lawsuits across several states.[103] The uncertainty of pending litigation led to suggestions that there

---

97. 3 U.S.C. § 5 (2018) (amended 2022).

98. *Id.*

99. IOWA CODE § 60.5 (2025).

100. Daniel W. Tuttle, Jr., *The 1960 Election in Hawaii*, 14 W. POL. Q. 331, 337 (1961).

101. Lum v. Bush, No. 7029 (Haw. 1st Cir. Ct. Dec. 30, 1960), *reprinted in* 107 CONG. REC. 290 (1961).

102. *See, e.g.*, State of Arizona Proclamation, Certificate of Final Determination of Presidential Electors (Jan. 4, 2021), https://perma.cc/M5DS-SWN5.

103. *See* Jim Rutenberg et al., *Where the Election Fight Is Playing Out in the Courts*, N.Y. TIMES, https://www.nytimes.com/2020/11/06/us/politics/election-courts.html (Nov. 7, 2020).

remained questions for states to resolve, and later that Vice President Mike Pence, acting as President of the Senate,[104] should "send it back to the States."[105] Trump's attorneys sought to ensure "pending, on January 6, in each of the six States, at least one lawsuit, in either federal or state court, which might plausibly, if allowed to proceed to completion, lead to either Trump winning the State or at least Biden being denied the State."[106] And in 2000, Representative Patsy Mink advocated a similar approach to Florida's disputed presidential election, calling for Democratic electors to cast votes—even without a certificate of election from the state—in the event of a subsequent resolution of a state recount in favor of Democratic candidate Al Gore.[107] In short, pending litigation could keep open the question of who truly carried a state, even after the electors voted.

And the old section 5 drove members of Congress to disregard it in the end. Members of Congress began to ignore the provision in section 5 that a final determination "shall be conclusive." Members objected to counting Ohio's electoral votes in 2005, and to Arizona's and Pennsylvania's votes in 2021.[108] They attempted to object to Florida in 2001, and many other states in 2017 and 2021.[109] Some attempted to argue that the certificates were not entitled to "safe harbor" states, and others ignored them.[110] But as to whether a state met the "safe harbor" deadline, members of Congress simply objected and sought revisit certified results from the states.[111]

Greater clarity and finality could reduce the uncertainty, exploitation, and disregard that have plagued recent elections. But Congress did not create new legal mechanisms to solve these problems. Congress instead sought to achieve clarity and finality by relying heavily on existing dispute resolution mechanisms.

---

104. *See* Derek T. Muller, *The President of the Senate, the Original Public Meaning of the Twelfth Amendment, and the Electoral Count Reform Act*, 73 CASE W. RSRV. L. REV. 1023, 1023 (2023).

105. *See supra* text accompanying note 4.

106. Memorandum from Kenneth Chesebro to James R. Troupis 1 (Dec. 6, 2020), https://perma.cc/V8HR-LPX5.

107. Michael Stern, *What the 1960 Hawaii Presidential Election Meant for* Bush v. Gore, POINT ORD. (Jan. 4, 2016), https://perma.cc/6PY6-HQJ2.

108. Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1531, 1534, 1542–43 (2021).

109. *Id.* at 1542–43.

110. *See id.* at 1533.

111. *See* Jenny Gross & Luke Broadwater, *Here Are the Republicans Who Objected to Certifying the Election Results*, N.Y. TIMES, https://www.nytimes.com/2021/01/07/us/politics/republicans-against-certification.html (Jan. 8, 2021).

1. A New Federal Venue to Resolve Disputes Under Existing Law

There are different ways that Congress might have attempted to achieve clarity and finality. In the Electoral Count Reform Act, it opted for some straightforward options. First, the Act places a firm deadline on executive officials to issue a certificate of ascertainment of appointment of electors. The executive "shall issue" a certificate "[n]ot later than the date that is 6 days before the time fixed for the meeting of the electors."[112] Congress replaced the presumption and the "safe harbor" with a fixed deadline. And this deadline includes an affirmative duty placed upon the executive of the state to issue a certificate by that deadline.[113]

Congress did not create a new opportunity to sue in federal court. The Electoral Count Reform Act explicitly fails to create a new private cause of action.[114] The Act speaks in no rights-creating language.

---

112. 3 U.S.C. § 5(a)(1).

113. *See generally* Derek T. Muller, *Election Subversion and the Writ of Mandamus*, 65 WM. & MARY L. REV. 327 (2023).

114. Although it is beyond the scope of this Article, it is worth pausing to evaluate some possibilities and complexities in the event someone *did* try to sue in federal court under the Act itself. One could rely on a federal court's inherent equitable power to instruct someone follow federal law. *See, e.g.*, *Ex parte* Young, 209 U.S. 123 (1908). The breadth of the opportunity to bring a case of this type in federal court remains of contentious dispute. *See, e.g.*, John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989 (2010); David L. Shapiro, Ex Parte Young *and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69 (2011); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269 (2020); Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1764 (2022). And the Supreme Court has narrowed the universe in which one might go into federal court and cite the court's inherent equitable power as a reason for the court to exercise jurisdiction. *See* Douglas v. Indep. Living Ctr. of S. Cal., Inc., 565 U.S. 606, 617–20 (2012) (Roberts, C.J., dissenting); Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327–29 (2015); Whole Woman's Health v. Jackson, 142 S. Ct. 522, 527 (2021). One reason a federal court might not intervene is if Congress has created a sufficiently comprehensive remedial mechanism elsewhere to preclude a federal court from exercising its inherent power. One could persuasively argue that Congress's power to refuse to count electoral votes fits this exception, at least in some circumstances. *See* 3 U.S.C. § 15(d)(2)(ii). There may be independent constraints on federal courts, such as the restriction on federal courts instructing state officers to comply with state law. *See id.* § 5(a)(1) ("[T]he executive of each State shall issue a certificate of ascertainment of appointment of electors, *under and in pursuance of the laws of such State* providing for such appointment and ascertainment." (emphasis added)); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984). And equity might likewise disfavor a remedy in certain circumstances—for instance, if mandamus, a remedy at law, is available, then equitable relief like an injunction might be inappropriate. *See* Muller, *supra* note 113; Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1254 (2023). For more, see Derek Muller, *Who Can Sue in Federal Court To Enforce the Date of*

Senator Susan Collins, who helped lead the bipartisan team with Senator Joe Manchin in drafting the bill, minced no words in her floor statement: "Let me be clear that this does not create a new cause of action. Instead, it will ensure prompt and efficient adjudication of disputes."[115] Instead, the provision for prompt and efficient adjudication of disputes is codified at 3 U.S.C. § 5(d).

An aggrieved candidate for President or Vice President may bring an expedited challenge in federal court for any action that arises under the Constitution or laws of the United States with respect to two specific matters: the issuance of a state executive's certification of electors or the transmission of the electors' certificates.[116] If a state executive attempted to manipulate the certificate identifying which slate of presidential electors won a state, for example, a candidate might have a due process or equal protection claim, which the candidate could file under 42 U.S.C. § 1983.[117] The case could go to a three-judge district court, with an appeal directly to the United States Supreme Court.[118]

Section 5(d)(2) has a special rule of construction: The new federal provision "shall be construed solely to establish venue and expedited procedures in any action brought by an aggrieved candidate for President or Vice President as specified in this subsection that arises under the Constitution or laws of the United States."[119] It was expressly designed to apply only to pre-existing federal causes of action. Instead of creating a new cause of action, the Electoral Count Reform Act created a new expedited track to resolve disputes arising under existing causes of action.

The new venue provision is expressly restricted still further: It only applies to cases filed "with respect to the issuance of the certification required under section (a)(1), or the transmission of such certification as required under subsection (b)."[120] That is, it applies only with respect to a state's executive issuing a certificate of election (or failing to issue a certificate), or sending that certificate to Congress.

In context, the narrow scope of section 5 as amended by the Electoral Count Reform Act makes sense. Section 5 addresses the link

---

Holding Presidential Elections (and Perhaps by Extension Some Provisions of the Electoral Count Reform Act)?, ELECTION L. BLOG (June 20, 2024), https://perma.cc/JUF2-J8KN.

115. 168 CONG. REC. S3544–45 (daily ed. July 20, 2022) (statement of Sen. Collins).

116. 3 U.S.C. § 5(d)(1).

117. *See* Derek Muller, *Some Thoughts on the Judicial Review Mechanism in the Electoral Count Reform Act*, ELECTION L. BLOG (July 22, 2022), https://perma.cc/H5GV-Y3KW.

118. 3 U.S.C. § 5(d)(1)(B), (D).

119. *Id.* § 5(d)(2).

120. *Id.* § 5(d)(1).

between the popular vote in a state, and the transmission of the results of that popular vote to the winning slate of electors and to Congress. After the 2020 presidential election, concerns arose that state executives would refuse to certify the results of an election or attempt to subvert the election process.[121] And the 2020 election saw a spate of litigation that sowed confusion about whether certification of the results of a state was truly final.

Relatedly, some members of Congress in 2021 attempted to refuse to count electoral votes submitted from some states on the ground that the states' elections were corrupted and that the results transmitted from the states were not the "right" results.[122] Section 5 likewise ensures that certificates issued in each state "shall be treated as conclusive in Congress."[123]

Section 5 does not address myriad other questions, including those that might arise before an election with respect to ballot access and voting rules before an election; to the conduct of presidential electors when they convene in mid-December; or to the counting of votes in Congress in early January. And section 5 makes no effort to address questions of presidential qualifications (or disqualification). Indeed, section 5 makes no mention of the word "President," except that a potentially "aggrieved candidate" may bring an action in a special federal venue.[124] The rest of the section focuses on the selection and certification of presidential electors.[125] Electors are the ones who are formally appointed in the state on Election Day.[126] Electors are the ones whose identity is "ascertained" in a "certificate of ascertainment of appointment of electors" after Election Day.[127] The certificate must name the "electors appointed" and "any and all votes" for electors.[128] The focus of section 5 is the appointment of electors, and the translation of each state's popular vote totals into an ascertainment of the identities of the electors who have won the election.

Additionally, the certification required by federal law requires that "the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day."[129] Ascertainment and appointment take place under state law—the rules for ballot access, the canvass, a recount, any audits, and a contest. A federal court

121. *See* Muller, *supra* note 113, at 330–31.
122. *See* Muller, *supra* note 108, at 1531.
123. 3 U.S.C. § 5(c)(1)(A); *see also id.* § 5(c)(2).
124. *Id.* § 5(d)(1)–(2).
125. *See id.* § 5(a)–(c).
126. *Id.* § 1.
127. *Id.* § 5(a)(1)–(2).
128. *Id.* § 5(a)(2)(A).
129. *Id.* § 5(a)(1).

likely could not step in to order state officials to comply with state law.[130]

The venue provision is limited to a narrow set of prospective plaintiffs: "any aggrieved candidate."[131] The qualifier "aggrieved" before "candidate" serves two purposes. First, it fits with the constitutional limitation that the judicial power extends to "all cases" "arising under this Constitution" and "the laws of the United States."[132] Generalized grievances—those injuries shared by citizens of the United States generally—are not eligible for a federal court to redress, as those are "more appropriately addressed in the representative branches."[133] And injuries that all voters share—or that all candidates for office share—tend to fall in the "generalized grievances" category.[134]

Second, the qualifier "aggrieved" ensures that only candidates whose electors would have won but for the alleged errors with respect to a certificate can bring a challenge. This qualifier expressly prohibits candidates who receive a trivial number of votes from attempting to litigate in federal court under this provision. Indeed, the "aggrieved" language is precisely the language identified by the Michigan Supreme Court in 2016 to prevent Jill Stein, the Green Party candidate who received 1.07% of the vote, from requesting a recount in that state.[135]

Consider, too, the context in which a candidate might be "aggrieved" to raise a dispute about certification under the Act. The certification under the Act is a "certificate of ascertainment of appointment of electors."[136] Unless a candidate can claim that the appointment should have gone to another elector or electors in a manner that has "aggrieved" that candidate, the candidate will not be "aggrieved," either for constitutional or for statutory purposes.

---

130. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.").

131. 3 U.S.C. § 5(d)(1).

132. U.S. CONST. art. III, § 2, cl. 1.

133. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984). While this principle has been sometimes labeled a "prudential" concern, the Supreme Court has more recently suggested it is a part of Article III and acts as a constitutional limitation on the power of the federal judiciary. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127–28 n.3 (2014).

134. *See Lexmark*, 572 U.S. at 127–28 n.3.

135. Att'y Gen. v. Bd. of State Canvassers, 896 N.W.2d 485, 487, 491 (Mich. Ct. App. 2016), *appeal denied*, 887 N.W.2d 786 (Mich. 2016) (mem.).

136. 3 U.S.C. § 5(a)(2).

In short, the venue provision in section 5 is deliberately narrow. It relies on stable, pre-existing causes of action rather than inventing new ones that could destabilize a presidential election if novel mechanisms were to be stress-tested in the pressure of a contentious presidential election. And it offers no new avenue to challenge a candidate's qualifications in federal court.

2. A Statute to Resolve Disputes in Counting Votes

In the event that an aggrieved candidate has a pre-existing federal cause of action and chooses to bring a claim in federal court, that candidate has an expedited venue available to resolve a narrow band of disputes relating to the certificate of ascertainment of appointment of electors. And this category offers nothing of particular novelty after *Trump v. Anderson*.

Put simply, section 5 of Title 3 has no connection with Section 3 of the Fourteenth Amendment. In *Trump v. Anderson*, the Supreme Court unanimously held that States have no role in enforcing Section 3 against a presidential candidate.[137] The ascertainment of appointment of electors under state law has no relationship to a candidate's qualifications or eligibility to hold office. If ineligible candidates may run for office, they can just as easily receive voters for office and certificates of election (or certificates for their electors).

Other post-election disputes, like recounts or election contests, are purely creatures of state statute, even if they incorporate federal standards. A run-of-the-mill election contest would be based on state law and be filed in state court. It could not be brought in federal court. If there is a state contest, it is a state cause of action, and it will arise in state court, even if it raises some federal issue.

And if a party has a section 1983 claim citing, say, the Due Process Clause or the Equal Protection Clause, it would not be state election contest. It would be a federal civil rights claim. These claims would be raised before certification of an election (*and specifically*, before a state contest is ripe). Candidates typically want certain votes counted or not counted during the canvass of the election, and they may cite federal statutory or constitutional provisions before the election is certified to ensure those vote totals are accurate.

State election contests do not permit a challenge to the outcome of an election on the basis that a presidential candidate is not qualified to serve (setting aside the wrinkle that the certification is for a slate of electors, not for a presidential candidate). And if a state election contest did permit that, it would run into the same problems that the Colorado Supreme Court faced in enforcing a state ballot access law on a presidential candidate's qualifications under Section 3 of the Fourteenth Amendment. The Court would likely conclude

137. Trump v. Anderson, 144 S. Ct. 662, 671 (2024).

that a state lacks the power, both before and after an election, to judge qualifications without some guidance from Congress.

Furthermore, section 5 of Title 3 does not relate to election contests. Contests arise after certification.[138] Section 5 speaks of actions arising before, or in the immediate aftermath of, certification.[139] Congress looked at pre-certification issues and ensured that Congress has the valid certificates of election, certificates that came from a reliable accounting of the results of the election. Other concerns—say, bribery of electors—that could arise in the days after the certification of election was issued were not of concern in section 5.

There is nothing in this portion of the Electoral Count Reform Act to empower federal courts to review disputes relating to a presidential candidate's qualifications more generally, or disqualification under Section 3 of the Fourteenth Amendment more specifically. There were no mechanisms to challenge qualifications under the Electoral Count Act, and nothing else has been added to the statute. Resolving qualifications disputes must occur elsewhere.

B. The Resolution of Disputes in Congress

Section 5 of the Electoral Count Reform Act addresses some of the newer mechanisms to handle timing and dispute resolution before presidential electors meet. As the previous Section of this Article shows, section 5 offers no path forward for litigation relating to a candidate's qualifications.

But what about dispute resolution during the counting of electoral votes? That question can be addressed in five steps. First, the Electoral Count Reform Act anticipates that Congress can refuse to count electoral votes on the basis of a presidential candidate's qualifications (or disqualification). Second, *Trump v. Anderson* does not constrain Congress's behavior when counting electoral votes under the Electoral Count Reform Act. Third, even though the Act is a statute, it does not invite judicial review of Congress's actions under the Act, because Congress is engaged in a constitutional duty to count votes, a duty that exists independent of the structure in the federal statute. Fourth, if Congress refuses to count votes cast for a winning candidate it deems not qualified, the second-place candidate does not win; instead, the election is thrown to the House of Representatives in a contingent election. Fifth, as a matter of policy, Congress should refrain from refusing to count votes cast for a candidate it deems not qualified under Section 3 of the Fourteenth Amendment if it has

138. *Contested Election Deadlines*, NAT'L CONF. ST. LEGISLATURES (Nov. 5, 2024), https://www.ncsl.org/elections-and-campaigns/contested-election-deadlines.

139. *See* 3 U.S.C. § 5(d)(1).

failed to implement enabling legislation before the election to ascertain whether a candidate is disqualified.

1. The Power of Congress to Reject Electoral Votes

The Electoral Count Reform Act clarifies that there are "only" two grounds for objections in the joint session: that the "electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors," or that the "vote of one or more electors has not been regularly given."[140] These two grounds already existed in the previous Electoral Count Act, but they were buried inside of a lengthy run-on sentence,[141] and the Electoral Count Reform Act helpfully extricates them.

The phrase "regularly given" appeared in the original Electoral Count Act.[142] It is best understood as meaning "cast pursuant to law," law that includes the federal Constitution, federal law, and state law.[143] And it focuses on the behavior of presidential electors in casting and transmitting their votes to Congress. If electors voted in the wrong place or at the wrong time, if they failed to vote by ballot, or if they voted under the influence of a bribe, Congress could refuse to count the votes as not "regularly given."[144] And Congress could refuse to count votes if the candidate is not qualified to hold office.[145] For instance, in 1873, Congress rejected electoral votes cast for Horace Greeley, a candidate who had died before electors cast their vote but who received three votes from electors in the State of Georgia.[146]

Rather than enumerate a series of potential objections, the Electoral Count Reform Act relies on the pre-existing term "regularly given" to embody any and all post-appointment controversies involving presidential electors.[147] Admittedly, other draft

---

140. *Id.* § 15(d)(2)(B)(ii).

141. 3 U.S.C. § 15 (2012) (amended 2018) ("[N]o electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.").

142. Electoral Count Act of 1887, Pub. L. No. 49-90, ch. 90, § 4, 24 Stat. 373, 374 (current version at 3 U.S.C. § 15).

143. Muller, *supra* note 108, at 1534–37.

144. *Id.* at 1539–40.

145. *Id.* at 1537–38.

146. *Id.* at 1538 n.42. Of course, the electors in 1872 knew that Greeley was dead. It is possible that a different scenario might arise in circumstances where the candidate is qualified at the time the electors cast their votes, but no longer qualified after that—say, in an instance where a candidate renounces his citizenship.

147. Electoral Count Reform Act of 2022, Pub. L. No. 112-328, § 109, 136 Stat. 5237, 5238 (codified as amended at 3 U.S.C. § 15(d)(2)(B)(ii)(II)).

amendments to the Electoral Count Act proposed an enumeration of objections. Senators Angus King, Amy Klobuchar, and Dick Durbin introduced a "discussion draft" of a bill called the Electoral Count Modernization Act.[148] Objections to the counting of electoral votes in that draft were expressly enumerated, including objections that a candidate was not eligible under Section 3 of the Fourteenth Amendment.[149] Likewise, when Representatives Zoe Lofgren and Liz Cheney proposed the Presidential Election Reform Act,[150] which the House passed hours after the bill was introduced but never received a vote in the Senate,[151] they too enumerated specific objections. Objections under Section 3 of the Fourteenth Amendment were specifically named and expressly reserved to Congress in that draft.[152]

One plausible inference from this legislative history might be that Congress lacks the statutory power to refuse to count votes for an ineligible candidate. After all, if two draft bills expressly enumerated Section 3 of the Fourteenth Amendment as a basis for objection, and the final version failed to enumerate that objection, then it is not a permissible basis for an objection. But just as plausible an inference is that enumeration was less preferable to a more general objection. Enumeration of specific objections needlessly complicates the Electoral Count Act. It could become out of date if new qualifications are added to the Constitution. And it could draw unnecessary attention to potential future objections.

The better reading of the statute is to ascertain the meaning of "regularly given." "Regularly given" appeared in the Electoral Count Act and was reincorporated into the Electoral Count Reform Act. And "regularly given" is a catch-all objection that includes the widely accepted understanding that objections to the actions of electors, including the act of casting a vote for an ineligible candidate, were permissible.[153]

---

148. Electoral Count Modernization Act, 117th Cong. (2022) (Discussion Draft), https://www.king.senate.gov/imo/media/doc/mcg22051.pdf.pdf.

149. *Id.* § 15(c)(1)(A)(iii)(II), at 30–31.

150. Derek Muller, *Lofgren-Cheney Proposal to Amend Electoral Count Act Would Create New Federal Cause of Action over Ballot Tabulation*, ELECTION L. BLOG (Sept. 20, 2022), https://perma.cc/8V54-9ZSH.

151. *See* 168 CONG. REC. 8032 (2022); *All Actions: H.R.8873 — 117th Congress (2021-2022)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/8873/all-actions (last visited May 12, 2025).

152. Presidential Election Reform Act, H.R. 8873, 117th Cong. § 15(c)(2)(C) (2022).

153. One reading of the Twentieth Amendment, ratified in 1933, might suggest that Congress cannot reject a presidential candidate for lack of qualifications. Section 3 of the Twentieth Amendment provides, "If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified . . . ." U.S. CONST.

2. Congressional Legislative and Non-Legislative Action

Trump v. Anderson includes several statements about the scope of congressional power as it relates to Section 3 of the Fourteenth Amendment. The concurring opinion goes so far to suggest that the majority holds that enforcement "must" occur by legislation.[154] By its own terms, however, the majority opinion does not hold that enforcement *must* occur by federal legislation or may *only* occur through federal legislation.[155] In fact, it admits that enforcement can occur through non-legislative means.

a. *Refusal to seat a member in a house of Congress.* The majority opinion, in a portion joined by six Justices, favorably notes that Congress has refused to seat members under its Article I power to judge the qualifications of its members.[156] That judging of qualifications extends to Section 3 of the Fourteenth Amendment. Congress holds the exclusive power to judge qualifications; federal courts have no power to second-guess the determinations of Congress.[157]

---

amend. XX, § 3. One interpretation of this Clause could lead to the conclusion that the Amendment provides for what happens when a President is not qualified for office, and Congress has no role in refusing to count votes. But this reading seems a strained one. The Clause does not appear to strip Congress of its counting power but to fill in the gaps in a scenario where Congress *does* count votes for an unqualified candidate. It would create unusual scenarios, such as a requirement that Congress count votes for a twenty-seven-year-old, then allow an "acting president" to serve for four years with no ability to appoint a vice president under the Twenty-Fifth Amendment. In short, Congress has two options when confronted with an unqualified candidate: count the votes and allow the Twentieth Amendment to fill in the gaps, or refuse to count the votes because, in its judgment, the candidate is not qualified. *See also infra* note 214 and accompanying text.

154. Trump v. Anderson, 144 S. Ct. 662, 673–74 (2024) (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

155. *See supra* Section II.C.

156. *Trump*, 144 S. Ct. at 669–70.

157. *See* Powell v. McCormack, 395 U.S. 486, 548 (1969) ("[W]e have concluded that Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution."); *id.* at 552 (Douglas, J., concurring) ("Contests may arise over whether an elected official meets the 'qualifications' of the Constitution, in which event the House is the sole judge."); Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 613 (1929) ("Generally, the Senate is a legislative body . . . . But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own members. Art. I, § 5, cl. 1. . . . Exercise of the power necessarily involves . . . the power . . . to render a judgment which is beyond the authority of any other tribunal to review."); Burton v. United States, 202 U.S. 344, 366 (1906) (examining the Constitution and concluding that "the Senate is made by that instrument the sole judge of the qualifications of its members"); Jones v. Montague, 194 U.S. 147, 153 (1904)

b. *Impeachment.* No opinion in *Trump v. Anderson* mentions another important congressional enforcement mechanism: impeachment. The House can impeach a President disqualified from holding office, and the Senate can convict him.[158] Impeachment and conviction do not take place pursuant to legislation. And in fact, the House approved an article of impeachment against Donald Trump on January 13, 2021, in which the article expressly referred to Section 3 of the Fourteenth Amendment.[159] Like the refusal to seat a member in a house of Congress, federal courts have no power to review the determinations made in Congress with respect to impeachment.[160]

c. *Counting electoral votes.* Additionally, another enforcement mechanism for Section 3 exists, a mechanism that works in the absence of any legislation: Congress's power to count electoral votes under the Twelfth Amendment. The Counting Clause of the Twelfth Amendment provides, in the relevant part, "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."[161] Congress holds the power to count.[162] In previous elections, Congress has counted pursuant to rules promulgated by both houses, a "joint rule" or a "concurrent rule."[163] It announces a vote total without legislation, and that announcement is deemed sufficient to identify the winner.[164] And there is general consensus that the act of counting is committed to Congress and is not, at least in most circumstances, subject to judicial review.[165] Indeed, in the

---

(stating that the House of Representatives "is the sole judge of the qualifications of its members").

158. U.S. CONST. art. I, §§ 2–3.

159. H.R. 24, 117th Cong. (2021).

160. *See* Nixon v. United States, 506 U.S. 224, 229–36 (1993); Hastings v. United States, 837 F. Supp. 3, 4–5 (D.D.C. 1993); *see also* Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After* Nixon, 44 DUKE L.J. 231, 244–47 (1994).

161. U.S. CONST. amend. XII.

162. *See* Muller, *supra* note 104.

163. Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 550 (2004).

164. *See, e.g.*, 1 ANNALS OF CONG. 17–18 (1789) (Joseph Gales ed., 1834) (noting that upon the counting of votes, the President and Vice President were "declared" to be so, and a message was sent to the winning candidates).

165. *See, e.g.*, Albert J. Rosenthal, *Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 27 (1968) ("This is not definitely a final commitment to Congress of the power to resolve dispute votes, but it has some of the hallmarks of one."); Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1107 (2001) ("There is a 'textual commitment' of determining the electoral votes in a slate to Congress."); RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 184 (2001) ("Once a dispute over electors lands in Congress, it is arguable, by analogy to the *Nixon* case, that judicial jurisdiction ceases. The responsibility for counting electoral votes is lodged firmly in Congress by Article II and the Twelfth

Amendment (which in this respect is identical to Article II), and there is no suggestion of a right or power of judicial review and no hint of a standard that a court reviewing Congress's decision on which electoral votes to count might steer by."); Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335, 341–42 (2001) ("[T]he Electoral Count Act, a set of federal statutes enacted after the Hayes-Tilden election to implement Congress's task under the Twelfth Amendment to count the electoral vote, assigns to Congress the authority and responsibility to settle disputes remaining after a state has tried to resolve electoral contests through 'judicial' (which Florida expressly chose to do) or other means."); Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 581–82 (2001) ("Article II and the Twelfth Amendment are readily interpretable as embodying a textually demonstrable commitment to Congress of the power to resolve all issues related to the proper tabulation of electoral votes."); Laurence H. Tribe, eroG v. hsuB *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 277–78 (2001) ("There is a powerful case indeed for the Court playing no role other than to protect Congress's decisionmaking function—that is, for treating the matter as a political question textually committed to Congress under the Twelfth Amendment, rather than a legal question properly resolved by a court. The requisite textual commitment to a political branch could hardly be clearer."); Samuel Issacharoff, *Political Judgments*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 71 (Cass R. Sunstein & Richard A. Epstein eds., 2001) ("The Court presumed that once it found the federal interest, its remedial obligations followed. . . . A review of [the Electoral Count Act], however, reveals that it carefully reserved to the political branches the key role in resolving contested presidential elections."); Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, *in* THE VOTE, *supra*, at 120 ("A good case can be made, however, that the Constitution and laws have designated Congress—not the Court—as the arbiter of such a conflict."); Frank I. Michelman, *Suspicion, or the New Prince*, *in* THE VOTE, *supra*, at 133 n.24 ("The Constitution does not in so many words assign to Congress, any more than it does to the Supreme Court, a responsibility to resolve disputes over the presidential elector election outcomes. The Twelfth Amendment's provision for electoral vote counting 'in the presence' of the House and Senate is somewhat suggestive, however, as is the choice of the House and Senate as the forums for resolving failures of any candidate to achieve electoral-vote majorities. Presumably it was, in part, on the basis of these textual intimations that various Congresses enacted, and various President signed, the bills now regulating the electoral process."); Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 618 (2001) ("[T]he Twelfth Amendment gives Congress broad discretion in counting—and hence determining the validity of—electoral votes. The Court should always affirm Congress's decisions, absent some plain and egregious violation of the Twelfth Amendment or some other constitutional provision."); *id.* at 618 n.88 ("An example of such a palpable and extreme violation would be Congress's refusal to count electoral votes because they were cast by women or Hispanics."); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 279 (2002) ("[I]f Congress has the authority to determine whether electors have been chosen in the manner directed by the state legislature as part

event that Congress refuses to count some votes and there is no majority winner, the Twelfth Amendment requires that the "the House of Representatives shall choose *immediately*, by ballot, the President."[166] There is no opportunity for the federal judiciary to review Congress's decision to count or refuse to count votes. Review after Congress has announced a President or after the House has chosen a President seems particularly problematic.[167]

The act of counting electoral votes under the Twelfth Amendment resembles Congress's role in seating members under Article I or Congress's role in impeaching executive officers or federal judges. It may occur without enabling legislation. It takes place pursuant to an independent constitutional obligation. It is insulated from judicial review. Therefore, actions taken under this counting obligation, like the seating and impeachment obligations, do not fit the "congruence and proportionality" test that the federal judiciary uses to review legislation enacted under the Fourteenth Amendment.[168] Congress's

---

of its counting power, the Supreme Court cannot nullify Congress's power by intervening before Congress has the opportunity to face the issue."); Peter Berkowitz & Benjamin Wittes, *The Lawfulness of the Election Decision: A Reply to Professor Tribe*, 49 VILL. L. REV. 429, 442–43 (2004) ("The trouble for Tribe's categorical claim is that the authority that the Constitution actually commits to Congress is that of counting electoral votes, not that of determining the legality of the procedures under which a state's electors are selected. Certainly, the political question doctrine would have prevented the Court from intervening in a dispute concerning which slate of electors Congress should have recognized had, for example, the Florida judicial process and the state's legislature each produced a competing slate and sent their slates to Congress. . . . In short, in addressing the questions put to it in *Bush v. Gore*, the Court in no way deprived Congress of its textually committed power to count electoral votes."); *see also* Baude & Paulsen, *supra* note 14, at 642 (expressing skepticism that Congress holds the power to judge qualifications under the Counting Clause but conceding "there is a serious argument that Congress might act as a *last constitutional backstop* against the installation of such a constitutionally disqualified person in the presidency" (emphasis added)); *cf.* Roudebush v. Hartke, 405 U.S. 15, 19 (1972) ("Which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court even before the Senate acted."); *accord* State v. Albritton, 37 So. 2d 640, 643 (Ala. 1948) ("[3 U.S.C. § 17] provides a complete remedy for contesting irregularity of casting votes by presidential electors.").

166. U.S. CONST. amend. XII (emphasis added).

167. *Cf.* DAVID DUDLEY FIELD, THE ELECTORAL VOTES OF 1876: WHO SHOULD COUNT THEM, WHAT SHOULD BE COUNTED, AND THE REMEDY FOR A WRONG COUNT 21 (New York, D. Appleton & Co. 1877) (recommending Congress enact a statute to create a *quo warranto* action to permit a challenge to a president improperly elected).

168. *See, e.g.*, Derek T. Muller, *Judicial Review of Congressional Power Before and After* Shelby County v. Holder, 8 CHARLESTON L. REV. 287, 287–88, 298–99 (2013).

actions are not legislation and are generally not subject to judicial review.[169]

That said, there remains one potential complication. Congress currently counts electoral votes pursuant to the Electoral Count Act, as amended by the Electoral Count Reform Act. The Act is a statute that went through bicameralism and presentment. And when it interprets and applies a term like "regularly given," Congress is interpreting and applying a statute.

Must Congress's actions to count electoral votes under the Electoral Count Reform Act survive judicial scrutiny and "congruence and proportionality"? Likely no. Undoubtedly, language in the opinion suggests that Congress must use legislation.[170] But before the Court purports to strip Congress of power that it has long exercised, one should expect the Court to speak much more clearly. And Congress should feel no compulsion to bend to the Court's preferences without such a clear statement—and without the remarkable holding of the Court purporting to constrain a function reserved to Congress. There are good historical reasons to recognize that legislation is not required for these functions, including the counting of electoral votes.

And even when Congress acts pursuant to a statute under these functions, judicial review is necessarily limited. That is, some statutes, including the Electoral Count Reform Act, are statutes reserved for Congress's interpretation and beyond the scope of judicial review.

3. Statutes Regulating Congress's Non-Statutory Constitutional Duties

Congress does not need to enact legislation to count electoral votes. Indeed, before the Electoral Count Act, Congress counted electoral votes under joint rules or resolutions.[171] But since 1887, Congress has counted under rules it set forth in a statute.[172] And there are reasons to doubt whether section 15 of Title 3—the portion of the Electoral Count Reform Act that governs Congress's counting—is ordinary "legislation."

Start with the proposition that a current Congress cannot bind a future Congress.[173] The rules for the House of Representatives governing its internal behavior are reapproved with each new

---

169. That is not to say there might not be outer bounds that would permit judicial review. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 512–16 (1969); Nixon v. United States, 506 U.S. 224, 239 (1993) (White, J., concurring); Pushaw, *supra* note 165, at 618 & n.88.

170. *See supra* notes 154–56 and accompanying text.

171. *See supra* note 163 and accompanying text.

172. Electoral Count Act of 1887, Pub. L. No. 49-90, 24 Stat. 373 (current version codified in scattered sections of 3 U.S.C.).

173. *See, e.g.*, United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *90).

Congress.[174] And before Congress counts electoral votes, it approves a concurrent resolution ratifying the rules set forth in 3 U.S.C. § 15.[175] It has done this stretching back to the late nineteenth century, in the immediate aftermath of the passage of the Electoral Count Act.[176] It is something of a pro forma process—the resolution occurs by unanimous consent at the opening of a new congressional session and before electoral votes are counted.[177] But it is a formal acknowledgement from Congress that it ought to reapprove rules continually, even if those rules are already on the statutory books. In the event Congress failed to agree on the rules, it would default to the rules on the books unless it could agree to something else. The statute reflects a bargained legislative process, and that statute holds sway over Congress each time it counts electoral votes.

The Electoral Count Act is not the only domain in which Congress has passed a statute governing behavior that addresses its internal rules and behavior. The Federal Contested Election Act is another.[178] And the parallels between the two statutes demonstrate how the judicial role is limited—and how judicial review is actually foreclosed.

Congress enacted the Federal Contested Election Act of 1969 to update the rules for election contests in the House of Representatives.[179] The law established a mechanism for a contestant to challenge the election of a member of the House, with a procedural framework to adjudicate contested elections.[180] But while that law establishes a mechanism for the House to judge qualifications disputes, it is not the only mechanism by which a candidate's election or qualifications may be challenged. A member of the House may initiate a challenge on his or her own.[181]

In 1985, one of the more notorious election disputes in recent memory, the "Bloody Eighth," arose in the House. Indiana Republican Rick McIntyre was certified as the winner over Democrat Frank McCloskey by thirty-four votes, even though not all counties had completed a recount.[182] The House, on motion by House member Jim

174. *See, e.g.*, Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 732 (1989); *see* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 267–301 (1st ed. 2017).

175. *See, e.g.*, S. Con. Res. 1, 117th Cong. (2021).

176. 29 Stat. app. 16 (1897).

177. *See* Memorandum from Kenneth Chesebro to James R. Troupis, Important That All Trump-Pence Electors Vote on December 14, at 2–3 (Dec. 6, 2020), https://perma.cc/WSG9-ZYJL.

178. Federal Contested Election Act, 2 U.S.C. §§ 381–396.

179. Federal Contested Election Act, Pub. L. No. 91-138, 83 Stat. 284 (1969) (codified at 2 U.S.C. §§ 381–396).

180. *See* Lisa Marshall Manheim, *Judging Congressional Elections*, 51 GA. L. REV. 359, 368–70 (2017).

181. 2 DESCHLER'S PRECEDENTS, H.R. DOC. NO. 94-661, at 1023 (1994).

182. *See* EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 265–66 (2d ed. 2024).

Wright, voted along party lines to declare the seat vacant pending a House-overseen recount.[183] After a series of sharply partisan internal decisions, Democrats led a recount with shifting rules before McCloskey was declared the winner, to the fury of Republicans.[184]

A group of registered Republican voters challenged the House's decision to seat McCloskey in a *pro se* action.[185] They lost at the district court and appealed.[186] In a decision by then-Judge Antonin Scalia—who was already nominated to the Supreme Court and who would be confirmed days later—a panel of the District of Columbia Circuit affirmed. Scalia's opinion in *Morgan v. United States*[187] squarely framed the matter as a political question, a matter reserved to the House and not to the federal judiciary.[188]

But the voters raised a separate, statutory argument. They cited the Federal Contested Election Act and noted that the House had failed to follow those procedures.[189] Scalia strongly rejected the claim that a federal court could review action taken under (or in violation of) this statute:

> It is doubtful, to begin with, whether—in this matter which the Constitution commits exclusively to the House's judgment—the House's alleged failure to follow statutorily prescribed procedures can ever be the subject of judicial inquiry. *Cf. In re Voorhis*, 291 F. 673 (S.D.N.Y.1923) (L.Hand, J.) (denying judicial authority to determine compliance with subpoena issued by House under earlier statute establishing procedures for resolving election disputes). The House has on many occasions asserted authority to disregard the statutory rules for resolving disputed elections where it finds them inappropriate. *See, e.g.,* I HINDS' PRECEDENTS §§ 330, 449, 597, 600, 680, 713, 825, 833; II *id.* at § 1122.[190]

Scalia rebuked the proposition that federal courts could even review congressional action under a *statute* in these circumstances. While one might think of judicial review of a statute or of action taken under a statute as ordinary, it is not so ordinary when the statute regulates Congress's behavior. The statute is guidance for Congress (and in this case, a single house), but Congress is not necessarily bound by it. That is, each house's power to judge the elections, returns, and qualifications of its members cannot be constrained by a mere statute, because each

183. *Id.* at 266; Brian C. Kalt, *Swearing in the Phoenix: Toward a More Sensible System for Seating Members of the House of Representatives at Organization*, 105 MARQ. L. REV. 1, 55 (2021).

184. FOLEY, *supra* note 182, at 269–71.

185. *See* Morgan v. United States, 801 F.2d 445, 446 (D.C. Cir. 1986).

186. *Id.*

187. 801 F.2d 445 (D.C. Cir. 1986).

188. *See id.* at 447–49 (opinion of Scalia, J.).

189. *See id.* at 446.

190. *Id.* at 450.

house has the power to interpret or alter the rules it promulgated in that statute.

Scalia's opinion continued, "once the outcome of the contest has been conclusively adjudged by the House there is no meaningful relief we can provide, and the dispute is therefore moot."[191] A conclusive adjudication mooted the case and precluded federal judicial relief.

Each house's power to judge its own elections and Congress's power to judge presidential elections have a parallel structure. With respect to congressional elections, Congress could enforce Section 3 of the Fourteenth Amendment in congressional elections through its Article I power to judge the qualifications of its members. It might enact a statute to guide how the House of Representatives handles election contests. But a statute is not the exclusive basis to address seating challenges, and the interpretation and application of the statute is not subject to judicial review.

Likewise, Congress could enforce Section 3 of the Fourteenth Amendment in presidential elections through its Counting Clause power under the Twelfth Amendment. Congress has enacted the Electoral Count Reform Act to guide how Congress handles challenges to candidates' qualifications. Congress is bound by the Electoral Count Reform Act to the extent Congress chooses to be bound by the Electoral Count Reform Act.[192] Its interpretation and application are not subject to judicial review.

That is not to say that the Federal Contested Election Act or the Electoral Count Reform Act are toothless. (Indeed, they are not the only sets of legislative rules enacted into law, and these statutes are hardly the only place where such disputes about their boundaries arise.)[193] Instead, these acts give Congress a set of neutral, ex ante rules that Congress (or, for the Federal Contested Election Act, the House) follows as a default. Congress (or the House) interprets these rules and develops precedent around these rules.[194] It takes an affirmative decision to deviate from these rules and ignore the precedent built up around them. But those are decisions for Congress, and not for the courts.

Relatedly, the interest in election finality weighs against federal judicial involvement. Just as Scalia recognized that a conclusive

---

191. *Id.* at 451.

192. *Cf.* Lisa Marshall Manheim, *Election Law and Election Subversion*, 132 YALE L.J.F. 312, 330–31 (2022).

193. *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1, 56–61 (2023); Jonathan H. Adler, *Placing "REINS" on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 28–29 (2013); Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 346–47 (2003).

194. *Cf.* Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975, 986 (2001).

adjudication in the House mooted the case, so would a conclusive adjudication in Congress moot a presidential election dispute. A declaration from Congress about the tabulation of electoral votes is sufficient to ascertain that a President of the United States has been elected.[195] The House must "immediately" move to select a President if no candidate receives a majority.[196] Judicial review after it has ascertained the winner of an election would appear to be moot.

4. The Consequence of Refusing to Count Votes

Congress holds the power to refuse to count electoral votes if those votes are not "regularly given." That includes the refusal to count if Congress decides a candidate is not qualified to hold office.[197] How that actually plays out on a given January 6 can be complicated. But if Congress refuses to count electoral votes for a purported winner, it does not mean that the second-place vote-getter becomes the President. Instead, after a potentially lengthy process, the election would be sent to the House for a contingent election.

The Electoral Count Reform Act forecloses any role for the President of the Senate in resolving disputes: "The President of the Senate shall have no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors, the validity of electors, or the votes of electors."[198] Any objections, however frivolous, would be submitted to Congress to evaluate.

Members of Congress may only object on two bases: "The electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1)," or "The vote of one or more electors has not been regularly given."[199] An objection requires 20 percent of each chamber to sign an objection before the objection may be considered.[200] This threshold is significantly higher than the one member from each chamber requirement in the Electoral Count Act. The threshold serves to winnow out frivolous objections. Any rejection of electoral votes requires a majority of both houses of Congress to concur in the objection.

The odds of a political party carrying the presidency but losing both chambers of Congress would appear low. That is, if Democrats

195. *See, e.g.*, 1 ANNALS OF CONG. 16–18 (1789) (Joseph Gales ed., 1834) (noting that after the president of the Senate announced the vote totals, the House agreed that the Senate could send a notification to George Washington that he had been elected president and to John Adams that he had been elected vice president).

196. U.S. CONST. amend. XII.

197. *See supra* Section III.B.1.

198. 3 U.S.C. § 15(b)(2).

199. *Id.* § 15(d)(2)(b)(ii).

200. *Id.* § 15(d)(2)(b)(i)(II).

in Congress seek to object to a Republican candidate, Democrats would need to control a majority of both chambers out of the same election that just chose that Republican candidate—and do so with sufficient margin to lose moderate or reluctant members. It is possible that a party could secure cross-partisan votes. But without controlling both chambers, it seems exceedingly unlikely that both houses would agree to reject any votes cast for a candidate.

Indeed, the 2024 election resulted in the presidency, the House, and the Senate all being controlled by Republicans. Trump won 312 electoral votes to Kamala Harris's 226.[201] There was no genuine possibility that there would be any viable objections to his election. A thought experiment in contrary hypotheticals, however, can help illuminate what might happen in similar future scenarios.

Suppose both chambers have not simply 20 percent signed onto an objection, but majorities of each chamber inclined to sustain an objection. Practically, the objection process could take days. Up to two hours' debate is permitted in each chamber, per each state's objection.[202] A chamber does not need to take that long, of course. But it seems likely that at least one chamber might be inclined to maximize the time spent on each state and prolong the process. Time is divided equally by the majority leader and the minority leader, heightening the likelihood of a substantial amount of time used to debate contentious objections.[203] Even if one chamber finishes early (as the Senate did in 2021 with Pennsylvania[204]), it would need to wait for the other chamber. The filing in and out of members of the joint session to separate meetings, along with the actual act of voting, add to that time. Suppose a winning candidate appeared to carry thirty states, and each objection takes two and a half hours. That is more than three days, assuming the session is uninterrupted (and recesses are limited under the Act).[205] In other words, this process would be a prolonged and laborious one to reject votes from each state, one at a time.

Assume, however, that both chambers of Congress are committed to refusing to count votes for a candidate they deem unqualified and endure the tedious and time-consuming process. At the end of counting, and assuming every state appointed a full slate of electors, Congress would likely recognize 538 duly appointed presidential electors who cast votes. Congress would likely count something less than 270 electoral votes for President, and 538 electoral votes for Vice President. A proper objection that the votes are not "regularly

201. NAT'L ARCHIVES & REC. ADMIN., 2024 ELECTORAL COLLEGE RESULTS (2025).
202. 3 U.S.C. § 17(1), (3).
203. *Id.* § 17(3).
204. *See* 167 CONG. REC. S38 (daily ed. Jan. 6, 2021).
205. *See* 3 U.S.C. § 16.

given,"[206] however, does not mean that the second-place vote-getter becomes the President-elect. Instead, no candidate would have the votes of a majority of the electors appointed.[207] The second-place vote-getter would have received something less than 270 electoral votes. To be elected President, the Twelfth Amendment requires that a candidate must receive "a majority of the whole number of electors appointed."[208] While the electors have been validly appointed, those electors' votes have been deemed improper and rejected. A majority under the Twelfth Amendment would require at least 270 votes among 538 appointed electors. The second-place vote-getter has not received a majority. No candidate has.

If no candidate receives a majority, a contingent election would "immediately" go to the House of Representatives.[209] Each state receives one vote.[210] A tie from a state's delegation does not count as a vote for any candidate.[211] It would take 26 state delegations to choose the next President. (The Vice President-elect in this scenario would presumably have received a majority of electoral votes.) And the House would choose among the top three vote-getters.

This possibility creates a separate, and risky, strategy for the political party of the candidate whose votes have been discarded. Well before January 6, and in anticipation of the risk of electoral votes not being counted, the party has options at its disposal.

A hypothetical scenario can help explain how this might play out in any scenario in the decades ahead, but it is most practical to use a scenario of the immediate moment. In a January 6, 2025, matchup, suppose the Republican Party anticipates that its nominee, Donald Trump, might have electoral votes not counted for him. But the Republican Party also anticipates that it will hold at least 28 state delegations, even if it does not control an outright majority of the House of Representatives. (In the 118th Congress, for instance, Republican delegations controlled 26 delegations, and two others, Minnesota and North Carolina, were evenly divided.)

Suppose the apparent Electoral College vote is Trump 277 and Democratic Party nominee Kamala Harris 261. If Congress rejects all Trump votes, the vote would simply be Harris 261, among 538 validly-appointed electors, with no candidate receiving a majority. The top three vote-getters are only one, Harris. And the House has only one choice, Harris.

---

206. *Id.* § 15(d)(2)(B)(ii)(II).

207. *See id.* § 15(e)(2).

208. U.S. CONST. amend. XII.

209. *Id.*; *see* Katherine A. Shaw, *"A Mystifying and Distorting Factor": The Electoral College and American Democracy*, 120 MICH. L. REV. 1285, 1289 (2022).

210. U.S. CONST. amend. XII.

211. *See id.*; *see also* Brian C. Kalt, *Of Death and Deadlocks: Section 4 of the Twentieth Amendment*, 54 HARV. J. ON LEGIS. 102, 106–07 (2017).

Instead, suppose one elector in Wyoming casts a vote for, say, Tom Cotton, a Senator from Arkansas, for President instead of Trump. The apparent Electoral College vote is now Trump 276, Harris 261, Cotton 1. (That Cotton vote, one assumes, would not be rejected by Congress.) After Congress rejects the electoral votes for Trump, the vote is now Harris 261, Cotton 1. The House can choose among the three vote-getters (here, just two candidates). And, if Republicans controlled at least 26 delegations, they could then choose Cotton.

An alternative approach, more consistent with the spirit of the Twentieth Amendment,[212] would involve that Wyoming elector voting for Trump's running mate J.D. Vance for President and Trump for Vice President, flipping the ticket. The vote would now be Trump 276, Harris 261, Vance 1. If Trump were disqualified, Vance could be selected as the next President. Vance would decline the vice presidency and appoint a Vice President with congressional consent under the Twenty-Fifth Amendment.

These approaches seem to be effective—if, candidly, suboptimal—strategies to prevent a contingent election where Harris is the only candidate. It would seem quite strange for the House to choose a candidate who appeared on no ballots for President or Vice President nationwide. That said, it is entirely within the letter of the Twelfth Amendment and the discretion of presidential electors (in states that permit discretion).[213] And, it is possible that if Democrats recognize this possibility, they would be less inclined to attempt to disqualify Trump on January 6, 2025, unless they simultaneously controlled 26 House delegations (or, unless they are happy to have a Republican other than Trump occupy the White House, in which case they may pursue the disqualification anyway). Of course, these hypotheticals would hold true for either Republicans or Democrats, for Section 3 or other qualifications-related disputes, in 2025 and beyond.

There are many other questions that this Article does not address. There are alternative contingencies that may involve the Twentieth Amendment,[214] with separate and disputed questions of how it would apply. For example, if a candidate has died, it seems

212. *Cf.* Michael L. Rosin, *A History of Elector Discretion*, 41 N. ILL. U. L. REV. 125, 133–34 (2020).

213. *See* Chiafalo v. Washington, 591 U.S. 578, 590 (2020) (upholding Washington's pledge law, reasoning that "nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion").

214. U.S. CONST. amend. XX, § 3 ("If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified."); *see also* Brian Kalt, *A Distinct System for Presidential Succession on Inauguration Day: Getting the Most Out of Section 3 of the Twentieth Amendment*, 46 CARDOZO L. REV. 307 (2025).

prudent for Congress to repudiate its 1873 precedent and instead count votes for a deceased candidate, following the protocol in newer constitutional amendments to handle vacancies in the office of President or Vice President.[215] There are further complexities if it appears no candidate will control 26 delegations on January 6 when the electors meet in mid-December; further disputes if it is impossible to identify the "top three" vote getters because of ties; additional issues about how the House handles a contingent election if it disputes what the joint session has done (for example, if the House deems itself constituted as delegations from each state rather than individual members when it meets to develop rules or resolve disputes during the contingent session); and potential debacles if the House attempts to refuse to seat some of its members or organize itself on January 3. These are disaster scenarios left for another article (or series of articles).

But to return to the point of this Section, the refusal to count votes cast for a candidate (in this hypothetical, Trump) does not necessarily mean the second-place finisher (here, Harris) wins the presidency (although, if Democrats controlled at least 26 state delegations, it might mean that). Refusing to count votes for a disqualified presidential candidate who appeared to have a majority of the electoral college means no candidate receives a majority and the House holds a contingent election.

5. Congressional Restraint in Counting Electoral Votes

Congress holds the power to review the qualifications of presidential candidates and to refuse to count votes cast for an ineligible candidate. If Congress does so, the second-place winner does not become President. Instead, the election is thrown to the House for a contingent election. But while Congress holds the power, should it exercise that power? Not necessarily.

The Electoral Count Reform Act, consistent with the Electoral Count Act, is designed to constrain Congress when it counts electoral votes. The fact that it offers just two hours' debate for objections to a state's vote suggests that intensive fact-specific inquiries are off the table.[216] The rejection of electoral votes should be for grave reasons, and for reasons obvious from the face of the record. The rejection of votes for a dead man in 1873, for instance, took no investigation into facts.[217] And the weeks-long slog of the investigation in 1877 was repudiated by the Electoral Count Act: Votes should be presumed regular and should be counted, and only for the most obvious reasons

215. *See* U.S. CONST. amend. XX, §§ 1–3; *id.* amend. XXV, §§ 1–2.
216. 3 U.S.C. § 17(3).
217. *See supra* note 146 and accompanying text.

(that is, those reasons that can be adequately explored in a two-hour debate) should votes be rejected.[218]

In deciding to count Arizona's electoral votes in 2021 (under the guise of an objection that the votes were not "regularly given," but really arguing that the electoral certificates were not lawfully certified),[219] members of Congress had two hours to debate. It was absurd to believe that in those two hours, an adequate "investigation" could be had to resolve the questions that some Republicans raised to the (ordinary) results of that election (even supposing Congress had the power to do so under the Twelfth Amendment and the Electoral Count Act). The same could be said of Democratic members of Congress who had hoped to reveal something about voting machines in Ohio in 2005.[220]

Two hours' debate is hardly adequate time for an intensive factual investigation into the circumstances surrounding a state's electoral votes. Instead, the limited time for debate suggests that Congress's deliberations should focus on blatant or obvious irregularities that would invalidate the vote, or pure questions of law. If, for instance, after Trump's impeachment, he were convicted by the Senate and disqualified from holding future office, but then re-elected, Congress could (and should) refuse to count votes cast for him. Likewise, if he were convicted under the Insurrection Act, Congress could (and should) refuse to count votes. The fact-intensive investigation would have taken place over an ample period of time well before the counting of votes. And the disqualification would have been widely known to the electorate. Congress would be in an easy position to apply the result of that investigation.

Congress was rightly concerned over attempts to reject votes in a joint session with inadequate deliberation. While the Electoral Commission of 1877 had the opportunity to investigate and resolve election disputes over a period of weeks, the Electoral Count Act was deliberately designed to limit and constrain such investigations. That is, Congress chose to constrain itself when counting electoral votes. Its preference was to count—and to make it difficult not to count.

The Electoral Count Act and the Electoral Count Reform Act anticipate a strong default presumption in favor of counting votes. Prior to the Electoral Count Act, either chamber could effectively refuse to count votes, and those votes would not be counted. The Electoral Count Act, however, added a presumption to count votes, and it would take an affirmative decision of both houses not to count the votes.

Relatedly, unique considerations arise with respect to Section 3 of the Fourteenth Amendment. Congress does have power to "enforce,

218. *See* Bush v. Gore, 531 U.S. 98, 153–54 (2000); 3 U.S.C. § 17(3).
219. Muller, *supra* note 108, at 1531.
220. *See id.* at 1542–43.

by appropriate legislation," the Fourteenth Amendment.[221] Of course, this point was a repeated theme in the majority opinion in *Trump v. Anderson*. Congress was acutely aware of institutional challenges to address the events of January 6, 2021. Indeed, the House promptly impeached Trump precisely because it found he had incited an "insurrection," to use the language of the impeachment resolution that mirrors Section 3.[222] But it enacted no other legislation to address how to identify or disqualify candidates under Section 3.

For Congress—which emphatically has the power to enforce Section 3 by other means—to have done nothing for four years, and then, only after all votes were cast, arrive in a joint session and opt to throw out electoral votes would be irresponsible. Congress does have the power to refuse to count electoral votes if they were not cast pursuant to law. But to sit idly by for years, failing to provide mechanisms to enforce Section 3, and then throw votes out at the last minute is something else.[223] Congress ought to provide the electorate notice if it anticipates it would like to throw out electoral votes, whether it would be inclined to do so in 2025 or in some future election.

* * *

After *Trump v. Anderson*, some members of Congress expressed their intention to count electoral votes cast for Trump.[224] Others were noncommittal.[225] Unified Republican control of Congress ahead of January 6, 2025, effectively mooted any questions of whether Congress would count the votes. And in the end, no member of Congress even attempted an objection.[226]

---

221. U.S. CONST. amend. XIV, § 5.

222. H.R. 24, 117th Cong. (2021).

223. Professor Ned Foley suggested something similar back in 2021: "Consider the basic point here the electoral equivalent of the familiar wedding refrain: 'Speak now or forever hold your peace.' Simply put, the time for disqualifying Trump from being on the ballot in 2024 is before those ballots are cast, not after he's won the election." Ned Foley, *Section 3 of the Fourteenth Amendment and January 6, 2025: The Need for Legislation Now*, ELECTION L. BLOG (Oct. 14, 2021), https://perma.cc/WS5H-5UKT.

224. Nicholas Wu & Daniella Diaz, *How the Trump Ruling Puts Dems in a Tough Spot*, POLITICO (Mar. 4, 2024), https://www.politico.com/newsletters/inside-congress/2024/03/04/how-the-trump-ruling-puts-dems-in-a-tough-spot-00144790 (quoting Representatives Ro Khanna and Eric Swalwell as members who would count votes cast for Trump).

225. *See, e.g.*, Russell Berman, *How Democrats Could Disqualify Trump If the Supreme Court Doesn't*, ATLANTIC (Feb. 23, 2024), https://perma.cc/2X4S-RPPB.

226. Annie Karni, *Four Years After Capitol Riot, Congress Certifies Trump's Victory Peacefully*, N.Y. TIMES (Jan. 6, 2025), https://www.nytimes.com/2025/01/06/us/politics/congress-trump-election-certification.html ("[N]obody rose to challenge any.").

The Court's decision in *Trump v. Anderson* resolved the narrow question of state authority over presidential ballot access but left unexamined several critical questions regarding congressional power in administering presidential elections and counting electoral votes. Congress's authority stems not from statutory delegation but from Congress's constitutional obligations in the electoral process. When Congress exercises its power to reject electoral votes, it must adhere to internally-developed procedural constraints designed to channel its discretion. The rejection of electoral votes triggers specific constitutional mechanisms for determining presidential succession rather than enabling Congress to designate an alternative winner by fiat. Moreover, where Congress has failed to provide adequate prior notice of potential candidate disqualification criteria, it should not subsequently invalidate electoral votes on those grounds. While *Trump v. Anderson* postpones resolution of certain questions that may emerge in future candidate qualification disputes, this constitutional framework helps mitigate uncertainty and potential procedural manipulation during such periods of legal indeterminacy.