Emergencies, Alien and Domestic

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ABSTRACT

Democracies survive some emergencies, even emerging stronger after some crises despite temporary suspensions of liberty. Democracies die when faced with other emergencies. This Article explores why. It addresses the claimed need to limit rights of electoral participation in response to the rise of antidemocratic forces through the lens of militant democracy in Europe and the Insurrection Clause of Section Three of the Fourteenth Amendment in the United States. When examined through the context of claimed exigency, the ability of democracies to survive or even thrive after emergencies turns heavily on whether the source of the perceived threat is foreign or domestic. As applied to Trump v. Anderson, context explains why a tool for disabling the former Confederacy fits poorly when applied to the leading candidate for the presidency.

I. EMERGENCIES AND DEMOCRACY

An old saying has it that war is bad for liberty but good for democracy. War emphasizes the need for command-and-control authority, rooted in crisis management by the executive. The customary protections for speech, association, and other liberties fall by the wayside in confronting the brute fact of a nation at risk. For example, the rise of the First Amendment a century ago was accompanied by the recognition that military matters—information about the sailing of troop ships being the paradigmatic example—required a carve out for true exigency.[1]

Perhaps counterintuitively, democracies emerge from war not diminished by the limited constraints on state authority, but enriched

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[1] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.").

by it. "We link wars and democracy when wars are lost, when they are won, and even when they are only feared."[2] More than half of the democracies formed since World War II have emerged from war.[3] War both brings people together against a common enemy and fuels demands for liberalization of democratic rights. In exchange for support during the war effort and the period of sacrifice during wartime, citizens are often rewarded in the form of greater political liberties once the war has abated.[4]

History is rife with examples of this type of compromise and democratic resilience in war's wake. The English franchise reforms of the early nineteenth century followed the long haul of the Napoleonic wars.[5] The expansion of the franchise to women in the United States finally took hold after the broad demands of World War I.[6] The push for black enfranchisement similarly followed World War II and was propelled by returning black servicemen.[7] Even the Magna Carta, the crowning establishment of limited government and parliamentary sovereignty, was the bargained concession by King John to the noblemen underwriting the Crown's wars.[8]

While the line between wartime emergencies and the broadening of the franchise and other democratic rights is well chronicled, it begs the question of how war can be a source of democratic resilience through periods of crisis. The answer lies in war serving as the perfect model of collective mission and collective sacrifice in the battle against a foreign enemy. But being the perfect model does not mean it is the only

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[2] Nancy Bermeo, *What the Democratization Literature Says—or Doesn't Say—About Postwar Democratization*, 9 GLOB. GOVERNANCE 159, 162 (2003) (describing literature on democracy and war).

[3] *See id.* at 159.

[4] *See* David L. Rousseau, *Conclusion*, *in* WAR AND RIGHTS: THE IMPACT OF WAR ON POLITICAL AND CIVIL RIGHTS 267, 267 (2021) (describing empirical support for the finding that war leads to both a short term decrease in rights and a corresponding long term increase in rights); RONALD R. KREBS, FIGHTING FOR RIGHTS: MILITARY SERVICE AND THE POLITICS OF CITIZENSHIP 3 (2006) (explaining one causal explanation is that "groups seeking first-class citizenship may deploy their military record as a rhetorical device, framing their demands as the just reward for their people's sacrifice").

[5] *See, e.g.*, Toke S. Aidt & Raphaël Franck, *How to Get the Snowball Rolling and Extend the Franchise: Voting on the Great Reform Act of 1832*, 155 PUB. CHOICE 229, 236–37 (2013) (describing renewed calls for franchise reform after the end of the Napoleonic wars).

[6] *See* Meghan K. Winchell, *Women and World War in Comparative Perspective*, *in* THE OXFORD HANDBOOK OF AMERICAN WOMEN'S AND GENDER HISTORY 595, 601 (Ellen Hartigan-O'Connor & Lisa G. Materson eds., 2018).

[7] *See* David L. Rousseau, *African American Soldiers in the U.S. Military: Fighting for Political Rights*, *in* WAR AND RIGHTS: THE IMPACT OF WAR ON POLITICAL AND CIVIL RIGHTS 126, 168–69 (2021).

[8] *See* Graham Smith & Anna Green, *The Magna Carta: 800 Years of Public History*, *in* THE OXFORD HANDBOOK OF PUBLIC HISTORY 387, 387–88 (Paula Hamilton & James B. Gardner eds., 2017) (describing how pressure from frustrated barons forced the king to agree to the Magna Carta).

manifestation. There is no obvious reason why similar patriotic mobilizations could not be inspired by other alien forces, be they natural disasters like hurricanes or earthquakes, or living entities, such as plagues or viruses.

Take the state responses to the COVID-19 pandemic for example. As with war, there was a dramatic constriction of liberty, ranging from compelled quarantines to limitations on social and other gatherings, to shuttering of universities, to registries for entering public places, including restaurants and churches. Political leaders often spoke of the "fight" or "war" against COVID-19.[9] Were these measures to be permanent features of a society, the Orwellian implications would be clear. Strikingly, however, democracies that allowed such dramatic curtailment of liberty did not acquire a taste for authoritarian controls that lasted beyond the early crisis period of the pandemic.

In a fascinating series of panel studies, a group of international researchers, led by Jeff King of University College London, found that democracies (unlike, for notable example, China) bounced back to their normal governmental arrangements after COVID-19 with indicators of liberty and democratic accountability intact. Similar to the democratic barriers to entering into war,[10] at least part of the explanation for this phenomenon is that in democracies there was "severe political and economic pressure to avoid imposing costly restrictions for any longer than absolutely necessary."[11] While people may have been willing to tolerate short-term restrictions to help stop the spread of the virus, there was a sense of urgency to end these measures as soon as possible. Even while imposing measures to prevent the spread of COVID-19, democratic institutions sought to reassure the public these measures would not become an enduring feature of society. As evidence of this, much of the enacting legislation in democracies such as Germany and the United Kingdom included sunsetting clauses, preventing these pandemic restrictions from becoming an enduring feature of life.[12] It

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[9] *See* Hanna Meretoja, *The Pandemic as a Crossroads: Problematizing the Narrative of War*, *in* NARRATIVE IN CRISIS: REFLECTIONS FROM THE LIMITS OF STORYTELLING 71, 72–74 (Martin Dege & Irene Strasser eds., 2024) (criticizing military rhetoric during COVID-19).

[10] *See* Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. OF LEGAL STUD. 189, 194–97 (2009) (discussing literature on democratic advantages in war).

[11] Jeff King, *Mobility Restrictions, Human Rights, and the Legal Test of Proportionality*, *in* PANDEMICS, PUBLIC HEALTH, AND THE REGULATION OF BORDERS 213, 221 (Colleen M. Flood et al. eds., 2024).

[12] *See* Anna-Bettina Kaiser & Roman Hensel, *Federal Republic of Germany: Legal Response to Covid-19*, *in* THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19 (Jeff King & Octavio Ferraz eds., 2021) (describing how COVID-19-era amendments to Infection Protection Act of 2000 included sunsetting provisions); Jeff King & Natalie Byrom, *United Kingdom: Legal Response to Covid-19*, *in* THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19 (Jeff King & Octavio Ferraz eds., 2021) (describing how the Coronavirus Act of 2020 included a sunsetting clause for two years from passage with the opportunity for extensions); Dean Knight,

was not solely the political branches, those most subject to political and economic pressures from the public, that prevented these limitations from becoming permanent. Courts also became less likely to uphold COVID-19 restrictions as the pandemic continued.[13] None of this gets to the wisdom of the actual policies selected, a matter that is now subject to healthy and critical examination.[14] The point is only that democracies settled on a set of responses to COVID-19 that necessarily would constrict liberty. Yet, this constriction of liberty did not portend a permanent contraction of democratic rights.

The same trend did not hold for authoritarian regimes. The public health measures taken in China in response to the initial outbreak were among the strictest globally. In Hubei province, where the virus was first detected, strict limitations on gatherings and public events became "the norm ever since the imposition of lockdown."[15] These measures were implemented largely without consideration of civil liberties and were enforced by the judiciary.[16] Similarly, in Russia, the ruling elites exploited the pandemic to further entrench their power, most clearly through the changing of electoral procedures with little oversight or opportunity for dissent.[17] Both the legislature and the courts have been completely ineffective in overseeing or limiting the executive's response. Even while lockdown measures and closures were lifted, gathering and protest prohibitions largely remained in place.[18] As one commentator on Russia summarizes, "[t]he new restrictions on freedom of assembly are particularly alarming because they are permanent—while adopted during the pandemic, they have nothing to do with protecting public

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New Zealand: Legal Response to Covid-19, *in* THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19 (Jeff King & Octavio Ferraz eds., 2021) (noting the Covid-19 Public Health Response Act 2020, which was passed to provide specific emergency powers, has a ninety day sunset clause and lapses within two years).

[13] Lindsay F. Wiley et al., *United States: Legal Response to Covid-19*, *in* THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19 (Jeff King & Octavio Ferraz eds., 2021) (describing how Supreme Court's response to closure of religious facilities illustrates increased scrutiny of restrictions as the pandemic continued).

[14] The stunning work on this score is STEPHEN MACEDO & FRANCES E. LEE, IN COVID'S WAKE: HOW OUR POLITICS FAILED US (2025).

[15] Zhiqiong June Wang & Jianfu Chen, *People's Republic of China: Legal Response to Covid-19*, *in* THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19, ¶ 60 (Jeff King & Octavio Ferraz eds., 2021).

[16] *Id.* ¶ 40 ("[N]ot only does the government control what the media might be allowed to report on Covid-19, but the criminal law and other laws on 'social order and administration' have been applied and continue to be applied to punish persons who report on Covid-19 information without government authorization. The Work Report of the Supreme People's Court . . . stated that the Court concluded 5,474 criminal cases (involving 6,443 persons) related to Covid-19 prevention and control, including spreading false information and rumours about Covid-19.").

[17] *See* Tatiana Khramova, *Russia: Legal Response to Covid-19*, *in* THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19 (Jeff King & Octavio Ferraz eds., 2021).

[18] *Id.*

health—non-proportional, and designed to be applied in a discriminatory way."[19] Without democratic institutions, authoritarian leaders were able to use the pandemic to expand and entrench limitations on liberty and rights with no end in sight.

The short of it seems to be that democracies largely trust their citizens and their citizens have more trust in government. For democracies, the unifying theme, both in war and in the fight against COVID-19, is us against them. When people within a democracy are united against a common, external enemy, democratic institutions and the people can tolerate short term constrictions of liberty, with the trust that these sacrifices will not last forever.

By contrast, the response to domestic enemies does not yield the same elevation of collective identity. From the Glorious Revolution and the Wars of the Reformation, state building in deeply riven societies most often depends upon the decisive defeat of one of the combatants or the destructive exhaustion of the society to continue at war. What is clear, in capsule form, is that internal wars do not yield the collective commitments that allow for democracies to readily claim legitimacy, even during crisis. Nor do they allow for the quick restoration of order once the crisis has passed.

This Article runs this analysis forward several centuries to address the problem of populist challenges to democratic authority and, indeed, to democracy itself. The focus is on the related concepts of what in Europe is termed "militant democracy," and in the United States is presented as disqualification from democratic consideration under the Insurrection Clause of the Fourteenth Amendment, leading to *Trump v. Anderson*.[20] The distinction between emergencies in the face of external enemies, and those occasioned by deep internal dissatisfaction with the fruits of democratic governance, is an underappreciated element of the reserve powers that all states must have. All governments must respond to emergencies that tax the ordinary allocation of political authority. There is a greater likelihood of popular buy-in and a more credible commitment to the restoration of liberty if the source of the threat is understood as external, rather than one of the internal political divides of the moment.

II. MILITANT DEMOCRACY

As first presented by Karl Loewenstein after World War II,[21] militant democracy became the sobriquet for democracies not allowing

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[19] *Id.* ¶ 162.

[20] 601 U.S. 100 (2024) (per curiam), *rev'g* Anderson v. Griswold, 543 P.3d 283 (Colo. 2023).

[21] *See generally* Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM.

their mortal enemies to sabotage them from within.[22] The horrors of Nazis mobilizing under the protective arms of democratic participation norms led to the demand for democracies to draw the boundaries against significant enemies of democracy itself.[23] Loewenstein theorized the concept[24] as a reaction to the weaponization of the Weimar Constitution and the "half-hearted, laggard, and thoroughly ineffective" attempts to stop the Nazi rise to power.[25]

Militant democracy, now established law within many European democracies,[26] describes constitutional enactments and norms that attempt to prevent anti-democratic actors from achieving their goals through electoral mobilizations.[27] Militant democracy is now used to encompass an array of practices: instituting party bans, prohibiting part of the electorate's political participation, defining the scope of political appeals, enacting unamendable constitutional protections for basic rights, and designating an entity, like a court, to serve as an ultimate check on the other branches of government.[28] Whether enacted individually or collectively, these constitutional measures all attempt to prevent a democracy from being subverted from within.

POL. SCI. REV. 417 (1937) [hereinafter Loewenstein, *Militant Democracy and Fundamental Rights, I*] (surveying responses to fascism and illiberalism in Europe); Karl Loewenstein, *Militant Democracy and Fundamental Rights, II*, 31 AM. POL. SCI. REV. 638 (1937) [hereinafter Loewenstein, *Militant Democracy and Fundamental Right, II*] (same).

[22] *See* SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 18 (2015) (broadly defining militant democracy as "the ability of democratic regimes to restrict forms of debate, political organization, or political participation that pose an existential threat to democracy itself").

[23] *See* Loewenstein, *Militant Democracy and Fundamental Rights, I supra* note 21, at 426–27 (describing Germany's democratic backsliding); Martin Klamt, *Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Constitutions*, *in* EXPLORATION OF LEGAL CULTURES 133, 136–40 (Fred Bruinsma & David Nelken eds., 2007) (detailing the changes made to the German Constitution after World War II).

[24] Stephen Holmes, *Militant Democracy*, 4 INT'L J. OF CONST. L. 586, 588 (2006) (reviewing MILITANT DEMOCRACY (András Sajó ed., 2004)) ("[T]he very phrase 'militant democracy' (*streitbare Demokratie*) is borrowed from two essays first published by Karl Loewenstein, the German émigré scholar, in 1937 . . . arguing that democratic regimes in post–World War I Europe lacked the legal instruments necessary to conduct a 'militant' defense against antidemocratic movements.").

[25] *See* Loewenstein, *Militant Democracy and Fundamental Rights, I* supra note 21, at 427; *id.* at 426 ("[T]he lack of militancy of the Weimar Republic against subversive movements, even though clearly recognized as such, stands out in the post-war predicament of democracy both as an illustration and as a warning."); *see also* ISSACHAROFF, *supra* note 22, at 43 ("Militant democracy cannot be understood without reference to the failure of the Weimar Republic and the immediate postwar response.").

[26] *See, e.g.*, Angela Bourne, *Party Bans and Populism in Europe,* VERFASSUNGSBLOG (Mar. 27, 2024), https://verfassungsblog.de/party-bans-and-populism-in-europe [perma.cc/756P-EH58] (describing how "20 out of the 37 European democracies . . . studied banned over 50 parties between 1945 and 2015").

[27] *See* BENJAMIN A. SCHUPMANN, DEMOCRACY DESPITE ITSELF: LIBERAL CONSTITUTIONALISM AND MILITANT DEMOCRACY 53 (2024).

[28] *See id.* at 25 (listing these three elements as central to an expansive, normative theory of militant democracy).

Theoretically, militant democracy owes an uncomfortable debt to Carl Schmitt's advocacy of emergency executive powers as a necessary condition of statecraft.[29] Schmitt warned against the "politicization"[30] of neutral democratic systems, fearing that political parties, who saw nothing in common with their opposition, would resort to solving disputes outside of the democratic sphere.[31] Per Schmitt's early writings, democracy could entrench its political identity within its constitution such that it could better protect "the people",[32] and he called for a strong executive power that could serve as a sort of defender of democracy in times of crisis.[33] One can read into Schmitt's Weimar era writings a defense of a democracy's power to protect itself against antidemocratic actors.

But context here is important, as Schmitt's theories are, rightly, colored by the environment in which they were written. Schmitt, in all his reverence for state authority and executive power, "offered no reason to privilege liberal democracy over any other political identity."[34] As a result, directly and indirectly, Schmitt's writings supported Hitler's rise to power in the 1930s[35] and "[h]is actions helped to normalize the Nazi regime in its infancy."[36] The widespread adoption of militant democratic measures in postwar Europe provides some proof "against readily assuming that any restraints in the political process necessarily lead to a collapse of democratic rights or a fundamental compromising of democratic legitimacy."[37] But that assurance does not diminish the immense value that context provides in analyzing the consequences of militant democracy. Expanding state authority to silence opposing speech or remove political objectors from the electoral arena is necessarily a fraught undertaking in a liberal democracy founded on expressive liberties and electoral choice.

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[29] *See generally* Mariano Croce, *Democracy: Constrained or Militant? Carl Schmitt and Karl Loewenstein on What it Means to Defend the Constitution*, 35 INTELL. HIST. REV. 247 (2025) (discussing the relationship and timeline between Carl Schmitt and Karl Lowenstein's writings).

[30] *See* SCHUPMANN, *supra* note 27, at 107.

[31] *Id.* at 109–11.

[32] *Id.* at 129–30.

[33] *See id.* at 106, 130 (noting that Schmitt "theorized the legitimacy of mechanisms of constitutionalism entrenchment associated with militant democracy, including . . . the need for a guardian of the constitution (although he problematically argued that the President should play that role)").

[34] *See id.* at 133.

[35] *See* Jennifer Szalai, *The Nazi Jurist Who Haunts Our Broken Politics*, N.Y. TIMES (July 15, 2024), https://www.nytimes.com/2024/07/13/books/review/carl-schmitt-jd-vance.html?smid=url-share [perma.cc/K5BH-P5NZ] ("[I]t was Schmitt's earlier work that laid the foundations for the Third Reich.").

[36] *See* SCHUPMANN, *supra* note 27, at 106.

[37] ISSACHAROFF, *supra* note 22, at 124.

If militant democracy does not necessarily foretell the collapse of democracy altogether, it nonetheless has a limited record of positive achievement despite its wide adoption in modern Europe. This is clearly exemplified by looking at party exclusion practices across the continent, as the party ban has "come to represent the typical response to antidemocratic threats."[38] Germany was able to use such militant democracy powers to ban Nazi revanchists shortly after the World War II and was subsequently able to ban the German communist party that served largely as the agent of East Germany and the Soviet Union, mortal external enemies.[39] Given Germany's history and the origin of militant democracy, this party ban makes some sense: "If there were a model for a party that should be banned, it would be a political mobilization of unrepentant Nazi combatants seeking to destabilize and overturn the fledgling German democracy right after World War II."[40]

While many European democracies have adopted some variant of militant democracy into the constitutions or law in the postwar period,[41] these have largely been without any subsequent practical effect.[42] These same laws have been toothless when confronting the internal rise of the Alternative für Deutschland party (AfD), an antidemocratic force with conspicuous and disturbing fascist undertones, and increasingly commanding electoral support in the areas of the former East Germany.[43] Expanding the gaze to the right-wing populists in France,

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[38] *Id.* at 79.

[39] *See* Gelijn Molier & Bastiaan Rijpkema, *Germany's New Militant Democracy Regime: National Democratic Party II and the German Federal Constitutional Court's 'Potentiality' Criterion for Party Bans*, 14 EUR. CONST. L. REV. 394, 394–98 (2018) (providing a history of political party bans in Germany).

[40] ISSACHAROFF, *supra* note 22, at 119.

[41] *See, e.g.*, Bourne, *supra* note 26 (describing how "20 out of the 37 European democracies . . . studied banned over 50 parties between 1945 and 2015").

[42] Giovanni Capoccia's theoretical and empirical work provides support for the scarcity of the use of militant democracy. He outlines a three-step process for successful reactions to extremism based on interwar Europe: recognition of the "antisystem challenge," political isolation of extremists, and "actual strategies of short-term defense, normally a mix of repression and accommodations." GIOVANNI CAPOCCIA, DEFENDING DEMOCRACY: REACTIONS TO EXTREMISM IN INTERWAR EUROPE 234 (2005). However, contemporary extremism does not fit comfortably with this model with challenges to defining the boundaries of "anti-systemness" and barriers to enacting repressive reactions. *Id.* at 236–37, 239.

[43] In May 2025, the German domestic intelligence service (Bundesamt für Verfassungsschutz, or BfV) designated AfD a right-wing extremist organization. AfD filed suit to challenge the designation and, shortly thereafter, the BfV paused its designation while an administrative tribunal considers the AfD's request for an injunction. Andreas Rinke, *German Spy Agency Pauses 'Extremist' Classification for AfD Party*, REUTERS (May 8, 2025), https://www.reuters.com/world/europe/german-spy-agency-pauses-extremist-classification-afd-party-local-court-says-2025-05-08/ [perma.cc/478M-WRUY]; *see also* Robert Benson, *A Bellwether for Trans-Atlantic Democracy: The Rise of the German Far Right*, CTR. FOR AM. PROGRESS (Oct. 30, 2024), https://www.americanprogress.org/article/a-bellwether-for-trans-atlantic-democracy-the-rise-of-the-german-far-right [perma.cc/U2AF-GP5F] (noting that AfD "secured unprecedented pluralities in regional elections in three eastern states, claiming 32 percent of the vote in Thuringia, 30

Italy, Austria, Spain, and other European countries shows the limited capacity of democracy to claim collective emergency authority when the society is divided internally rather than facing a common external challenge.

In particular, militant democracy has proved incapable of addressing the populist surge that has brought strong antidemocratic currents into the heart of European politics. Most notably, no German formal commitment to democracy prevented the stunning electoral rise of the aforementioned AfD party, a far-right faction of the German electorate, which has won sizable victories in areas of Eastern Germany in recent elections.[44] In France, the French Constitution commands that political parties respect democratic principles, and parties that violate this command can be banned.[45] But, despite some bans against certain far-right associations,[46] the Rassemblement National has captivated a sizable portion of the French electorate.[47] This party is an opportunistic coalition of anti-democratic actors led by the remnants of the fascist National Front. While banning a party is theoretically permitted under the Italian Constitution, Italy targets anti-democratic conduct in two ways: "the criminalization of fascism apologia" and banning political associations, rather than formal parties.[48] But Italian regulators have not defined what constitutes a "fascist" party, so it is left to judges to decide; as a result, the scope of the law remains ambiguous as the limited case law develops.[49] A descendent of the fascist movement controls in Italy today, and Prime Minister Meloni is the most forceful chief executive in Europe at present.

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percent in Saxony, and 28 percent in Brandenburg").

[44] *See* Benson, *supra* note 43.

[45] Michael Minkenberg, *Repression and Reaction: Militant Democracy and the Radical Right in Germany and France*, 40 PATTERNS OF PREJUDICE 25, 39 (2006).

[46] *See, e.g.*, Diane Jeantet & Angela Charlton, *France Bans Extreme-Right and Radical Islamic Groups Ahead of Polarizing Elections*, ASSOC. PRESS (June 26, 2024), https://apnews.com/article/france-election-extremist-groups-banned-right-islamic-56eb2bffed27dc2a7c49beb40a70b553 [perma.cc/9TEH-YJAC].

[47] *See* Clément Guillou, *2024 European Elections: Far-right Rassemblement National Achieves Historic Success*, LE MONDE (June 9, 2024), https://www.lemonde.fr/en/politics/article/2024/06/09/2024-european-elections-far-right-rassemblement-national-achieves-historic-success_6674319_5.html [perma.cc/XZ32-NBZG] ("The Rassemblement National (RN) performed beyond expectations in the European election on Sunday, June 9, garnering 31.5% of the votes cast . . . . The score represents a 40-year record for any French political party in the European elections.").

[48] *See* Andrea Gatti, *A Limping Militant Democracy: Sanctioning Neo-fascist Demonstrations in Italy*, VERFASSUNGSBLOG (Apr. 4, 2024), https://verfassungsblog.de/a-limping-militant-democracy [perma.cc/EU63-YGXK].

[49] *See id.*; *see generally* Joanna Rak, *Why Did Italian Democracy Become Vulnerable? Theorizing the Change from Neo- to Quasi-Militant Democracy,* 50 POLISH POL. SCI. Y.B. 51 (2021) (detailing Italy's system of militant democracy).

Similarly, Austria does not have explicit mechanisms for militant democracy as other countries do,[50] rather it retains statutory commitments to individual liberties (e.g. freedom of assembly), and it banned the National Socialist organization after 1945.[51] Fast forward to the Austrian election in September 2024, and there was no mechanism to prevent the Freedom Party (FPÖ), a party with roots in Nazi ideology, from garnering twenty-nine percent of the vote nationally.[52] In 2002, following a series of violent attacks, Spain banned the Batasuna party because of its connections to Euskadi ta Askatasuna (ETA), a more radical Basque separatist group.[53] While the Batasuna party disbanded in 2012, the EH Bildu coalition has arisen in its place, doing its best to distance itself from ETA while serving as a vocal "federation of far-left separatist parties."[54] Lastly, Hungary is often cited as a quintessential example of how democratic backsliding can occur, despite entrenched militant democratic mechanisms. When the 1989 Hungarian Constitution was written, the world celebrated the country's "transition from communism to democracy."[55] However, Fidesz, a populist right-wing political party, and Viktor Orbán, its leader, have since used these exact democratic mechanisms to advance antidemocratic aims, such as using the Constitution's flexible amendment process to basically re-write the Constitution in 2011 to limit the power of judicial review and erode separation of powers.[56]

Ultimately, the rise in power of the AfD, and other fringe political parties, places significant strain on the practice of militant democracy because "[t]here is an inherent difficulty with any government being allowed to claim that a group with substantial popular support—one that has had its members elected to influential positions and may even constitute a plurality in government—is a threat to democracy."[57] Restrictions imposed "to protect the electorate against itself" are

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[50] *See* Klamt, *supra* note 23, at 141–43.

[51] *Id.* at 143 ("Austria uses mainly general statutory reservations for fundamental rights that do not specifically refer to the idea of Militant Democracy or to historical experiences of dictatorship, with one exception: National Socialist movements and their legal heritage are not accepted by Austrian (constitutional) law.").

[52] *See* Matthew Karnitschnig, *Austria Goes Back to the Future as Voters Embrace Far-Right Party Founded by Nazis*, POLITICO (Sept. 29, 2024), https://www.politico.eu/article/austria-far-right-freedom-party-win-national-election-early-projections-herbet-kickl/ [perma.cc/MH7Z-NJGB].

[53] ISSACHAROFF, *supra* note 22, at 63–65.

[54] Caroline Gray, *The 2024 Basque Election and the Region's Long-term Political Landscape*, CENTRE ON CONSTITUTIONAL CHANGE (May 7, 2024), https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/2024-basque-election-and-regions-long-term-political-landscape [perma.cc/MJS8-TKCF].

[55] SCHUPMANN, *supra* note 27, at 7–9.

[56] *Id.* at 9, 11–13.

[57] ISSACHAROFF, *supra* note 22, at 69.

difficult to justify to the public within a democracy, even when, as Goebbels put it, a democracy's "mortal enemies" are poised to conquer and destroy it by leveraging the electoral process.[58] These examples illustrate the simple fact that militant democracy has experienced sizable challenges in implementation, even in places where the practice has been more normalized. The reasons why are varied, but at the core, these mass populist parties tend to combine many divergent strains and do not announce their antidemocratic aims quite so directly. Thus, "contemporary parties present much more ambiguous fronts, and it may only be when a party is in power that its true threat to democratic rule becomes apparent . . . ."[59]

The inability of militant democracy to thwart the rise of strong populist groups with little commitment to democratic norms returns us to the central thesis of this essay. Germany was able to invoke constitutional commitments to democracy in the face of groups whose express commitments were to external forces. This was clear in the context of the German communist party which pledged loyalty to East Germany and the forces of the Soviet bloc. It was true as well, without quite the same geographic divide, for groups that agitated for a return to Nazi rule after World War II. Both the protection against Nazi restoration and subsequently against a potential Soviet invasion were enforced by military command, first in the form of the Allied Control Council and then subsequently under NATO.

Populist groups that seek electoral victory, yielding the elected autocrats of today,[60] are not an external force seeking to conquer democracies in the name of a foreign agent. Rather they emerge from the failure of democratic statecraft and the collapse of traditional center-left and center-right political parties.[61] They present themselves as both internal to the political order and as an external rejection of it, a conceptual problem long evident, even as far back as Schmitt's writings during the Weimar Republic.[62] As with the threat of war or a viral contagion, there is no reason to suppose that the same invocation

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[58] *See id.* at 56, 93; Timothy Ryback, *How Hitler Used Democracy to Take Power*, TIME (Apr. 26, 2024), https://time.com/6971088/adolf-hitler-take-power-democracy/ [perma.cc/E3R2-QM8P].

[59] Tom Gerald Daly & Brian Christopher Jones, *Parties Versus Democracy: Addressing Today's Political-Party Threats to Democratic Rule*, 18 INT'L J. OF CONST. L. 509, 525 (2020).

[60] *See* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 581 (2018) (describing how "a new generation of autocrats has learned to govern by appealing to electoral legitimacy while using the tools of law to consolidate power in few hands").

[61] This is the central thesis of SAMUEL ISSACHAROFF, DEMOCRACY UNMOORED: POPULISM AND THE CORRUPTION OF POPULAR SOVEREIGNTY (2023).

[62] Christopher McKoy, Inevitable Enmity, Inevitable Violence: Carl Schmitt on Internal and External Enemies (July 19, 2010) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1642262).

of emergency powers against an alien threat will translate smoothly to a threat that grows organically within the body politic.

The European experience invites the conclusion that militant democracy tends to be invoked too early or too late. Germany may today remove legal benefits from the neo-Nazi National Democratic Party (NDP), but that follows an earlier ruling that the NDP was too inconsequential as a political force to justify an actual party ban.[63] On the other hand, hundreds of thousands of Germans rally to protest the real menace posed by the right-wing AfD.[64] At this point, however, the AfD has major backing in the electorate, and it won the most votes in recent legislative elections in an area which strikingly retraces the map of former East Germany.[65] It should give us pause that thirty-five years after reunification there is a push to remove the revealed voting preferences of former East Germany from electoral consideration—in the name of democracy, no less.

III. INSURRECTION CLAUSE

Although militant democracy has only been implemented abroad, some scholars have theorized how it could be applied in the United States.[66] Vice President J.D. Vance himself even commented on Carl Schmitt's theory of illiberalism, causing concern about the resurgence of this rhetoric and its implications for American democracy.[67] There is no exact parallel to the militant democracy mechanisms seen in Europe within the United States Constitution, but their closest analog is, arguably, Section Three of the Fourteenth Amendment: the Insurrection Clause. This is an obscure provision of the Constitution, not invoked in over a century, and a remnant of America's experiment

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[63] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2 BvB 1/19, Jan. 23, 2024, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2024/bvg24-009.html [perma.cc/JCV3-84EZ]; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2 BvB 1/13, Jan. 17, 2017, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html [perma.cc/4UQP-32MK].

[64] Seher Asaf, *Thousands Protest against Far-Right in Berlin,* BBC (Feb. 2, 2025), https://www.bbc.com/news/articles/cpqlyr02125o [perma.cc/M6XQ-DAXT].

[65] Amanda Taub, *How a Demographic 'Doom Loop' Helped Germany's Far Right*, N.Y. TIMES (Feb. 25, 2025), https://www.nytimes.com/2025/02/25/world/germany-election-far-right-afd.html [perma.cc/V5ZZ-K5X6].

[66] *See, e.g.*, Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018). *See* Aziz Z. Huq, *Structural Logics of Presidential Disqualification*, 138 HARV. L. REV. 172 (2024); William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605 (2024); MARK A. GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR (2023); and Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87 (2021), for the current debates surrounding January 6.

[67] *See* Szalai, *supra* note 35 ("Where Schmitt may actually be useful is as a guide to the implications of the Supreme Court's ruling in *Trump v. United States*.").

with militant democracy and lustration to keep political control after the Civil War between the Union under Lincoln and the slaveholding South. Under Section Three, public officials who have engaged in insurrection or given material aid to an enemy are presumptively disqualified from federal elective office. When I was writing on the parallels between militant democracy and the disqualification provision of the Fourteenth Amendment, the Insurrection Clause was largely a relic with little carry over into modern constitutional law.[68] All that changed with the January 6 assault on the Capitol and with the subsequent attempts in Colorado and Maine to disqualify President Trump from electoral consideration in 2024.

The debates over whether the conduct of Donald Trump on January 6 would satisfy the original understanding of insurrection have occupied much of the academic literature. Mark Graber forcefully captures the historical consensus:

> Historians, as opposed to Trump's lawyers, uniformly support the interpretation of Section Three advanced by those urging that Trump be disqualified. Every person who submitted an amicus brief in the Trump disqualification case before the Supreme Court who regularly attends meetings of the American Legal History Association and publishes in peer review history journals agreed that Section Three contains relative [sic] clear rules for constitutional disqualification. They point out that no one in 1866 thought a former president who had never held any office enjoyed a bizarre exemption from constitutional disqualification.[69]

I do not necessarily differ from the textual reading of Section Three. Rather, focusing on context as opposed to text, I question whether the historical understanding of what "insurrection" meant at the conclusion of the Civil War necessarily carries over to acts of violence and upheaval undertaken 150 years later.

A. Disqualification in Context

Following the general thesis of this essay, these debates miss the important fact of the source of the claimed insurrection. In 1867, the United States had just defeated the Confederate uprising. Despite the refusal to treat the war as a foreign conflict (due to the importance of

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[68] *See* ISSACHAROFF, *supra* note 22, at 30.

[69] Mark A. Graber, *Who's Afraid of Militant Democracy, U.S. Style*, VERFASSUNGSBLOG (Feb. 20, 2024), https://verfassungsblog.de/whos-afraid-of-militant-democracy-u-s-style/ [perma.cc/4DGA-R3DD] (the punchline to the question is that I seem to be the fearful party).

maintaining the perception of a cohesive Union), the Civil War had the classic form of a battle against an alien force. The Confederacy was geographically separate, had its own state authority, fought under its own flag and military command, and claimed the right of autonomy not inclusion. In this sense, the battle was no different than moving against the German Communist Party when it acted as an agent of a geographically distinct hostile authority. Under these circumstances, a prohibition on public office for those who had been part of a rivalrous claimant for military hegemony was obvious and pretty much self-executing.[70] There was no great mystery in identifying who fell under the prohibition on office holding for those who "have engaged in insurrection or rebellion against the [United States], or given aid or comfort to the enemies thereof."[71] The Civil War was fought in military uniform and the Confederate States of America reproduced the formal offices of state found in the United States.

Even before Section Three was ratified, former Confederate officials were disqualified.[72] To enforce this exclusion, Congress passed the Ironclad Oath during the Civil War, which required government officials to swear or affirm that they had "never voluntarily borne arms against the United States" and had "voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility" with the United States.[73] Section Three was also enforced before ratification through military reconstruction acts and legislation restoring statehood.[74] Under the Second Military Reconstruction Act, the Army was tasked with registering voters for state convention elections, and voters needed to swear that they were not disqualified under Section Three,[75] a striking parallel to Allied occupation of Germany between 1945 and 1949, before the restoration of democracy in West Germany.[76] In 1868, when North Carolina, South Carolina,

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[70] Mark A. Graber, *Section 3 of the Fourteenth Amendment: Is Trump's Innocence Irrelevant?*, 84 MD. L. REV. 1, 16–17 (2024).

[71] U.S. CONST. art. XIV, § 3.

[72] *See* Magliocca, *supra* note 66, at 90 ("All of these points are illuminated by the unusual fact that Section Three is the only constitutional provision that was enforced prior to its ratification.").

[73] Graber, *supra* note 70, at 11; *See also* Tom Ginsburg, Aziz Z. Huq & David Landau, *Democracy's Other Boundary Problem: The Law of Disqualification*, 111 CALIF. L. REV. 1633, 1653 (2023).

[74] *See* Magliocca, *supra* note 66, at 97–99.

[75] *See* Second Military Reconstruction Act, ch. 153, § 5, 14 Stat. 429 (1867); *see also* Magliocca, *supra* note 66, at 97 (discussing military reconstruction acts).

[76] *See, e.g.*, MIKKEL DACK, EVERYDAY DENAZIFICATION IN POSTWAR GERMANY: THE FRAGEBOGEN AND POLITICAL SCREENING DURING THE ALLIED OCCUPATION (2023) 21–32 (describing the planning and implementation of mass political screening through the Fragebogen system as a prerequisite for reentering civic life, including holding public trust positions); *id.* at 175–76 (explaining how local elections in 1946 became sites of contest over denazification eligibility criteria); Thorsten Holzhauser, *Democratic Revisionism in Postwar Europe: Justifying Purges and*

Louisiana, Georgia, Alabama, and Florida were readmitted to the United States, the act included that,

> no person prohibited from holding office under the United States, or under any State, by section three of the proposed amendment to the Constitution of the United States, known as article fourteen, shall be deemed eligible to any office in either of said States, unless relieved from disability by Congress.[77]

The Insurrection Clause was an integral part of the conditions for the readmission of the former Confederate states to the Union.[78] Congressional Republicans, who propelled the Reconstruction Amendments, viewed secession as revoking the rights and privileges of a state. The Reconstruction Amendments not only expanded federal authority to enforce the rights of citizenship but also conditioned the grounds for readmission. Sections Two and Three of the Fourteenth Amendment were central to the Republican goal of preventing "rebel rule" by empowering those who were perceived as loyal to the Union and preventing "traitors" from holding power.[79] As expressed during debates about Section Three by Senator Richard Yates, "I am for the exclusion of traitors and rebels from exercising control and power and authority in this Government."[80] The provision was written at a time when keeping Confederates who had lost the war from assuming office in the post-Civil War South was not only an evident consequence of the war but was just as obvious in its implementation. Unfortunately, time has eroded whatever evident application this provision was intended to have. Instead, what remains is a text that presents as a lawyer's nightmare of distinctions between offices and officers, oaths in specific prior capacities, and even the reliance on the uncertain term of insurrection.

B. Enforcing the Fourteenth Amendment

After Section Three was ratified, it could be enforced in various ways including restrictions on ballot eligibility, a writ of mandamus actions to prevent swearing in of those improperly elected, quo warranto actions for removal from office, and congressional challenges

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Amnesty Laws in France, Austria and West Germany, 1943–1957, 34 CONTEMP. EUR. HIST. 1, 3–7 (2025) (discussing explicit temporary disenfranchisement measures barring former Nazis from voting or standing for office).

[77] Act of June 25, 1868, ch. 70, § 3, 15 Stat. 73; *see also* Magliocca, *supra* note 66, at 98.

[78] Graber, *supra* note 70, at 2, 7.

[79] *Id.* at 9, 11–12.

[80] *Id.* at 12 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 3038 (1866)).

for Senate and House-elects.[81] In 1870, Congress provided a mechanism for enforcement of Section Three by enacting the First Ku Klux Klan Act. Under Section Fourteen of this act, "it shall be the duty of the district attorney of the United States for the district in which such person shall hold office . . . to proceed against such person, by writ of quo warranto . . . ."[82] Under Section Fifteen of this act, it was a misdemeanor for anyone who was barred by Section Three to hold office at the state or federal level.[83]

The best example of these proceedings are the quo warranto actions brought by the U.S. Attorney in Tennessee, Elad Camp.[84] Although quo warranto actions are civil in nature, they carry procedural protections akin to a criminal prosecution.[85] In February 1871, indictments were filed against three Tennessee Supreme Court Justices, Nicolson, Nelson, and Sneed, and the Tennessee Attorney General, Heiskell.[86] Eventually, Nelson resigned from his position. In May 1872, Congress passed an Amnesty Act, and President Grant directed all U.S. Attorneys to dismiss quo warranto actions that were covered by the act.[87] While the Act likely did not cover Nicholson and Nelson since they were previous members of Congress, all of the actions were dismissed, likely because of Camp's resignation due to pressure from Tennessee's congressmen.[88] As the political temperature began to cool, enforcement of Section Three became less rigid and fraught.

From the ratification of the Fourteenth Amendment until 1872, it was a frequent practice for Congress to pass bills removing Section Three disabilities, naming those people for whom the disability was being removed. According to the Speaker of the House at the time, James G. Blaine, "the unwritten rule was that 'everyone who asked for

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[81] Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM & MARY BILL RTS. J. 153, 184–94 (2021) (describing potential disqualification challenges).

[82] First Ku Klux Klan Act, ch. 114, § 14, 16 Stat. 140 (1870); *see also* Magliocca, *supra* note 66, at 35.

[83] First Ku Klux Klan Act, ch. 114, § 15, 16 Stat. 140 (1870).

[84] Magliocca, *supra* note 66, at 109.

[85] One important procedural protection similar to the criminal law is a limitation on who can bring a quo warranto action. *See* Newman v. United States *ex rel.* Frizzell, 238 U.S. 537, 550–51 (1915) (holding a person without a special interest separate from that of the general public cannot commence quo warranto proceedings); People *ex rel* Ray v. Lewistown Cmty. High Sch. Dist. No. 241, 388 Ill. 78, 83 (1944) (describing *quo warranto* statue requires court permission to file actions that are not brought by the Attorney General); Reed v. Harrisburg City Council, 606 Pa. 117, 122 (2010) (acknowledging that private citizens cannot file quo warranto actions unless state and local prosecutors refuse to do so).

[86] Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870*, TENN. BAR J., Aug. 2013, at 20, 26.

[87] *Id.*

[88] *Id.*

[amnesty], either through himself or his friends, was freely granted remission of penalty."[89] From 1869 to 1871, Section Three disabilities were removed for 3,300 members of the Confederacy.[90] In 1872, Congress passed an Amnesty Act with support from more than two-thirds of the members in each House, in compliance with Section Three,[91] which removed the political disabilities for all people except those who held very high offices.[92] In 1898, during the Spanish-American War, Congress removed the very few remaining political disabilities to promote unity during wartime.[93] These amnesty acts officially removing all Section Three disabilities and the rapid irrelevancy of Section Three as the nation began to heal from the Civil War suggests that those who were once external enemies had once again become internal. Congress itself acted twice (1872 and 1898) to remove all disqualifications from office holding to individuals deemed covered by Section Three.[94]

The only semi-recent application of Section Three was the exclusion of Victor L. Berger,[95] itself over a century ago. After serving as the first Socialist Congressperson, Berger released a manifesto against United States involvement in World War I, and he was indicted for violating the Espionage Act. While awaiting trial, Berger was elected to Congress in 1919. Another member of the House of Representatives challenged Berger's qualifications, a special House committee determined that he was disqualified under Section Three, and the Speaker of the House refused to administer the oath. The House then voted 311-1 to disqualify Berger. After the Supreme Court overturned his Espionage Act conviction based on prejudice of the trial judge, Berger was re-elected to the House in 1922, and no one challenged his qualifications despite the lack of an amnesty action.

The constitutional framework provides further support for the conclusion that Section Three is aimed at external enemies in a defined time and context. The Insurrection Clause is not the only avenue for disqualification included in the U.S. Constitution. The most obvious tool is impeachment. Ginsburg, Huq, and Landau argue that: "whereas

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[89] Magliocca, *supra* note 66, at 112.

[90] *Id.* at 112 n.133.

[91] Amnesty Act of 1872, 17 Stat. 142 (excluding from application "Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States").

[92] Ginsburg, Huq & Landau, *supra* note 73, at 1653–54.

[93] Magliocca, *supra* note 66, at 88.

[94] Baude & Paulsen, *supra* note 66, at 617.

[95] *See* Lynch, *supra* note 81, at 211–13 (describing Berger's disqualification and later re-election).

impeachment is a prophylaxis against threats *internal* to the governing apparatus, Section Three supplies a response to the problem of *external* threats to the federal government."[96] The focus on external threats explains differences between the Insurrection Clause and the impeachment process: Section Three applies to a narrower range of conduct but a broader range of people, the application is categorical as opposed to individualized, there is a stark lack of detail on the process for disqualification, and the consequences of disqualification are more extensive since they apply to both federal and state government.[97]

IV. TRUMP V. ANDERSON

The distinction between enemies domestic and foreign offers a distinct perspective on the debates over the use of the Insurrection Clause leading to the Supreme Court's decision in *Trump v. Anderson*.[98] Although the text of the Fourteenth Amendment left many possible ambiguities, including application to being a candidate for president or whether the president is an officer of the United States, the Court focused narrowly on the question of where the decision-making authority would lie. For the Court, states had "no power under the Constitution to enforce Section Three with respect to federal offices, especially the Presidency."[99] The Constitution does not textually isolate the election of the president, but this is not the first time the Court has invoked the unique national interest in the office of the chief magistrate. Most famously, the concurrence of Chief Justice Rehnquist in *Bush v. Gore*[100] began with the simple yet compelling admonition that, "[w]e deal here not with an ordinary election, but with an election for the President of the United States."[101]

In contrast to the Civil War, the repudiation of electoral norms by President Trump was a problem from within American democracy, not different in kind from the challenge Germany faces from the AfD. When efforts at disqualification were presented in 2024, Trump was the leading Republican figure, soon to be the nominee of the party. The technical question of whether the specific acts on January 6 and related efforts to challenge democratic order were similar in kind to those that would have triggered disqualification 150 years earlier largely miss the significance of context. The disqualified former Confederates were

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[96] Ginsburg, Huq & Landau, *supra* note 73, at 1654 (emphasis in original).

[97] *See id.* at 1654–57.

[98] 601 U.S. 100 (2024).

[99] *Id.* at 110 ("We conclude that States may disqualify persons holding or attempting to hold *state* office.") (emphasis in original).

[100] 531 U.S. 98 (2000).

[101] *Id.* at 112.

being removed for having joined an external challenge that had been defeated. The victorious Union could both enforce the terms of Appomattox and restore liberties in the surviving Republic.

The problem in applying the Insurrection Clause in the absence of an external enemy is that it constricts democratic liberties to respond to an exigency that is not readily superable, offering no indication of when or how the status quo ante will be restored. It is one thing to disqualify someone who has taken an oath of office to a hostile power, especially in the aftermath of actual war. It is quite another to disqualify the electoral preference of a sizeable portion of the population—not to mention a plurality or even a majority—in the name of preserving the integrity of the processes of democratic choice. The Court gets at this problem obliquely and inelegantly, and I suggest here only that there may be an intuition about how far the boundaries of democracy may be stretched. The Court identifies the risk that a "single candidate would be declared ineligible in some States, but not others, based on the same conduct (and perhaps even the same factual record)."[102] As a prudential matter, this is no doubt correct. How can it be that a Democratic-leaning state such as Colorado banning Trump would not beget a Republican-leaning state such as Missouri retaliating by finding that Biden or Harris is also giving comfort to America's enemies across the southern border? As I previously wrote, "[d]own that path lies nothing good for democracy."[103]

As the Court framed the prudential inquiry, allowing state-level disqualification would in turn be an invitation to "chaos,"[104] although why is not specified. Nor is the reader told how this distinguishes the process of state-by-state eligibility that allows some candidates to appear on some state ballots but not others, or to withdraw from some but not others, as occurred with Robert ("Bobby") F. Kennedy, Jr., in 2024.[105] The Court cautions that state control of balloting as advanced in Colorado and Maine would be disruptive and "could nullify the votes of millions and change the election result."[106] But Jill Stein ran in 2024 while appearing on only thirty-eight state ballots and more established

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[102] *Anderson*, 601 U.S. at 116–17.

[103] Samuel Issacharoff, *Old Constitutional Provisions and Presidential Selection: The Folly of Exhuming Section 3 of the 14th Amendment,* JUST SECURITY (Jan. 5, 2024), https://www.justsecurity.org/91009/old-constitutional-provisions-and-presidential-selection-the-folly-of-exhuming-section-3-of-the-14th-amendment/ [perma.cc/AS2W-26S3].

[104] *Anderson*, 601 U.S. at 117.

[105] *See* Rebecca Davis O'Brien, Simon J. Levien & Jonathan Swan, *Robert F. Kennedy Jr. Endorses Trump and Suspends His Independent Bid for President*, N.Y. TIMES (Aug. 23, 2024), https://www.nytimes.com/2024/08/23/us/elections/rfk-jr-suspends-campaign-presidential-race.html [perma.cc/3FCD-ZJFE] (discussing Kennedy's withdrawal from the ballots in battleground states).

[106] *Anderson*, 601 U.S. at 117.

third-party candidates, such as John Anderson in 1980, ran while not being eligible to appear on all state ballots.[107] Moreover, as Derek Muller well chronicles, states have disqualified national candidates for all sorts of reasons.[108]

Anderson found refuge in the notion that Section Five of the Fourteenth Amendment vested the power of enforcement in the hands of Congress. This is the closest the Court comes to finding a textual basis for its holding. But the weakness of this textual claim shows how the Court must have been scrambling for a different source of prudential argumentation at odds with its generally proffered approach. While Section Five certainly was an expansion of congressional authority, it has not been read in prior case law as vesting gatekeeping power in Congress so that no actions may be taken under the Fourteenth Amendment absent specific enabling legislation. Aziz Huq captures this well in writing that it is

> unclear how section five could be read to make the federal government's obligation to enforce section three against presidential candidates exclusive, while preserving states' power, and indeed duty, to act under sections one and two. There is neither textual nor precedential warrant for the per curiam's carve out of this eccentric little pocket of federal exclusivity.[109]

And yet the intuition holds. When the Court says that it would be "incongruous to read [Section Three] as granting the States the power—silently no less—to disqualify a candidate for federal office,"[110] it does not specify the source of incongruity. The difficulty with *Anderson* is that nothing in currently prevailing constitutional interpretation, most notably a commitment to textualism, directs this inquiry. The opinion is a series of pragmatic judgments about threats to democratic integrity that have no textual warrant. However, when read against the backdrop of the Civil War, the critical contextual fact was that the victorious Union had marshaled all national resources to defeat the Confederacy. Delegating power to state and local federal officials, including military overseers of Reconstruction, threatened no collective

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[107] *See* Alyce McFadden et al., *Where Independent and Third-Party Presidential Candidates Are on the Ballot*, N.Y. TIMES (Oct. 16, 2024), https://www.nytimes.com/interactive/2024/us/politics/presidential-candidates-third-party-independent.html [perma.cc/CF5K-3NUQ] (highlighting where third-party and independent candidates were on the ballot for the 2024 election); Anderson v. Celebrezze, 460 U.S. 780, 782 (1983) (describing Anderson's exclusion from Ohio's ballot due to early filing deadlines).

[108] *See* Brief of Professor Derek T. Muller as *Amicus Curiae* in Support of Neither Party at 6–8, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719).

[109] Huq & Ginsburg, *Structural Logics*, *supra* note 66, at 190.

[110] *Anderson*, 601 U.S. at 112.

sense of emergency response to outside aggression. Presumably if democratic resilience in the face of emergency measures requires collective acceptance of the need for emergency authority, the presumption must be that the capacity to declare the emergency must exist at the national level. To allow local officials the capacity to declare a national emergency is the presumptive source of the Court's concern about "chaos." The incongruity is not in the ultimate reasoning but in the absence of any textual mooring for the Court's intuition. The Constitution speaks of the congressional power to suspend habeas corpus,[111] but otherwise it is silent on the source and scope of emergency powers, unlike most modern constitutions.[112]

V. CONCLUSION

Presumably no spoiler alert is necessary. President Trump appeared on the ballot in all states, won the popular vote and the Electoral College, and came within a whisker of being the first Republican in twenty years to win an outright majority of the popular vote—denied because of third-party entrants who did not run in all states.[113] Once in office, he pardoned almost all of the January 6 rioters and moved to discharge all federal investigators and prosecutors involved in charging offenses for the storming of Congress. How this portends for democracy is unfortunately uncertain. Many democracies have faced periods of uncertainty, which some, but not all, overcame through popular resistance to autocratic claims to power.[114] Where successful, democracies have righted themselves through the vigilance of governmental and non-governmental organizations allowing the popular will to reassert itself. By contrast, there is no history of a democracy retaining popular sovereignty by removing the preferred candidate of half the electorate from consideration.

One possible conclusion is that laws that reflect emergency restrictions on democratic participation should sunset with the end of

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[111] U.S. CONST. art. I, § 9, cl. 2.

[112] *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296, 296 (2004) (describing lack of explicit emergency powers in the U.S. Constitution); Elizabeth Goitein, *Emergency Powers, Real and Imagined: How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis*, 11 J. NAT'L SEC. L. & POL'Y 27, 29 (2020) ("The U.S. Constitution is an outlier among modern constitutions in that it contains no provision for emergency rule.").

[113] *See 2024 Election Statistics*, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/elections/2024 [perma.cc/K6XU-R4GU] (showing Harris received 48.34% of the popular vote, Trump received 49.81% of the popular vote, and other candidates received 1.85% of the popular vote).

[114] *See* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 191–93 (2018) (describing averted "close calls" with authoritarianism).

the emergency, lest they be an invitation to subsequent mischief. In Poland, for example, the lustration of those who commanded in the Soviet days later turned into a political instrument of the *Kaczyński* government which could claim that any contemporary political opponent whose name happened to be found in a police file was a collaborator who should be politically excluded.[115] Similarly in Latvia, a law to accelerate the post-1989 break from Soviet occupation required officeholders to speak Latvian. What was sensible in 1989 becomes highly problematic when re-invoked today to threaten non-Latvian speakers with expulsion from the country, including those born in Latvia and who have known no other home.[116]

Returning to the doctrinal level at which the issue was joined in the United States, the Supreme Court ultimately held in *Anderson* that any effort to bar presidential contestants had to be national in scale and confirmed by direct congressional authorization. This Article gives support for this outcome not from the text of the Fourteenth Amendment but from its context. Section Three of the Fourteenth Amendment was designed as a tool to address a specific democratic crisis brought on by an alien-like threat: former Confederate officials. Based on a collective will to resist, democracies facing external enemies can relax their liberty foundations without threatening their systemic resilience. Once the exigency is overcome, democracies should and do lift their contingent liberty restrictions. Historically, democracy has benefitted from the collective effort at national defense.

These prudential considerations animate the *Anderson* Court's intuition, if not its reasoning. Notwithstanding widespread adoption of militant democracy across Europe, its usefulness for thwarting the unfolding threat of antidemocratic and populist forces acting within the democratic process has been limited. These internal political currents—the products of homegrown challenges to democratic statecraft and political polarization—cannot be readily overcome, offering the public little assurance that constrictions on political liberties will pay off. The same holds true for the modern application of Section Three of the Fourteenth Amendment. It addressed an external threat in the aftermath of the Civil War; it is a poor fit to block today's challenges. Democracies using these same tools to confront substantial forces internally, especially those that command imposing domestic support, do so without historic assurances of their resilience.

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[115] WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019).

[116] Marija Andrejeva, *'Express Your Loyalty': Russian Speakers In Latvia Face Language Test -- Or Deportation,* RADIO FREE EUROPE/RADIO LIBERTY (Sept. 16, 2024), https://www.rferl.org/a/russia-latvia-residents-deportation/33116047.html [perma.cc/AQ2G-43HN].