Elections, Courts, and Democratic Crisis: Constitutional Structure and the 2020 Election Cases

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ABSTRACT

This Article analyzes how the U.S. constitutional order responds to democratic crisis by examining Supreme Court cases dealing with the effort to overturn the 2020 election, and the response to the January 6th Capitol attack. It analyzes the Court's approaches to constitutional structure in key cases and how these approaches impact constitutional capacity to address democratic crises. The Article discusses how the effort to overturn the 2020 election sought to exploit key weaknesses in the U.S. constitutional framework. It then examines how the Supreme Court adjudicated cases related to the effort to overturn the 2020 election, including Moore v. Harper, Trump v. Anderson, and Trump v. United States. Each of these cases reflected distinct models of constitutional structure and modalities of constitutional interpretation. I argue that the application of constitutional structure-based approaches in these cases pose key challenges for the constitutional order's ability to respond to democratic crises. The Article traces how the Court utilized structure-based approaches that weaken our capacity to respond to democratic disaster. It critiques these approaches and suggests applying a limited conception of the basic structure doctrine in comparative constitutional law in these cases. Basic structure doctrine conceptions can provide support for state and federal court enforcement of the disqualification provision in Section Three of the Fourteenth Amendment, and a more limited conception of executive immunity. This approach would go beyond constitutional structure and the allocation of power, to consider the threats posed to core elements and features of U.S. constitutional and electoral governance.

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I. INTRODUCTION

The framers of the U.S. Constitution sought to counter the threats of tyranny and majority factions by separating and dividing power, limiting the public's role in direct elections by creating a decentralized system of electoral governance based on federalism, and including a Bill of Rights to limit federal power.[1] However, this constitutional design did not anticipate threats to democracy and constitutionalism posed by political polarization, and authoritarian movements and candidates.[2] In the 2020 election, political actors sought to exploit key weaknesses and vulnerabilities in constitutional design to undermine democracy, culminating in the January 6th attack on the U.S. Capitol during the election certification process.[3]

Over the past decade, a growing body of scholarship has focused on constitutional degradation and democratic backsliding globally.[4] Scholars have examined how would-be autocrats often utilize constitutional and electoral processes to undermine and weaken constitutions and democracies.[5] As Tom Ginsburg and Aziz Huq argue, there are multiple pathways to democratic erosion, including using constitutional amendment to marginalize political opposition, eliminating or weakening the separation of powers, centralizing and politicizing executive power, deteriorating the epistemic and deliberative elements of the public sphere, and eliminating political competition.[6] Constitutional courts play a crucial role in protecting democracy and constitutionalism but can also undermine them.[7]

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[1] *See* THE FEDERALIST NO. 51 (James Madison); Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592 (1986).

[2] *See generally* DANIEL ZIBLATT & STEVEN LEVITSKY, HOW DEMOCRACIES DIE (2018) (discussing how elected leaders gradually undermine and weaken democracy globally); TOM GINSBURG & AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018).

[3] *See* Lauren Miller Karalunas, Harry Isaiah Black, Wendy R. Weiser & Daniel I. Weiner, *Lessons for our Elections from the January 6th Hearings,* BRENNAN CENTER FOR JUST. (Dec. 16, 2022), https://www.brennancenter.org/our-work/research-reports/lessons-our-elections-january-6-hearings [perma.cc/AR8P-CNM9]; LAWRENCE LESSIG & MATTHEW SELIGMAN, HOW TO STEAL A PRESIDENTIAL ELECTION (2024); Isaac Chotiner, *The "Gap" in the Constitution That Led to January 6th*, NEW YORKER (June 27, 2022), https://www.newyorker.com/news/q-and-a/the-gap-in-the-constitution-that-led-to-january-6th [perma.cc/4Z64-PN6S].

[4] *See* ZIBLATT & LEVITSKY, *supra* note 2, at 21–25, 75–97 (discussing how elected leaders gradually undermine and weaken democracy globally); *see generally* GINSBURG & HUQ, *supra* note 2.

[5] *See* David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV 189 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 560–62 (2018); David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy,* 53 U.C. DAVIS L. REV 1313 (2019).

[6] GINSBURG & HUQ, *supra* note 2, at 90–119.

[7] *See generally* SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE AGE OF CONSTITUTIONAL COURTS (2015); Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & SOC'Y REV. 117 (2001).

The effort to overturn the 2020 election highlighted key vulnerabilities in the U.S. constitutional structure and the Court's decisions in *Trump v. Anderson*[8] and *Trump v. United States*[9] exacerbated these vulnerabilities. First, the devolution of power to administer and regulate federal elections to state governments opens the door to partisan efforts to undermine state level election results. In the 2020 election, Republicans unsuccessfully attempted to overturn the results of state elections through efforts to cajole certain state legislatures to appoint alternate Trump electors to the electoral college, based on maximalist versions of the "Independent State Legislature Theory" (ISLT).[10] According to the ISLT, state legislatures have the power to overturn state election results in defiance of state laws and constitutions and state courts lacked the power to challenge such actions by state legislatures because the Elections Clause delegates that authority exclusively to the legislature.[11] As discussed in Part II, the Supreme Court rejected the maximalist version of the ISLT in *Moore v. Harper*.[12]

Second, in contrast to other polities, the U.S. Constitution does not establish a clear framework for restricting candidates and political speech that threaten core constitutional norms and democratic processes. Other systems have embraced variants of "militant democracy" models that involve constitutional and electoral regulations aimed at protecting democracy from anti-democratic threats that can be traced back to efforts to restrict fascist parties after World War II.[13] The U.S. system embraces a different model that provides strong and expansive protections for political candidates, parties, and political speech under the First Amendment.[14] The primary exception to this is

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[8] 601 U.S. 100 (2024).

[9] 603 U.S. 593 (2024).

[10] Zach Montellaro, Kyle Cheney & Madison Fernandez, *How the Supreme Court's Decision on Election Law Could Shut the Door on Future Fake Electors*, POLITICO (June 27, 2023), https://www.politico.com/news/2023/06/27/supreme-court-decision-on-election-law-00103942 [perma.cc/D6RZ-NMN6]; *see* Carolyn Shapiro, *State Law and Federal Elections After Moore v. Harper*, 99 N.Y.U. L. REV. 2049 (2024) (discussing conceptions of independent state legislature theory and Supreme Court and federal court decisions and opinions that considered the ISLT).

[11] Montellaro, Cheney & Fernandez, *supra* note 10; Shapiro, *supra* note 10.

[12] 600 U.S. 1, 26 (2023) ("The legislative defendants and the dissent both contend that, because the Federal Constitution gives state legislatures the power to regulate congressional elections, only *that* Constitution can restrain the exercise of that power.").

[13] *See* Tom Ginsburg, Aziz Z. Huq & Tarunabh Khaitan, *Introduction* to THE ENTRENCHMENT OF DEMOCRACY: THE COMPARATIVE CONSTITUTIONAL DESIGN OF ELECTIONS, PARTIES AND VOTING, at 12–13 (Tom Ginsburg, Aziz Huq & Tarunabh Khaitan, eds., 2024) (citing Karl Lowenstein, *Militant Democracy and Fundamental Rights I*, 31 AM. POL. SCI. REV. 417, 417–32 (1937)); Karl Loewenstein, *Militant Democracy and Fundamental Rights II*, 31 AM. POL. SCI. REV. 638, 638–58 (1937); ALEXANDER S. KIRSHNER, A THEORY OF MILITANT DEMOCRACY: THE ETHICS OF COMBATTING POLITICAL EXTREMISM (2014); ISSACHAROFF *supra* note 7.

[14] *See* ISSACHAROFF *supra* note 7; *cf.* ROBERT POST, CITIZENS DIVIDED: CAMPAIGN FINANCE

contained in Section 3 of the Fourteenth Amendment, which first introduced a constitutional mechanism for barring candidates who engaged in or played a role in encouraging an insurrection against the government.[15] The Court in *Anderson* weakened Section 3, rejecting state authority over federal candidate disqualification under Section 3, and introduced new ambiguities whether other federal actors can play a role in disqualification.[16]

Third, the Constitution's provisions for executive accountability have been interpreted as providing too much power and authority to the President, paving the way to the possibility of an authoritarian executive.[17] In *Trump v. United States*, the Court was presented with an opportunity to entrench core separation of powers and rule of law norms in the context of former President Trump's arguments for executive immunity in the 2020 election interference case. Instead, the Court embraced an expansive conception of executive immunity that was not well grounded in text, historical evidence, or practice governing separation of powers and presidential power.[18]

Constitutional capacity to respond to and address democratic crises and threats must be understood both in terms of a democratic institution's ability to hold actors accountable, and the legal and constitutional architecture of a system. The effort to overturn the 2020 election and January 6th attack on the Capitol posed unprecedented threats to the stability and survival of our constitutional democracy.[19] Key institutions and actors—including actors within the executive branch, legislative bodies, political parties, election officials, and

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REFORM AND THE CONSTITUTION 80–86 (2014) (discussing a managerial model of the First Amendment).

[15] *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 622–44 (2024); MARK GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF THE CONSTITUTIONAL REFORM AFTER THE CIVIL WAR (2023); Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87 (2021); Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153 (2021).

[16] *See* William Baude & Michael Stokes Paulsen, *Sweeping Section 3 Under the Rug: A Comment on* Trump v. Anderson, 138 HARV. L. REV. 676 (2025); *infra* Part III.

[17] *See* Martin H. Redish & David M. Epstein, *The Unitary Executive in the Age of American Authoritarianism*, 59 WAKE FOREST L. REV. 451, 452–53 (2024).

[18] *See* 603 U.S. at 684–86 (Sotomayor, J., dissenting).

[19] In this respect, the 2020 election and its aftermath arguably involved multiple types of constitutional crises. *See* Sanford Levinson & Jack Balkin, *Constitutional Crisis*, 157 U. PA. L. REV. 707, 714 (2009) (offering a typology of constitutional crises with three types: (1) Type I crises arise when "political leaders believe that exigencies require public violation of the Constitution"; (2) Type II crises involve "situations where fidelity to constitutional forms leads to ruin or disaster"; and (3) Type III crises involve struggles for power beyond the realm of ordinary politics that involve violent protests, mobilization of the military and the use or threat of brute force to prevail); *cf.* JACK BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 44 (2020) (distinguishing between "constitutional crises" and "constitutional rot," and defining "constitutional rot" as the "decay of those features of a constitutional system that maintain it both as a democracy and as a republic").

courts—can all play a critical role in safeguarding democracy within the framework of U.S. constitutionalism. However, in the aftermath of January 6th, both the Cabinet and the Senate in the impeachment trial failed to take action against President Trump that would have disqualified him from holding office.[20] And during the Biden Administration's tenure, what followed were delayed prosecutions by the Justice Department and state governments that all ultimately failed to result in accountability for the effort to overturn the 2020 election and the Capitol attack.[21] The lack of swift action responding to January 6th proved to be decisive. The Trump campaign was able to reframe or erase the effort to overturn the 2020 election and the January 6th Capitol attack while using ongoing prosecutions to galvanize support among Trump's core base of supporters.[22] Additionally, the Supreme Court aided Trump's successful re-election effort in 2024. The Court did so by turning away challenges to his eligibility as a candidate in *Anderson*,[23] pushing back the timeline for his prosecution in *United States v. Trump*[24] until after the 2024 election by delaying ruling on the issue of immunity until its decision in *Trump v. United States* in July 2024.[25]

This Article examines the U.S. constitutional system's capacity to respond to democratic crises by analyzing the Court's decisions in *Moore v. Harper*,[26] *Anderson*, and *Trump v. United States* ("the 2020 election cases"). It analyzes the role the Supreme Court played in these cases and its use of structure-based rationales. It then critiques these approaches by suggesting the need to conceptualize these cases in terms of the core or basic structure of the U.S. Constitution. I advance two main arguments in this Article.

First, I argue that the Supreme Court's approach to constitutional structure in these cases has been uneven, and, in some cases, weakened the constitutional capacity to respond to democratic threats. Each case advances an approach to constitutional structure involving federalism, judicial power, and executive immunity with critical implications for

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[20] Jack N. Rakove, *Impeachment, Responsibility and Constitutional Failure: From Watergate to January 6, in* BRITISH ORIGINS AND AMERICAN PRACTICE OF IMPEACHMENT (Chris Monaghan & Matthew Flinders eds., 2023).

[21] Ankush Khardori, *Trump Got Away With It—Because of the Biden Administration's Massive Missteps*, POLITICO, Nov. 7, 2024, https://www.politico.com/news/magazine/2024/11/07/trump-legal-failures-blame-column-00187945 [perma.cc/M5NG-H9SY].

[22] Dan Barry & Alan Feuer, *'A Day of Love': How Trump Inverted the Violent History of Jan 6th*, N.Y. TIMES, Jan. 5, 2025, https://www.nytimes.com/2025/01/05/us/politics/january-6-capitol-riot-trump.html [perma.cc/UKZ6-XRQA].

[23] 601 U.S. 100 (2024).

[24] Indictment, United States v. Trump, 1:23-cr-00257, (D.D.C. Aug. 1, 2023).

[25] 603 U.S. 593 (2024).

[26] 600 U.S. 1 (2023).

the constitutional system's ability to address democratic threats and crises. I examine a key distinction between the *models* of constitutional structure in each decision[27] and the *modalities* to constitutional interpretation involving principle of constitutional structure.[28] I trace how each of the 2020 election cases embraces a distinct *model* of constitutional structure, and that these models are informed by dissonant approaches to constitutional interpretation. *Moore v. Harper* advances a model of decentralized judicial federalism, *Anderson* advances a model of centralized federal power that rules out a role for states in enforcing Section 3 of the Fourteenth Amendment, and finally, *Trump v. United States* advances a model of executive supremacy.

These cases also illustrate how dissonant *modalities* of interpretation of structure-based frameworks in U.S. election law impact our system's capacity to respond to democratic threats and crises. While *Moore* is grounded in evidence of original and historical intent and practice, *Anderson* and *Trump v. United States* deployed structural, prudential and consequentialist reasoning that are not strongly supported by the weight of originalism, historical practice, or prior precedent.[29] Both decisions introduce uncertainty into settled understandings of federalism in election law and separation of powers in executive immunity doctrine.

Where structural reasoning is unmoored from other constitutional guideposts, such as original and historical intent and practices, courts can reach inconsistent decisions that undermine the separation of powers, federalism, and other core constitutional principles.[30] *Anderson* and *Trump v. United States* illustrate these dynamics. *Anderson*

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[27] I define models of constitutional structure as types or forms of constitutional design. For scholarship on different models of constitutional republics, including variation in different models and types of federalism, see Richard H. Fallon Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (analyzing differences between the nationalist and federalist models of judicial federalism); Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10 J. DEMOCRACY 19 (1999) (describing different models of federalism in comparative systems); David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV 153 (2016) (comparing archetypes of constitutional governance).

[28] On modalities of interpretation, see PHILIP C. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7–8 (1982); Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 18–26 (2024).

[29] *See* Aziz Huq, *Structural Logics of Presidential Disqualification*, 138 HARV. L. REV. 172, 179, 216 (2024) (discussing use of structural, prudential and consequentialist approaches in *Anderson* and consequentialist arguments and considerations in *Trump v. United States*).

[30] *Trump v. United States*, 603 U.S. at 659–61 (Sotomayor, J., dissenting); *id.* at 684 (discussing lack of textual and historical support for majority's decision and noting that "the long-term consequences of today's decision are stark. The Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. This new official-acts immunity now 'lies about like a loaded weapon' for any President that wishes to place his own interests, his own political survival, or his own financial gain, above the interests of the Nation" (citations omitted)).

eliminated the role of state courts in serving as a vital check on threats to democracy and constitutionalism, while *Trump v. United States* undermined the role of federal courts as a check on the excesses of executive power.

Second, I argue that the Supreme Court should apply a limited conception of the basic structure doctrine in comparative constitutional law, particularly in cases involving existential threats to core features of the U.S. Constitution.[31] The basic structure doctrine entrenches core or basic features of a constitution against abrogation or change via constitutional amendment, laws, or other government actions, and has also been used to uphold and justify government actions designed to preserve and protect basic features. In some polities, the basic structure doctrine is mandated by constitutional text and design, and courts have applied a basic structure doctrine to protect entrenched or eternal constitutional provisions that may not be abrogated by the government without changing the constitution itself through amendment or revision.[32] In other polities, the basic structure doctrine is a product of judicial creation. In these systems, constitutional courts have interpreted constitutions as having basic features that cannot be abrogated by constitutional amendments, laws, or other government acts, and have also upheld some government actions as necessary to effectuate and preserve core constitutional principles.[33]

India provides an example of how the basic structure doctrine has been applied. As discussed in Part III, the Supreme Court of India asserted the basic structure doctrine in response to actions by the government of Indira Gandhi to fundamentally alter the Indian Constitution by curbing and limiting judicial review of laws abrogating fundamental rights, including around the Emergency rule period (1975–1977). Building on these earlier decisions, the Indian Supreme Court expanded the basic structure doctrine to protect judicial independence by asserting autonomy and control over judicial appointments, and later in *S.R. Bommai v. Union of India*,[34] the

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[31] *See* discussion *infra* Part III. In earlier work, I suggested how insights from the basic structure doctrine might inform state court adjudication of the amendment-revision distinction under state constitutional law in California and other states. *See* Manoj Mate, *State Constitutions and the Basic Structure Doctrine*, 45 COLUMBIA HUM. RTS. L. REV. 441 (2014).

[32] *See* Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913 (2014); RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS (2019); YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2016); SILVIA SUTEU, ETERNITY CLAUSES IN DEMOCRATIC CONSTITUTIONALISM (2021).

[33] *See* Manoj Mate, *Judicial Supremacy in Comparative Constitutional Law*, 92 TUL. L. REV. 393, 415–17 (2017).

[34] (1994) 3 SCC 1 (upholding declaration of president's rule and dismissal of three state governments). In line with *Bommai*, a more limited version of the basic structure doctrine could apply in the U.S. that would not include the power to invalidate constitutional amendments that

Supreme Court of India applied the basic structure doctrine to uphold the Central Government's dismissal of three state governments that were found to have aided efforts to undermine communal harmony.

In India, and other systems that have adopted basic structure doctrines, there is a recognition that constitutional courts play a critical role in protecting core or basic features or principles. Indeed, many constitutional systems have directly created electoral mechanisms for countering threats to democracy, including restrictions on election speech and empowering courts to exclude candidates and parties who threaten core constitutional and democratic norms.[35]

A primary advantage of the basic structure doctrine is that it creates uniformity in adjudication by identifying and entrenching core features of constitutions, forcing courts to consistently protect those core features across all cases. Viewing the 2020 election cases through the lens of the basic constitutional structure reveals insights about how the U.S. Supreme Court can entrench constitutional and democratic norms in response to threats to core features of constitutional governance. I argue that the U.S. Supreme Court could apply a more limited version of the basic structure doctrine that would not include the power to invalidate constitutional amendments that violate the basic structure. Unlike other polities like India, it is very difficult to amend the U.S. Constitution. Instead, the basic structure framework could be used to review government laws or actions designed to protect basic features for consistency with the basic structure doctrine. This is consistent with a "protective" secularism approach to constitutional adjudication.[36]

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violate the basic structure, in part because unlike other polities like India, it is very difficult to amend the U.S. Constitution. Instead, the basic structure framework could be used to review government laws or actions for consistency with the basic structure. This is consistent with a "protective constitutionalist" approach to constitutional adjudication. *See* Manoj Mate, *Constitutional Erosion and the Challenge to Secular Democracy in India*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS 382 (M. Graber, M. Tushnet & S. Levinson eds., 2018) (discussing the Indian Supreme Court's decision in *Bommai*).

[35] *See generally* ISSACHAROFF, supra note 7.

[36] *See* Mate, *supra* note 34, at 382 (arguing that the decision in *Bommai* represents a "protective" conception of secularism). Recent developments in India illustrate how application of the basic structure doctrine can be affected by shifts in constitutional interpretation, shifts in judicial assertiveness, and changes in judicial independence. Although the Indian Supreme Court asserted the basic structure doctrine to protect constitutional features in key cases, it weakened the principle of secularism in later cases. *See* Mate, *supra* note 34, at 385–88, 390–93 (discussing how the *Hindutva* cases created greater space for religiosity in elections). In addition, the Indian Supreme Court has retreated from its earlier role as a constitutional guardian through deference and various forms of avoidance including delaying or refusing to hear cases and failing to enforce rulings against the Government in the face attacks on judicial independence. Rehan Abeyratne & Surbhi Karwa, *The Institutional Failings of India's Chief Justice in the Age of Modi*, 23 INT'L. J. CONST. L. 160, 172–77 (2025) (discussing avoidance strategies and failures of the Indian Supreme Court to address executive overreach and constitutional violations).

Much like India in the late 1960s and 1970s, the United States has recently witnessed attacks on core features of the Constitution. The basic structure doctrine would provide U.S. courts with a uniform framework and baseline to assess whether particular laws or actions are inconsistent with core features of the constitutional framework and uphold laws or actions that are necessary to protect basic features. In the U.S. context, courts could apply a more limited conception of the basic structure doctrine to uphold actions that enforce disqualification provisions like Section 3 and reject broad executive immunity inconsistent with the separation of powers.

Conceptions of the basic structure doctrine could inform a more uniform and consistent approach to constitutional structure by drawing on the text, precedent, original intent, and historical practice to identify core features of the Constitution.[37] Drawing on this approach, I argue that the Supreme Court should recognize and entrench free and fair elections, democracy, peaceful and orderly transitions in power, and separation of powers and federalism as core or basic features of the Constitution. Based on this conception of the basic structure, federal courts should invalidate government laws or actions aimed at destroying these core features and uphold government actions that are consistent with and preserve these features.

As discussed in Part III, the Court's inconsistent application of different interpretive approaches effectively weakened the force of Section 3 of the Fourteenth Amendment and the framework holding the President accountable for actions that sought to undermine election certification and the operation of democracy. Applying a basic structure approach, the Court could hold that the President's actions to stop election certification and encourage the January 6th attack violated the basic features of free and fair elections, democracy, and peaceful transition of power entrenched by Section 3. Based on the basic feature of federalism, the Court in *Anderson* would be required accept the core role of states and federalism in electoral regulation and enforcement of Section 3 and uphold the decision of the Colorado Supreme Court disqualifying Trump from running as a candidate for President. Applying the basic structure doctrine in *Trump v. United States*, the Court would affirm the power of the executive branch to prosecute government officials who violate laws enacted by Congress and abrogate and undermine basic features of the Constitution and reject

[37] There are many problems with the use of originalist approaches, including the fact that constitutional provisions and earlier government policies advanced and entrenched policies of oppression and subordination including slavery and disenfranchisement. In Part III, I argue that a basic structure approach should be applied in line with framework originalist or living constitutionalist approaches account for constitutional change through constitutional construction. *See* discussion *infra* Part III; BALKIN, *supra* note 28, at 97–100.

broad conceptions of executive immunity as inconsistent with core separation of powers principles.

Part II examines how the Supreme Court adjudicated the 2020 election cases through distinct models of constitutional interpretation that weakened our capacity to respond to democratic disaster. Part III critiques these approaches and suggests considering insights from comparative constitutional law, including the concept of a basic structure doctrine to provide support for federal and state court enforcement of Section Three of the Fourteenth Amendment, and a more limited conception of executive immunity.

II. APPROACHES TO CONSTITUTIONAL STRUCTURE IN THE 2020 ELECTION CASES

In the 2020 election cases, the Supreme Court weakened constitutional capacity to respond to democratic threats, like the effort overturn the 2020 election, while affirming the Court's supremacy over constitutional interpretation.[38] This reflects different dimensions of the broader trend in the Roberts Court toward judicial supremacy and judicial aggrandizement.[39] The Court's approach in these cases reflect three distinct models of structure-based approaches: decentralized judicial federalism in *Moore*, centralized federal power in *Trump v. Anderson*, and executive supremacy in *Trump v. United States*.

Each of the decisions introduce various chords of constitutional dissonance that collectively weaken the constitutional framework's ability to address and respond to democratic threats. *Moore* represents a hybrid judicial federalism-judicial supremacy model that affirms the power of state courts to review state regulation of federal elections under state law, while reserving final authority to the federal judiciary to review state court decisions to ensure they do not transcend ordinary powers of judicial review that arrogate legislative power.[40] In this sense, *Moore* affirms principles of state constitutionalism and judicial federalism, subject to final check by the U.S. Supreme Court. By contrast, *Anderson* represents a centralized-judicial supremacy model,

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[38] Although *Trump v. United States* reflects a model of executive supremacy, it also arguably reinforces judicial supremacy as the Court simultaneously affirms its own power to define the scope and parameters of executive power even as it cedes some power in the realm of executive accountability.

[39] Judicial supremacy refers to the supremacy and finality of federal courts in constitutional interpretation, while judicial aggrandizement describes the expansion of judicial role and power vis-à-vis the other branches. *See* Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125 (2021); *see also* Alan Sumrall & Beau Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE (2024).

[40] Moore v. Harper, 600 U.S. 1, 26 (2023); *see* Michael Weingartner, *Second-Guessing State Courts in Election Cases: Arrogation and Evasion Under* Moore v. Harper, 56 ARIZ. ST. L.J. (2024).

rejecting the power of state courts to enforce Section 3 of the Fourteenth Amendment, and suggesting that Congress plays an exclusive role in enforcing Section 3 subject to federal judicial review.[41] *Anderson* rejects a model of judicial federalism in enforcement of Section 3's disqualification provisions and adopts a more centralized model of constitutional structure. Finally, *Trump v. United States* represents a strong executive supremacy model that codifies horizontal separation of powers principles that expand and strengthen executive immunity at the expense of judicial power to oversee prosecutions of the President.

A. *Moore v. Harper*: Decentralized Judicial Federalism

Moore clarified the foundational understandings of federalism, state regulation of federal elections, and state constitutionalism.[42] *Moore* arose from an appeal by legislative defendants representing the North Carolina General Assembly from the North Carolina Supreme Court's decision in *Harper v. Hall*.[43] In *Harper*, the North Carolina Supreme Court invalidated the General Assembly's redistricting plan as an impermissible partisan gerrymander that violated multiple provisions of the state constitution, and ordered the drawing of new congressional maps.[44]

The North Carolina legislative defendants appealed to the U.S. Supreme Court. Following the Supreme Court's earlier decision in *Rucho v. Common Cause*[45] immunizing partisan gerrymandering from challenge in the federal courts, Republicans sought to use the appeal in *Moore* as a vehicle for immunizing partisan gerrymandering claims from challenge in state courts. In *Moore*, the North Carolina legislative defendants argued that state courts lacked the power to review state redistricting and other regulation of federal elections under the federal Elections Clause, based on a maximalist conception of the independent state legislature theory.[46]

The Court in *Moore* rejected these arguments, holding that state regulations of federal elections enacted by state legislatures remain subject to the ordinary exercise of judicial review by state courts.[47] In

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[41] *See* Baude & Paulsen *supra* note 16, at 691–94 (arguing that the Court did not decide whether Congress had exclusive authority to enforce Section 3 of the Fourteenth Amendment).

[42] *Moore*, 600 U.S. at 26; *see* Leah Litman & Kate Shaw, *The Bounds of Moore: Pluralism and State Judicial Review*, 133 YALE L.J. F. 881 (2023); Manoj Mate, *New Hurdles to Redistricting Reform: State Evasion,* Moore *and Partisan Gerrymandering*, 56 CONN. L. REV. 839 (2024).

[43] 886 S.E.2d 393 (N.C. 2023).

[44] *Id.* at 449.

[45] 588 U.S. 684 (2019).

[46] *Moore*, 600 U.S. at 36.

[47] *Id.*

its decision, the Court relied on historical understandings about the nature of federalism and constitutional structure, and the important role state courts played in that structure by enforcing state constitutional norms.[48] But at the same time, the Court in *Moore* also opened the door to federal judicial review of state court interpretation of state constitutional and statutory provisions by articulating a new standard: "state courts may not transgress the ordinary bounds of judicial review so as to arrogate to themselves the power vested in state legislatures to regulate federal elections."[49]

In rejecting the ISLT, and unlimited state legislative power to regulate federal elections, *Moore* is a strong response to a looming democratic threat. Had the court adopted the extreme version of the ISLT, it could have closed the door to state court checks on extreme partisan gerrymanders and other rules that violate state constitutional provisions and norms. In addition, it would have allowed state legislatures to subvert the will of the electorate by advancing slates of alternate electors in presidential elections in 2020, including Trump's fake elector scheme.[50]

Moore represents a unique case in the constitutional canon because of the two levels of structure-based analysis in the decision. First, it affirmed judicial federalism in recognizing and affirming state courts' power and role in enforcing state constitutional norms in the context of state regulation of federal elections. The majority relied on historical evidence of the exercise of judicial review by state courts and how early state court decisions provided a model for James Madison, Alexander Hamilton, and others who would later defend the principle of judicial review."[51] The Court further observed that

> [t]he idea that courts may review legislative action was so 'long and well established' by the time we decided *Marbury* in 1803 that Chief Justice Marshall referred to judicial review as 'one of the fundamental principles of our society.[52]

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[48] *Id.*; Litman & Shaw, *supra* note 42; Mate, *supra* note 42.

[49] *Moore*, 600 U.S. at 36.

[50] Montellaro, Cheney & Fernandez, *supra* note 10 ("The Supreme Court's rejection of a controversial election theory may also have another huge political consequence for future presidential contests: It obliterated the dubious fake elector scheme that Donald Trump deployed in his failed attempt to seize a second term . . . . Backed by fringe theories crafted by attorneys like John Eastman, Trump contended that state legislatures could unilaterally reverse the outcome and override their own laws and constitutions to do so."); *see* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUMBIA L. REV. 1733, 1752–53 (2021) (discussing deployment of ISLT arguments in 2020 election cases).

[51] *Moore*, 600 U.S. at 20 (discussing arguments raised by James Madison, Elbridge Gerry and Alexander Hamilton in defense of judicial review at the Constitutional Convention of 1787).

[52] *Id.* at 22 (citing Marbury v. Madison, 5 U.S. 137, 176–77 (1803)).

Moore also drew on the Court's earlier decisions in *Ohio ex rel. Davis v. Hildebrandt*,[53] *Smiley v. Holm*,[54] and *Arizona State Legislature v. Arizona Independent Redistricting Commission*[55] in holding that state redistricting must comply with state constitutional requirements.[56]

Second, *Moore* affirms a conception of federal judicial supremacy, drawing on the logic of Chief Justice Rehnquist's concurrence in *Bush v. Gore* asserting a new "weak" version of the ISLT standard for federal court review of state court decisions to ensure that state courts do not transgress the ordinary bounds of judicial review and arrogate to themselves legislative power.[57] The Court observed that this standard was designed to prevent state courts from distorting state law, thereby evading the Elections Clause.[58] Under this standard, federal courts retain the final check on state court judicial review of state regulations of federal elections, entrenching federal judicial supremacy. *Moore* thus entrenches two levels of judicial supremacy: state court supremacy in the sphere of state electoral regulations, and federal judicial supremacy in the oversight of state courts to prevent evasion of the federal Elections Clause.

Some scholars and commentators have argued that the new standard in *Moore* also poses little concern in terms of its future application to state court decisions in the context of federal elections.[59] However, the new *Moore* standard is murky and lacks precision, opening the door to an uncertain future applications that could displace the pluralism of interpretive approaches applied by state courts.[60]

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[53] 241 U.S. 565 (1916).

[54] 285 U.S. 355 (1932).

[55] 576 U.S. 787 (2015).

[56] *Moore*, 600 U.S. at 25–26.

[57] *Id.* at 35–36.

[58] *Id.*

[59] *See* Vikram Amar, *The* Moore *the Merrier: How* Moore v. Harper*'s Complete Repudiation of the Independent State Legislature Theory is Happy News for the Court, the Country and Commentators*, 2022–2023 Cato Supreme Court Review (forthcoming); Anna K. Jessurun, David H. Gans & Brianne J. Gorod, Moore v. Harper*, Evasion, and the Ordinary Bounds of Judicial Review*, 66 B.C. L. REV. 1295 (arguing that the ordinary bounds of judicial review are very broad and that federal courts will rarely be able to assert the *Moore* standard to invalidate state court decisions).

[60] *Moore* arguably applied a combination of historical and structural approaches in affirming state judicial review and a structural approach in adopting the anti-arrogation standard. *See* Amar, *supra* note 59, at 277; Jessurun, Gans & Gorod, *supra* note 59, at 1304–06. Scholars have questioned whether the new standard in *Moore* is consistent with its broader history and traditions approach given that it could limit state courts from engaging in nontextual interpretive practices that were present at the time of ratification. *See* Litman & Shaw, *supra* note 42, at 895 ("In determining whether state courts had the power of judicial review under substantive provisions in state constitutions, *Moore* focused on state interpretive practices around the time the Federal Constitution was ratified, as well as practices leading up to and postdating ratification. Judged by these metrics of history and tradition, any federal-court effort to limit state courts to especially

Leading election law and constitutional law scholars have cautioned that the decision could allow federal courts to issue decisive rulings in cases involving post-election challenges in presidential elections, and undermine protections for voting rights by second-guessing state court decisions enforcing voting rights protections under state constitutional law.[61] While *Moore* rejected conceptions of state legislative supremacy based on the ISLT, the Court's assertion of a new weak standard of judicial review may allow the Supreme Court a pathway to continued federal judicial aggrandizement vis-à-vis state courts.[62]

B. *Trump v. Anderson*: Centralized Federal Power Over Section 3 Enforcement

While *Moore* partly strengthened U.S. democracy by rejecting efforts by state legislatures to undermine the will of the voters in presidential elections, *Anderson* weakens the constitutional system's ability to respond to immediate and long-term threats to democracy. First, *Anderson* negatively impacted the system's capacity to address the immediate crisis from the effort to overturn 2020 election and the January 6th Capitol attack. It did so by failing to address the question whether Trump had engaged in actions or conduct rising to the level of insurrection under Section 3 and by blocking the only institutional pathways through which Trump had actually been disqualified—disqualification by states.[63] On this front, the majority in *Anderson* notably failed to clearly describe and convey the severity and violence of the January 6th attack.[64] Indeed, the contrast between the majority and Sotomayor's concurring opinion on this count is striking.[65] Second, the decision weakened the constitutional system's capacity to address future actions aimed at insurrection and undermining elections by delineating a new set of rules requiring that congressional action comport with the *Boerne* congruence and proportionality standard.[66]

'textualist' methods of interpretation of state law fails.").

[61] Litman & Shaw, *supra* note 42.

[62] *See* Carolyn Shapiro, *State Law and Federal Elections After* Moore v. Harper, 99 N.Y.U. L. REV. 2049 (2024).

[63] *See* Baude & Paulsen, *supra* note 16, at 683.

[64] *See* Karen M. Tani, *Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 78–79 (2024) (contrasting the detailed depiction of violence and attacks on law enforcement officials during January 6th Capitol attack in the Colorado Supreme Court's decision in *Anderson v. Griswold*, 543 P.3d 283 (Colo. 2023), with the lack of a detailed description of violence in *Trump v. Anderson*, *Trump v. United States*, and *Fischer v. United States*, 603 U.S. 480 (2024)).

[65] *Id.*

[66] *Id.*; City of Boerne v. Flores, 521 U.S. 507 (1997); *cf.* Huq, *supra* note 29, at 173 (arguing that *Anderson* and *Trump v. United States* "rest on a consequential logic of democratic defense — but both judgments inflict serious harms on the project of enduring democratic rule").

This standard assesses the fit between the means and ends of congressional legislation enacted pursuant to Congress' enforcement power under Section 5 of the Fourteenth Amendment, requiring that such legislation must be both "congruent and proportional to the injury to be prevented or remedied."[67]

The Court in *Anderson* reversed the Colorado Supreme Court's decision ordering the Colorado Secretary of State to exclude Trump from the state primary ballot.[68] It held that states could disqualify candidates holding or attempting to hold *state* office under Section 3, but that states lacked the power to enforce Section 3's disqualification provisions "with respect to federal offices, especially the Presidency."[69] Given that the Court suggested the other primary pathway for enforcement of Section 3 was via congressional legislation, and the U.S. House of Representatives was under Republican control, the Court's decision effectively ended any meaningful chance of disqualifying Trump in 2024.[70] As discussed below, in preventing state enforcement of Section 3, the Court in *Anderson* advanced an approach to constitutional structure that weakens the U.S. constitutional system's capacity to respond to and address threats to democracy.

A significant dimension of *Anderson* is its focus on constitutional structure, including the exploration of multiple dimensions of federalism and the separation of powers.[71] The Court relied on arguments based on the text of Section 3 and the Fourteenth Amendment, historical understanding, state practice and traditions, and the logic of federal supremacy.[72] The Court held that the text of the Section 3 does not delegate enforcement power to disqualify federal candidates to the states and that the Fourteenth Amendment only delegates enforcement power to Congress in Section 5.[73] In addition, the majority held that neither the Elections Clause nor the Electors Clause "implicitly authorize the States to enforce Section 3 against federal officeholders and candidates" and that conferring states with this authority would invert the Fourteenth Amendment's rebalancing of federal and state power."[74]

Anderson also introduced a second dimension of structure-based analysis based on horizontal separation of powers. The decision

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[67] *City of Boerne*, 521 U.S. at 520.

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

[69] *Id.* at 110.

[70] Baude & Paulsen, *supra* note 16, at 691 n.111.

[71] *See* Huq, *supra* note 29, at 173 (analyzing structural logics of federalism, separation of powers, and democracy in *Anderson*).

[72] *Anderson*, 601 U.S. at 109–16.

[73] *Id.* at 112.

[74] *Id.*

suggested that Section 5 plays a critical role when it comes to enforcement of Section 3, and the methods and procedures involved, including making determinations about whether particular individuals are covered based on whether their conduct constitutes an "insurrection."[75] In holding that the Constitution confers on Congress the power to make determinations, the Court held that Section 5 limits and constrains Section 3, and that any enforcement legislation enacted by Congress must meet the congruence and proportionality standard.[76]

In an earlier article, William Baude and Michael Stokes Paulsen argued that Section 1 of the Fourteenth Amendment is a self-executing provision.[77] The per curiam failed to address arguments that Section 3 is a self-executing provision that can be applied and enforced by any federal or state actors.[78] *Anderson* is inconsistent with existing scholarship on the text, historical context, and original public understanding of the operation of Section 3.[79] As William Baude and Michael Paulsen note, Section 3 is a self-executing provision and does not require implementing legislation enacted by Congress pursuant to Section 5.[80] It can be used and applied by any federal or state actor that has a role in determining electoral qualifications.[81]

The Court also noted the lack of historical precedent and tradition of state enforcement of Section 3 against federal candidates and office holders, and that this lack of precedent suggested a "severe constitutional problem" with the assertion of Section 3 enforcement power by states.[82] At the same time, the Court noted historical precedent of congressional enforcement of Section 3.[83] Citing to remedial limitations on Congress' enforcement power, the Court held that a construction of the Constitution granting states "freer rein than

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[75] *Id.* at 110–13.

[76] *Id.* at 115.

[77] *See* Baude & Paulsen, *supra* note 15, at 622–28.

[78] Remarkably, the per curium fails to even use or mention the word "self-executing" in its opinion or to address arguments related to the self-executing nature of Section 1 of the Fourteenth Amendment.

[79] Baude & Paulsen, *supra* note 15, at 682 n.34 (citing Magliocca, *supra* note 15, at 87; Lynch, *supra* note 15, at 153; Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350 (2024); Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 HARV. J. & PUB POL'Y 309 (2024)).

[80] Baude & Paulsen, *supra* note 16, at 692–94; Baude & Paulsen, *supra* note 15, at 623–28 (arguing that the plain text of Section 3 parallels other qualification provisions and other provisions of the Fourteenth Amendment that are also self-executing, while differing from other provisions that do require enforcement by other actors).

[81] Baude & Paulsen, *supra* note 15, at 622–64.

[82] *Anderson*, 600 U.S. at 114.

[83] *Id.* at 113.

Congress to decide how Section 3 should be enforced with respect to federal offices is simply implausible."[84]

In rejecting the power of states to apply and enforce Section 3, the Court also relied on arguments based in the logic of federal supremacy.[85] The majority held that state disqualification of candidates could force Congress to exercise its power to remove any Section 3 disability via a two-thirds vote, and that it is "implausible to suppose that the Constitution affirmatively delegated to the States the authority to impose such a burden on congressional power with respect to candidates for federal office."[86] The Court held that state court enforcement of Section 3's disqualification provisions would undermine a uniform result in presidential elections, and that variation in state law, adjudication, and state procedures could result in disqualification in some states and not others.[87] The Court observed that allowing states to enforce Section 3 to disqualify federal candidates would result in an uneven patchwork where a federal candidate is excluded from some state ballots and not others, and that this would "sever the direct link that the Framers found so critical between the National Government and the people of the United States."[88]

This uniformity rationale is intertwined with a rationale based on the operation of democracy and its implications for the exercise of voting rights.[89] As the Court observes, in the context of a presidential election, "'the impact of the votes cast in each State is affected by the votes cast'—or, in this case, the votes not allowed to be cast—'for the various candidates in other States.'"[90] The Court speculates about how evolving electoral dynamics should inform the Court's approach, noting that

> "[a]n evolving electoral map could dramatically change the behavior of voters, parties, and States across the country, in different ways and at different times. The disruption would be all the more acute—and could nullify the votes of millions and change the election result—if Section 3 enforcement was attempted after the Nation voted."[91]

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[84] *Id.* at 115.

[85] *Id.*

[86] *Id.* at 113 (discussing how state disqualification under Section 3 would run contrary to the logic of federal judicial supremacy set forth in *McCulloch v. Maryland*).

[87] *Id.* at 115–17.

[88] *Id.* at 116 (citing U.S. Term Limits v. Thornton, 514 U.S. 779, 822 (1995)).

[89] *See* Huq, *supra* note 29, at 206 ("The *Anderson* per curiam appealed in broad terms to the structural value of democracy as a consequentialist lodestar guiding its result. This sounded primarily in a concern with uniformity in presidential elections.").

[90] *Anderson*, 600 U.S. at 116 (quoting Anderson v. Celebrezze, 460 U.S. 780, 795 (1983)).

[91] *Id.*

Anderson's approach to constitutional structure fails to comport with existing understandings of how federalism operates in the context of elections under the U.S. Constitution.[92] The Court's analysis of the relationship of federal and state power in the context of elections fails to align with how the Constitution actually structures power.[93] The Court's observations about states lacking enforcement power under Section 3 based on the Elections and Electors Clauses and logic of federal supremacy was flawed. This is because Article II of the Constitution explicitly delegates power of election regulation and administration to the states and creates a state-centric framework for administering presidential elections.[94] In addition, the Court's decision in *Anderson* was at odds earlier precedent on the nature and scope of state power and autonomy under federalism, including earlier cases dealing with state powers over presidential elections.[95] What is also noteworthy about *Anderson* is that its heavy reliance on constitutional structure and prudentialism ignores the text and original public understanding of Section 3.[96] In addition, the per curiam opinion also fails to acknowledge the adverse consequences and uncertainty that will result from its decision, including post-election uncertainty.[97]

Furthermore, as Justice Sotomayor argued in her concurring opinion, the majority unnecessarily limited pathways for enforcement of Section 3 by moving beyond a more limiting ruling rejecting enforcement by state courts.[98] Instead, the majority went much further in setting forth the procedures and rules under which Congress could enact enforcement legislation enforcing Section 3 disqualification under its Section 5 enforcement power, subject to judicial review by federal

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[92] *See* Baude & Paulsen, *supra* note 15, at 625–26; *see also* Huq, *supra* note 29, at 195–97 (discussing how the Elections and Electors Clauses of the Constitution allocate authority over regulation of elections to states and discussing Supreme Court decisions confirming this understanding).

[93] *See* Huq, *supra* note 29, at 197, 208 ("It is hard to credit the per curiam's view of the marginal effect of state section three enforcement, however, given states' expansive power to shape the presidential election campaign under the Elections and Electors Clauses of Articles I and II.").

[94] Baude & Paulsen, *supra* note 15, at 626–27; *see* Huq, *supra* note 29, at 192 ("Consistency in the treatment of 'federalism' thus ought to have led the *Anderson* per curiam to give states wide regulatory berth with respect to section three. Yet the per curiam adduced no reason to think that federalism should constrain national power when it comes to enforcing Reconstruction, promoting school integration, and enforcing the Bill of Rights — and then take on a different valence when it comes to presidential disqualification.").

[95] *See* Huq, *supra* note 29, at 194–96 (discussing earlier decisions regarding state power over presidential elections).

[96] *Id.* at 179 (arguing that *Anderson* represents a deviation from the Roberts' Courts adherence to originalist and textualist modes of interpretation and rejection of consequentialism in other cases).

[97] *Id.* at 211–15.

[98] *Anderson*, 600 U.S. at 118–23 (Sotomayor, J., concurring).

courts under the *Boerne* congruence and proportionality standard.[99] As Justice Sotomayor further observed, the majority unnecessarily imposed limits on federal enforcement of Section 3 by articulating a set of new rules guiding how enforcement must operate, weakening the ability of the government to disqualify candidates under Section 3.[100]

There is controversy among commentators over *Anderson's* actual scope. The concurrences of Barrett and Sotomayor fault the per curiam for going beyond a limited rule barring state enforcement of Section 3 against federal candidates and holding that federal legislation is the exclusive pathway through which Section 3 can be enforced.[101] Other commentators also argued that the per curiam held that federal legislation is the exclusive pathway for enforcement of Section 3.[102] By contrast, Baude and Paulsen suggest that the per curiam never explicitly held that federal legislation is the exclusive pathway for enforcement.[103] This ambiguity is not only unhelpful, but arguably dangerous given the scale and magnitude of the problems that Section 3 seeks to confront.

A key distinction between *Moore* and *Anderson* is their divergent understandings of the operation of federalism in election law. While *Moore* arguably rests on original and historical intent-based understandings of the role of state judicial review within our system of federalism, *Anderson* rejected the role that state courts can play in enforcing Section 3. *Moore* embraced judicial federalism and the role of state courts in enforcing state constitutional norms in reviewing state regulation of federal elections. In contrast, *Anderson* suggests a centralized model of enforcement of Section 3 by federal actors, rejecting a conception of federalism in which state actors have the power to enforce Section 3.

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[99] *Id.*

[100] *Id.* at 123 (Sotomayor, J., concurring) ("The majority announces novel rules for how that enforcement must operate. It reaches out to decide Section 3 questions not before us, and to foreclose future efforts to disqualify a Presidential candidate under that provision. In a sensitive case crying out for judicial restraint, it abandons that course.").

[101] *Id.* at 118 (Barrett, J., concurring) ("This suit was brought by Colorado voters under state law in state court. It does not require us to address the complicated question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced."); *id.* at 119 (Sotomayor. J., concurring) ("The majority announces that a disqualification for insurrection can occur only when Congress enacts a particular kind of legislation pursuant to Section 5 of the Fourteenth Amendment. In doing so, the majority shuts the door on other potential means of federal enforcement.").

[102] Baude & Paulsen, *supra* note 16, at 692 n.94 (citing multiple commentators suggesting that per curium ruled that congressional legislation was the exclusive pathway for enforcement of Section 3, and other commentators suggesting that the ruling was ambiguous and unclear on this issue).

[103] Baude & Paulsen, *supra* note 16, at 691–94,

C. *Trump v. United States*: Executive Supremacy

In contrast to *Moore* and *Anderson*, *Trump v. United States* centers around a different dimension of constitutional structure—the scope of executive power and executive immunity from criminal prosecution. *Trump v. United States* arose out of an appeal from the federal government's prosecution of President Trump in the election interference case in federal district court. A grand jury indicted former President Trump on four counts for conduct after the 2020 election leading up to the January 6th Capitol attack, alleging that after losing the 2020 election, then-President Trump conspired to overturn the election "by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results."[104] Former President Trump moved to dismiss the federal indictment on presidential immunity grounds, arguing that a President has absolute immunity from criminal prosecution for actions performed within the outer perimeter of the President's official responsibilities and that the federal indictment's allegations focused on the core of the President's official duties.[105] The District Court rejected Trump's motion to dismiss and held that former Presidents lack federal criminal immunity for any acts, and the D.C. Circuit affirmed.[106] However, both courts declined to decide whether the indicted conduct implicated official acts.[107]

Trump v. United States must be understood in terms of its immediate consequences for the ongoing federal prosecution of former President Trump in the election interference case. The Court's delay in hearing oral arguments in April 2024, and issuing the decision in July, delayed Trump's prosecution in the election interference case until after the election.[108] In advancing a particular model of separation of powers,

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[104] *Trump v. United States*, 603 U.S at 602. The indictment alleged former President Trump had advanced this goal through five primary means: using knowingly false claims of election fraud to get state legislators and elections officials to change electoral votes; organizing fraudulent slates of electors and causing them to transmit false certificates; attempting to use the Justice Department to conduct sham election crime investigations and send letter to certain states making false claims about concerns impacting the election outcome; attempting to persuade Vice President Pence to fraudulently alter election results in the Jan. 6th certification proceeding, repeating knowingly false claims of election fraud and false claims that Vice President had authority to alter results and directing gathered supporters to go to Capitol to obstruct certification; and after large crowd attacked Capitol and halted certification, Trump and co-conspirators "exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification." *Id.* at 602–03.

[105] *Id.* at 603–04.

[106] *Id.* at 604–05.

[107] *Id.*

[108] Ryan J. Reilly, Daniel Barnes & Lawrence Hurley, *Supreme Court's Immunity Ruling Will Delay Trump's Jan. 6 Case Until After the Election*, NBC NEWS (July 1, 2024), https://www.nbcnews.com/politics/justice-department/supreme-courts-immunity-ruling-will-delay-trumps-jan-6-cas

the decision also has significant implications for the future of presidential power, separation of powers, and democracy. Indeed, the Court implicitly acknowledged these concerns, noting the case raised novel issues involving the first criminal prosecution of a former President for actions taken during their term and that the Court "must not confuse 'the issue of a power's validity with the cause it is invoked to promote," but must instead focus on the "enduring consequences upon the balanced power structure of our Republic."[109] However, as it did in *Anderson*, the majority in *Trump v. United States* failed to fully convey the severity of the January 6th attack.[110] By contrast, Justice Sotomayor's dissent emphasizes the gravity of the election interference effort and attack on January 6th attack, highlighting the severity and violence of that attack and the broader implications for democracy and constitutionalism.[111]

In contrast to *Moore* and *Anderson*, *Trump v. United States* relies on a third distinct model of constitutional structure, one based on a strong conception of executive power that undermines judicial power to do justice in cases involving prosecutions of the President and executive branch officials.[112] *Trump v. United States* asserts judicial supremacy and judicial power to define the contours of executive immunity including the scope of "core" constitutional powers, and the scope of official and unofficial acts, even as it undermines the judicial role and power to adjudicate cases involving the prosecution of Presidents. Drawing on earlier decisions in *Nixon v. Fitzgerald*,[113] *Youngstown Sheet and Tube v. United States*,[114] and *United States v. Nixon*,[115] the Court held that the nature of presidential power requires that a former President has expansive immunity from criminal prosecution for official acts committed while in office, advancing three categories of immunity.[116]

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e-election-rcna159764 [perma.cc/Q35V-ZCVX].

[109] *Trump v. United States*, 603 U.S. at 605–06 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

[110] *Id.* at 579.

[111] *Id.* at 657–58 (Sotomayor, J., dissenting).

[112] Redish and Epstein, *supra* note 17.

[113] 457 U.S. 731 (1982).

[114] 343 U.S. 579 (1952).

[115] 418 U.S. 683 (1974).

[116] *Trump v. United States*, 603 U.S. at 605–06, 614–15. Justice Jackson's dissent also provides a useful summary of these three categories. *Id.* at 691 (Jackson, J., dissenting) ("First, with respect to any criminal conduct relating to a President's 'core constitutional powers'—those subjects 'within his "conclusive and preclusive" constitutional authority'—the President is entitled to absolute immunity from criminal prosecution. . . . Second, expanding outward from this 'core,' regarding all other 'acts within the outer perimeter of [the President's] official responsibility,' the President is entitled to 'at least a *presumptive* immunity from criminal prosecution.' . . . Third, if the criminal conduct at issue comprises 'unofficial acts, there is no immunity.").

First, in the exercise of core constitutional powers, the majority held that the President has absolute immunity. The Court held that presidential power entitles a former President to absolute immunity from criminal prosecution for actions within his conclusive and preclusive constitutional authority.[117] This analysis drew on earlier precedent, including Justice Jackson's tripartite *Youngstown* framework for analyzing presidential power, as well as discussion of several areas in which presidential power is conclusive and preclusive, including the pardon power, removal power, and the power "to control recognition determinations" of foreign countries.[118] Second, for acts taken within the outer perimeter of a President's official responsibility, the Court held that the President is entitled to at least a presumptive immunity. Drawing on *Fitzgerald*, the Court held that the President is immune from prosecution for an official act in this second category, "unless the Government can show that applying a criminal prohibition to that act would pose no "dangers of intrusion on the authority and functions of the Executive Branch."[119] The rationale for this presumptive immunity is that it is necessary to "safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution."[120] Third, for nonofficial acts, the President is entitled to no immunity.[121]

Relying on this new framework, the majority remanded the case back to the District Court to determine whether various acts constituted official or unofficial acts.[122] However, the Court proceeded to make its own determinations in classifying certain acts. First, the majority held that former President Trump's discussions with Justice Department officials, as part of the alleged conspiracy to convince states to replace legitimate electors with fraudulent slates of electors and to investigate purported election fraud, were "official actions" entitled to absolute immunity.[123] Second, the majority held that former President Trump's discussions with Vice President Pence regarding Pence's constitutional and statutory duty to preside over the certification of the electoral votes was entitled to at least presumptive immunity.[124] These discussions were part of the alleged effort to pressure Pence to alter the

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[117] *Id.* at 593.

[118] *Id.* at 609.

[119] *Id.* at 596 (citing *Fitzgerald*, 457 U.S. at 754).

[120] *Trump v. United States*, 603 U.S. at 595.

[121] *Id.* at 593.

[122] *Id.* at 624.

[123] *Id.* at 619–25.

[124] *Id.* at 622–23.

election results by rejecting States' electoral votes or sending them back to state legislatures.[125] Third, the Court remanded to the District Court to determine whether a series of the former President's tweets and part of the speech that former President Trump delivered on January 6th constituted official or unofficial acts.[126] In a part of the decision that was not joined by Justice Barrett, and heavily criticized by the dissents, the majority also held that evidence of official acts that are protected by executive immunity cannot be used in prosecution for unofficial acts.[127]

The majority's new framework for analyzing executive immunity departs from the approach advanced by the D.C. Circuit, District Court, and Justice Sotomayor and Justice Jackson's dissenting opinions. The District Court and D.C. Circuit rejected executive immunity from criminal prosecution for official acts. Citing *Marbury v. Madison*,[128] the D.C. Circuit relied on the distinction between two kinds of official acts: discretionary and ministerial, and observed that "the judiciary has the power to hear cases involving ministerial acts that an officer is directed to perform by the legislature."[129] From this distinction, the D.C. Circuit concluded that the "separation of powers doctrine, as expounded in *Marbury* and its progeny, necessarily permits the Judiciary to oversee the federal criminal prosecution of a former President for his official acts because the fact of the prosecution means that the former President has allegedly acted in defiance of the Congress's laws."[130]

As noted by Justices Sotomayor and Jackson in their dissenting opinions, the majority's newly crafted conception of expansive immunity for official acts is not based on or supported by constitutional text, historical evidence, and established understandings of the scope of executive power.[131] Sotomayor's dissent observed that the nation's history "points to an established understanding, shared by both Presidents and the Justice Department, that former Presidents are answerable to the criminal law for their official acts."[132] Sotomayor's dissent argued that the majority significantly expands the scope of executive immunity for official acts outside of the exercise of core

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[125] *Id.*

[126] *Trump v. United States*, 603 U.S. at 630.

[127] *Id.* at 630–32.

[128] 5 U.S. 137 (1803).

[129] *Trump v. United States*, 603 U.S. at 605 (quoting United States v. Trump, 91 F.4th 1173, 1189–90 (D.C. Cir. 2024)).

[130] *Id.* (citing *United States v. Trump*, 91 F.4th at 1191).

[131] *Id.* at 666 (Sotomayor, J., dissenting) ("In sum, the majority today endorses an expansive vision of Presidential immunity that was never recognized by the Founders, any sitting President, the Executive Branch, or even President Trump's lawyers, until now. Settled understandings of the Constitution are of little use to the majority in this case, and so it ignores them.").

[132] *Id.* at 664 (Sotomayor, J., dissenting) (citing Chiafalo v. Washington, 591 U.S. 578, 592–93 (2020)).

constitutional powers, largely drawing on the creation of a new category of presumptive immunity and a new balancing test that draws on *Fitzgerald*.[133]

Critically, the majority's broader approach and balancing test relied on functional, prudential, and consequentialist reasoning that in some ways parallel the Court's per curiam decision in *Anderson*.[134] A major battle between the majority and dissents centered on the potential consequences of rival approaches to executive immunity. The majority criticized the dissents for "fear mongering on the basis of extreme hypotheticals about a future where the President 'feels empowered to violate federal criminal law.'"[135] In response, the majority applies prudential reasoning and advances its own hypothetical scenarios, suggesting that that the dissents fail to contemplate a more likely scenario in which the Executive Branch "cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next."[136] The majority then argues that failure to recognize expansive executive immunity for official acts would lead to cycles of factional strife and prosecutions of ex-Presidents that undermine executive power, and suggests that the dissents would leave the preservation of the constitutional system of separation of powers "up to the good faith of prosecutors."[137]

The Court's approach to constitutional structure in *Trump v. United States* departed from core understandings of separation of powers, executive accountability, historical evidence, and precedent recognized in foundational decisions like *United States v. Nixon*. *United States v. Nixon* supports an understanding of separation of powers in which the judiciary and criminal justice system must be able to function to ensure that the executive can be held accountable for actions that violate the Constitution and criminal law.[138] Both Justice Sotomayor and Justice Jackson argue in support of this understanding of separation of powers. Sotomayor argues that both *United States v.*

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[133] *Id.* at 670–71.

[134] *Trump v. United States*, 603 U.S. at 668–72; *see* Huq, *supra* note 29.

[135] *Id.* at 640 (critiquing dissents' use of extreme hypotheticals); *cf. id.* at 673, 681, 684–86 (Sotomayor, J., dissenting); 691–96, 699–700, 703–05 (Jackson, J. dissenting.).

[136] *Id.* at 640.

[137] *Id.*

[138] United States v. Nixon, 418 U.S. 683, 707 (1974) ("The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.")

Nixon and *Nixon v. Administrator of General Services* demonstrate that some degree of intrusions are necessary and justified in order to do justice in the context of criminal prosecutions.[139] Furthermore, Justice Jackson argues that the Constitution and prior precedent establish an "individual accountability model" of accountability in the context of criminal law and prosecutions, and that *Trump v. United States* deviates from this model.[140]

However, the majority in *Trump v. United States* departs from these understandings by applying balancing analysis that provides too much weight toward the interests of the Executive. As Gillian Metzger argues, *U.S. v. Nixon* and *Fitzgerald* both deployed balancing tests in cases involving criminal and civil claims against the President in which the Court balanced "the constitutional weight of the interest to be served" by judicial action "against the dangers of intrusion on the authority and functions of the Executive Branch."[141] Here, *Trump v. United States* deviates from the earlier approach to balancing by giving greater weight to concerns about intrusion on the authority of the Executive weight, and less weight to the interest served by judicial action than the Court did in *U.S. v. Nixon* or *Fitzgerald*.[142] Metzger observes that the Court in *Trump v. United States* departed from the earlier approach to balancing in engaging in "faux" balancing of interests.[143]

The Court advanced a new framework and approach to executive immunity by applying the balancing test advanced in *Fitzgerald* in ways that were inconsistent with earlier approaches to balancing, based in part on functionalist approaches. As Metzger argues, the majority's approach applied formalism in analyzing the President's core powers but applied functional and consequentialist approaches in analyzing immunity in other contexts.[144] This mix of functionalist and consequentialist reasoning heavily weighted the constitutional value of a strong and effective executive branch, over other values such as executive accountability and the rule of law.[145]

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[139] *Trump v. United States*, 603 U.S. at 666–67 (2024) (Sotomayor, J., dissenting).

[140] *Id.* at 687–90 (Jackson, J. dissenting).

[141] Gillian Metzger, *Disqualification, Immunity, and the Presidency*, 138 Harv. L. Rev. F. 112 at 129 (2025).

[142] *Id.* (discussing how even the Roberts Court has previously engaged in careful balancing of interests in cases involving presidential immunity and privilege claims including in *Trump v. Mazars, USA, LLP*).

[143] *Trump v. United States*, 603 U.S. at 666–67 (Sotomayor, J., dissenting); *see* Metzger, *supra* note 141, at 129.

[144] Metzger, *supra* note 141, at 129–130.

[145] *Id.*

In recognizing a broad conception of absolute immunity for core constitutional powers, and an expansive conception of presumptive immunity for official acts, the Court deployed functionalist and consequentialist reasoning, driven by a fear of excessive judicial intrusion into executive power that would undermine the strength of the Presidency and the federal government.[146] However, the majority's concern about excessive judicial intrusion is overstated. As Justice Sotomayor argued, federal criminal prosecutions have robust procedural safeguards, and federal courts historically have accorded the President significant leeway and protections to minimize concerns about judicial intrusion into the official functions of the executive branch.[147] Furthermore, like *Anderson*, *Trump v. United States* could actually undermine the Presidency. As Metzger argues, although the Roberts Court argued that both decisions were justified based on the need to protect the Presidency, the effect of these decisions was that Trump would not face any consequences for subverting the 2020 elections—an effort directly threatening presidential political accountability.[148] Metzger argues that the Court's decisions "will end up damaging the presidency more than they protect it."[149]

Furthermore, *Trump v. United States* was also inconsistent with historical practice. As Justice Sotomayor argued in her dissenting opinion, there is no textual basis for the Court's recognition of immunity, and historical evidence and practice including Ford's pardoning of Nixon, and prior precedent including *United States v. Nixon* suggest that there are limits on executive immunity in criminal prosecutions.[150] Justice Sotomayor argued that Ford's pardon of Nixon confirmed that the President could have been criminally prosecuted for acts related to Watergate, and in *United States v. Nixon* the Court held that intrusions into executive authority and functions may be justified by the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions."[151]

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[146] *Trump v. United States*, 603 U.S. 593 at 640 (deploying prudential and consequentialist reasoning in discussing how criminal prosecution of former Presidents for official acts would unleash a cycle of partisan prosecutions that would undermine effective governance and lead to crippling factional strife).

[147] *Id.* at 670–74 (Sotomayor, J., dissenting).

[148] Metzger, *supra* note 141, at 139.

[149] *Id.*

[150] *Trump v. United States*, 603 U.S. 593 at 664–65 (Sotomayor, J., dissenting); *see* Metzger, *supra* note 141, at 126 (citing Justice Sotomayor's dissent and arguing that Ford's pardoning of Nixon was evidence that President Nixon would have faced criminal liability for his conduct and actions without the pardon).

[151] *Trump v. United States*, 603 U.S. 593 at 666–67 (Sotomayor, J., dissenting).

III. BEYOND CONSTITUTIONAL STRUCTURE: INSIGHTS FROM THE BASIC STRUCTURE DOCTRINE

Moore, *Anderson*, and *Trump v. United States* each confronted distinct aspects of threats facing the republic and democracy in the 2020 election. In each case, the Court advanced distinct models of constitutional structure in ways that either reinforced (*Moore*) or undermined (*Anderson* and *Trump v. United States*) the constitutional capacity to address threats to constitutionalism and democracy. These distinct models of structure were supported by different modalities of constitutional interpretation. The Court's approach to federalism and entrenching state court judicial review in *Moore* was grounded in an analysis of evidence of historical intent and practice.

By contrast, the Court's decisions in *Anderson* and *Trump v. United States* undermined core principles of federalism and separation of powers based on a combination of structural, prudential and consequentialist reasoning unmoored from historical intent and practice.[152] In *Anderson*, the per curiam advanced a particular structural logic of federal supremacy in holding that state courts lacked the power to enforce Section 3, directly contravening the state centric structure of federal elections.[153] In *Trump v. United States*, the majority relied on prudential reasoning to undermine core understandings of the separation of powers by embracing an expansive conception of executive supremacy.[154]

In light of key problems with these decisions' approach to constitutional structure, insights from the basic structure doctrine are useful in supporting a unified, consistent approach to structural principles, including federalism and separation of powers. As applied in other nations, the basic structure doctrine is a doctrine that informs and guides courts about the core principles or features of the Constitution and provides uniformity and consistency in interpreting and applying core or basic features. The doctrine empowers courts to engage in judicial review of constitutional amendments, laws, and other government actions on substantive grounds to ascertain whether they contravene or abrogate the basic features of a Constitution, and to uphold laws that are necessary to preserve the basic features.[155]

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[152] *See* Huq, *supra* note 29, at 179–84, 207–13 (analyzing the per curium's reliance on prudential and consequentialist reasoning and arguing that the per curium in *Anderson* embraces a conception of the operation of democracy at odds with the actual structure of the Constitution); David Pozen & Adam Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729 (2021).

[153] *See supra* Section II.B.; Huq, *supra* note 29, at 207–10; Baude & Paulsen, *supra* note 15, at 625.

[154] *See supra* Section II.C.

[155] *See* Mate, *supra* note 33, at 415–17.

The Indian basic structure doctrine emerged as part of the judicial response to efforts by the Indira Gandhi government to amend the Constitution to limit and curb judicial review of policies that abrogated key fundamental rights.[156] In the 1960s, under the leadership of Indira Gandhi, Parliament enacted amendments that immunized laws abrogating the right to property from judicial review.[157] Following an earlier decision by the Indian Supreme Court that asserted the power to invalidate constitutional amendments, Gandhi's government enacted three amendments that sought to override the Court's decision and prevent judicial review.[158] In *Kesavananda Bharati Sripadagalvaru v. State of Kerala*, the Indian Supreme Court asserted the basic structure doctrine and invalidated part of one of these amendments as violating basic features of the Indian Constitution, because the amendment would allow for the complete abrogation of the fundamental rights in Articles 14, 19 and 21, and the Court's power of judicial review.[159] Following this decision, and increasing protests and mobilization by opposition parties and leaders, Gandhi declared emergency rule in 1975. The government detained opposition leaders and supporters, enacted laws that cracked down on fundamental rights, including suspending habeas corpus for detainees, and attacked and curbed the Supreme Court's power of judicial review and jurisdiction through the enactment of the 42nd Amendment.[160] The Indian Supreme Court acquiesced to and upheld the emergency laws and decrees. Following Gandhi's defeat in the 1977 elections by the Janata Party coalition, the Court in the *Minerva Mills v. Union of India* reasserted the basic structure doctrine and invalidated key provisions of the 42nd amendment enacted during the Emergency that limited judicial review.[161]

In later decisions, the Court built on the doctrine in recognizing other basic constitutional features, including secularism and judicial independence.[162] In response to efforts by the government to appoint judges to the Supreme Court of India without consulting the Chief Justice and senior justices, the Court in the Second Judges Case applied

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[156] *Id.* at 414–22.

[157] *Id.* at 415.

[158] *Id.* at 415 (discussing the *Golak Nath v. State of Punjab* decision and the Gandhi government's enactment of the Twenty Fourth, Twenty Fifth, and Twenty Ninth amendments aimed at overriding that decision and immunizing future land reform laws from judicial review).

[159] Kesavananda Bharati Sripadagalvaru v. State of Kerala, (1973) 4 SCC 255, 315–29, 393, 1000, 1007 (India); see Mate, *supra* note 33, at 415–17.

[160] *See* Mate, *supra* note 33, at 423.

[161] Minerva Mills v. Union of India, (1981) 1 SCR 206, 240 (India).

[162] Kesavananda Bharati Sripadagalvaru v. State of Kerala, (1973) 4 SCC 225 (India); Minerva Mills v. Union of India, (1981) 1 SCR 206 (India).

the basic structure doctrine to formalize the "collegium" system of appointments, mandating that the government consult with and secure the concurrence of the Chief Justice and senior justices for appointments to the Supreme Court.[163] Later, the Court invalidated a constitutional amendment enacted by the BJP government led by Narendra Modi establishing a National Judicial Appointments Commission (NJAC), holding that this amendment violated the basic feature of judicial independence.[164]

There are key differences and similarities between India and the United States that can guide how to apply the basic structure doctrine in the U.S., including differences between India's parliamentary system and the U.S. separation of powers model with an elected President. It is much easier to amend the Indian Constitution, as many amendments require only simple or special majorities in Parliament and do not require ratification by states. The relative difficulty of amending the U.S. Constitution suggests that there is a less of a need for the doctrine to be applied as a check against amendments that might abrogate core features of the U.S. Constitution.

However, both India and the U.S. are similar in that they both have centralized judiciaries empowered with judicial review. Both systems have witnessed government actions threatening their constitutions. As such, I suggest that the "protective constitutionalist" conception or dimension of the Indian basic structure doctrine may be of greater utility to the U.S. Supreme Court.[165] Applying this doctrine, the U.S. Supreme Court could review government actions responding to efforts to undermine the Constitution in order to ascertain whether such government actions are necessary to preserve the basic structure. In addition, the U.S. Supreme Court could also apply this protective constitutionalist dimension of the basic structure doctrine to aid interpreting the Constitution over the scope of executive immunity in light of separation of powers principles.

Rethinking how the 2020 election decisions entrench or undermine basic structure principles provides insights on how courts play a role in

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[163] Supreme Court Advocates-on-Record Ass'n v. Union of India (*The Second Judges Case*), (1993) 4 SCC 441 (India). In a later case, In re Special Reference No. I of 1998 (*The Third Judges Case*), (1998) 7 SCC 739, the Court clarified how the collegium system would operate.

[164] Supreme Court Advocates-on-Record Ass'n v. Union of India (*The Fourth Judges Case*), (2016) 5 SCC 1 (India). However, following *The Fourth Judges Case*, the Indian Supreme Court shifted toward deference and avoidance in failing to rule against unconstitutional policies and actions of the Modi Government. *See* Abeyratne & Karwa, *supra* note 36.

[165] I use the term protective constitutionalism to describe the application of judicial review to block government laws and actions that undermine core constitutional features and to uphold government laws actions designed to protect core constitutional features. *Cf.* Mate, *supra* note 34, at 382 (analyzing how the Indian Supreme Court's assertion of the basic structure doctrine in Bommai provided an illustration of a "protective" conception of secularism).

either bolstering or weakening constitutional frameworks against degradation. While courts should be cautious in considering insights from comparative constitutional law, a basic structure framework is not completely foreign to U.S. constitutional jurisprudence. Indeed, Jack Balkin's conception of framework originalism has important parallels to the basic structure doctrine.[166] According to Balkin's framework originalism approach, "the Constitution creates a basic framework or plan for politics that is not complete at the outset but must be filled out and built on by later generations."[167] Balkin argues that framework originalism distinguishes between constitutional interpretation, which involves interpreting the original meaning of the Constitution's text, and constitutional construction, the process in which courts apply and implement the text of the Constitution in practice.[168] As Balkin observes, the "basic framework consists of the original meaning of the Constitution and its subsequent amendments, and the Constitutions choice of legal norms—rules, standards, and principles—to constrain and delegate future constitutional construction."[169] Like the basic structure doctrine, framework originalism focuses on ascertaining the original meaning of a Constitution as amended by subsequent amendments and core elements of that basic framework that may not be changed without constitutional amendment or revision via a constitutional convention. However, consistent with the idea of living constitutionalism, under Balkin's conception of framework originalism, constitutional constructions may change without amendment that "are the part of the Constitution-in-practice that changes, while the basic framework remains the same."[170]

There are a variety of other constitutional systems that apply basic structure doctrines. One approach is the adoption of entrenched "eternal clauses" that are judicially enforceable.[171] The German Constitution or Basic Law codifies unamendable principles that entrench core constitutional principles and rights against constitutional amendment.[172] In contrast to the U.S. Constitution, the

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[166] *See* BALKIN, *supra* note 28, at 100.

[167] *Id.* at 97.

[168] *Id.* at 98.

[169] *Id.* at 100.

[170] *Id.* at 98.

[171] *See generally* SUTEU, *supra* note 32; ROZNAI, *supra* note 32.

[172] *See* Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837 (1991); Monica Polzin, *Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law*, 14 INT'L J. CONST. L. 411 (2016).

German Constitution expressly authorizes the German Constitutional Court to invalidate amendments that violate eternal clauses.[173]

A second approach is the adoption of court-created basic structure doctrines that entrench certain core principles or features of constitutions and empower constitutional courts to invalidate constitutional amendments, laws, or government actions.[174] We see variants of this approach throughout the world, including in India and Colombia. In these polities, courts have entrenched key principles including democracy, judicial review, and limited government as basic features of their constitutions.

As noted above, the Supreme Court of India first asserted the basic structure doctrine around Indira Gandhi's Emergency Rule Regime (1975–1977), and subsequently developed the doctrine by identifying the core features of the Indian Constitution and invalidating certain constitutional amendments and laws.[175] The Indian Supreme Court also asserted the doctrine to uphold the exercise of government power as necessary to protect the basic structure. For example, in *S.R. Bommai v. Union of India*,[176] the Supreme Court of India invoked the basic structure doctrine to uphold the Central Government's dismissal of three state governments that were found to have aided efforts to undermine communal harmony.[177] Constitutional courts in other polities, including Colombia, have also developed applied variants of the basic structure doctrine.[178]

A third way in which constitutional systems may entrench constitutional norms is in the context of imposing restrictions on candidates and parties in the context of electoral regulations. Several nations have imposed variants of "militant democracy" in imposing

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[173] *See* Kommers *supra* note 172; Mate, *supra* note 33.

[174] *See* Richard Albert & Betil Oder, *The Forms of Unamendability*, *in* AN UNAMENDABLE CONSTITUTION? UNAMENDABILITY IN CONSTITUTIONAL DEMOCRACIES (Richard Albert & Betil Oder eds., 2018).

[175] *See* SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009); Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT'L L.J. 175 (2010).

[176] (1994) 3 SCC 1, 137–38, 151–53, 172–75 (upholding declaration of president's rule and dismissal of three state governments based on the rationale that the declaration of President's rule was necessary to preserve secularism and the rule of law as part of the basic structure of the Indian Constitution); *see* Mate, *supra* note 33, at 397.

[177] S.R Bommai v. Union of India, (1994) 3 SCC 1, 137–38, 151–53, 172–75; *see* Manoj Mate, *Constitutional Erosion and the Challenge to Secular Democracy in India*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS (M. Graber, M. Tushnet, & S. Levinson, eds., 2018); GARY JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONTEXT (2003); Gary Jacobsohn, *Bommai and the Judicial Power, A View From the U.S.*, 2 INDIAN J. CONST. L. 38 (2009).

[178] *See* Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT'L J. CONST. L. 339 (2013).

such limits on candidates and parties.[179] For example, in both Germany and Turkey, high courts have imposed bans or restrictions on political parties that are deemed to pose a threat to the eternal or core features.[180] Similarly, in India, both the Supreme Court of India and the Election Commission have asserted the power to impose restrictions on candidates and parties under the Representation of People Act, which imposes restrictions on certain types of electoral speech that undermines communal harmony by making appeals on the basis of religion or other categories.[181] Section 3's codification of disqualification under the Fourteenth Amendment reflects another example of militant democracy, suggesting that the U.S. Constitution already contains a provision based on the logic of the basic structure.

The basic structure doctrine can be an important framework for courts to utilize in emergencies and crises in which government actors seek to undermine or destroy core elements of a constitution. The Supreme Court of India asserted the basic structure doctrine during periods in which the Government sought to dramatically alter and undermine core features of the Constitution, including during the Emergency Rule period (1975–1977) in India. The doctrine was also applied in *Bommai* to uphold the exercise of Central Government power to invoke President's Rule to dismiss state governments that posed a threat to the basic feature of secularism. As I have argued in other work, *Bommai* represented an example of the assertion of a "protective constitutional" approach.[182]

Critics of applying a basic structure doctrine approach might argue that it would simply represent another form of pure originalism that disregards constitutional evolution and change. In line with Balkin's framework originalism, I argue that an approach informed by the basic structure could draw on principles of constitutional interpretation and constitutional construction that includes precedent that evolves and reflects political and societal change.[183] The Supreme Court could draw on consensus understandings of what constitute the basic features of the Constitution based on the text, original and historical intent,

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[179] *See* KIRSHNER, *supra* note 13; Lowenstein, *supra* note 13.

[180] *See* ISSACHAROFF, *supra* note 7.

[181] *See* Mate, *supra* note 34, at 382.

[182] *See* Mate, *supra* note 34, at 382.

[183] *See* Balkin, *supra* note 28, at 98–100. Such an approach would also be consistent with Bruce Ackerman's theory of constitutional moments, which posits that constitutional change can be effected by changes in Supreme Court doctrine that result from changes in judicial appointments and precedent that ratify political change that results from elections and social movements. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 268–90 (1991) (discussing theory of dualist democracy and processes of constitutional change outside of formal amendment).

historical practice, precedent and structural approaches grounded in these other approaches.[184]

The U.S. Supreme Court could apply some aspects of the basic structure doctrine to address governmental attacks on core constitutional features, including holding that Section 3 of the Fourteenth Amendment codifies a basic feature by protecting democracy and representative institutions against actors seeking to destroy democracy. It could also apply the basic structure doctrine to identify a more balanced conception of the separation of powers that ensures executive accountability as a basic feature, and on that basis reject expansive conceptions of executive immunity as inconsistent with the basic structure of the Constitution.

To be sure, critics might also argue that the basic structure doctrine could be misused or improperly applied by a partisan Supreme Court in ways that would not protect core features of the Constitution. Short of the gradual appointments of new justices after elections, the possibility of court packing, or impeachment, there are not many ways to prevent the Court from allowing the Constitution to be degraded. But there is currently no overarching or universal framework that guides the Court's jurisprudence in cases responding to constitutional emergencies or attacks on the Constitution, as illustrated by the 2020 election cases. The basic structure doctrine would serve as a unifying framework that could both guide and limit judicial action and also provide a baseline for the electorate to assess whether the Court was acting consistently with such a doctrine to protect the Constitution.

Anderson and *Trump v. United States* highlight the potential pitfalls of structural, prudential and consequentialist modalities in cases that involve existential threats to the constitutional republic. In both cases, these approaches were marshalled to advance structural models that were inconsistent with the basic framework of the U.S. Constitution. A limited application of the basic structure doctrine could impose guardrails on invocation of structural, prudential, and consequentialist modalities of interpretation where such modalities undermine basic features of the constitutional framework. While these approaches may be useful and beneficial in other contexts involving harms in the context of individual rights,[185] they can wreak havoc in cases involving threats to the core structural framework of the Constitution. A basic structure doctrine could inform and counsel courts toward constitutional minimalism in cases involving threats to the core constitutional framework.[186]

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[184] *See* Balkin, *supra* note 28, at 98–99.

[185] *See* Aaron Tang, *Consequences and the Supreme Court*, 117 NW. U. L. REV. 971 (2023).

[186] *See* Pozen & Samaha, *supra* note 152, at 796 ("Otherwise anti-modal arguments in favor of

Viewed through the lens of the basic structure, *Moore* arguably strengthens certain basic features of the U.S. Constitution. *Moore* can be conceptualized as a decision that builds on *Marbury* in entrenching the principle of state judicial review of state electoral regulations of federal elections. In rejecting the ISLT, the Supreme Court in *Moore* reaffirmed that state legislatures and other state actors in enacting regulations under the Elections Clause must comply with state constitutional provisions and norms as enforced by state courts exercising the power of judicial review. Additionally, *Moore* is also a decision that emphasizes federalism and state constitutionalism as core features. Because the Elections Clause and Electors Clause confer power on states over regulation and administration of federal elections, judicial review of state election regulations by state courts plays a central role in enforcing state constitutional norms.

Conceptualizing federalism as a basic feature of the U.S. Constitution requires a nuanced analysis of how federal supremacy, another basic feature, interacts with state power.[187] While the Court in *Moore* built on *Marbury* in entrenching state court judicial review and state constitutionalism as a basic feature, it also reiterated the finality of federal judicial review and opened the door to an expanded federal judicial role in policing how state courts interpret state constitutions to prevent judicial overreach and arrogation of legislative power that would amount to evasion of the Elections Clause.[188] While insights from the basic structure arguably support the entrenchment of judicial review by both state and federal courts, *Moore v. Harper* potentially opens the door to an improper application of the *Moore* standard by a partisan Supreme Court to override state courts even where they engage in state constitutional interpretation not rising to the level of arrogation.[189] From the lens of the basic structure doctrine, there is a

a limited footprint for constitutional law might be modified and deployed in narrowly case-specific terms, promoted as a resource for resolving close calls in a 'construction zone,' and enlisted to steer modalities such as prudentialism and structuralism toward constitutional minimalism.").

[187] Applying the basic structure doctrine under the U.S. Constitution would require balancing protecting both the core features of federal supremacy and federalism, and in cases where they conflict, recognizing that federal power is superior to state power. Recognition of state power to enforce Section 3 of the U.S. Constitution in *Anderson* would still be consistent with the role of states within a system of federal constitutional supremacy. Given that federal supremacy is a core feature of the Constitution, I argue against conceptions of federalism that undermine federal power to regulate elections. For this reason, I argue that the Court's decision in *Shelby County v. Holder* invalidating the preclearance formula of the Voting Rights Act based on principles of "equal sovereignty" was inconsistent with a conception of the basic structure doctrine because it undercuts Congress' ability to enforce the Fifteenth Amendment's protections for the right to vote, which I argue is a core feature of the reconstructed Constitution. 570 U.S. 549, 544 (2013).

[188] *See Moore*, 600 U.S. at 34–35.

[189] *See* Litman & Shaw, *supra* note 42.

risk that the Court could improperly apply the *Moore* standard in ways that undermine state constitutionalism and federalism.

Anderson can be distinguished from *Moore* in that it involves the application of the Fourteenth Amendment, which along with the other Reconstruction Amendments fundamentally transformed the U.S. Constitution by ending slavery, introducing core rights and equality protections, and granting African-Americans the right to vote.[190] In addition, as Mark Graber argues, a central goal of the Radical Republicans during Reconstruction was to prevent rebel rule by creating a framework for punishing treason and rewarding those who remained loyal to the Union during the Civil War.[191]

In contrast to *Moore*, *Anderson* weakens core features of the U.S. Constitution, including democracy, free and fair elections, and the rule of law based on structural and prudential reasoning unmoored from evidence of original and historical intent and practice. First, *Anderson* is arguably inconsistent with federalism and the Constitution's creation of a state-centric system of regulation and administration of federal elections.[192] Section 3 supported federalism by creating a self-executing disqualification provision and provided multiple pathways for enforcement by federal and state actors, with multiple lines of defense against insurrection against the republic.[193] However, instead of accepting and embracing this multi-layered and multi-institutional framework, *Anderson* undermined Section 3, improperly applying the logic of federal supremacy vis-à-vis principles of federalism in elections to deny state actors the ability to enforce Section 3 against federal office holders and candidates. In centralizing power over Section 3 disqualification in Congress, subject to federal judicial review, *Anderson* is arguably at odds with the core attributes of the state-centric structure of presidential election administration under the Constitution.[194]

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[190] *See* GARY JACOBSOHN & YANIV ROZNAI, CONSTITUTIONAL REVOLUTION (2020) (arguing that the Reconstruction Amendments should be viewed as a part of a constitutional revolution); Mark Graber, *The Post Civil-War Amendments as a Constitutional Revolution*, 7 CONST. STUD. 1. (2021).

[191] *See* GRABER, *supra* note 15.

[192] Conceptualizing federalism as a basic feature does not rule out a strong role for Congress in enacting statutes regulating federal elections that will be applied and enforced by federal courts against states, consistent with federal supremacy. In my view, Congress must and should play a central role in the regulation of elections within the context of the federal system established by the Constitution, including strengthening protections for voting rights. *See generally* Nicholas Stephanopoulos, *The Sweep of the Electoral Power*, 36 Const. Comment. 1 (2021).

[193] Baude & Paulsen, *supra* note 16, at 700.

[194] Baude & Paulsen, *supra* note 16, at 700 (arguing that *Anderson* "completely inverts the structure of federalism designed by the Framers of the Constitution with respect to such elections, which was explicitly to provide for elections to federal offices through the medium of state laws and procedures" and that "the Constitution's state-centric election design *was* the Framers' vision").

As Baude and Paulsen observe, the majority's decision ignores core aspects of how the Constitution created an Electoral College that was state-centric in nature as well as the assigning states a primary role in election administration, including administering and enforcing constitutional qualifications for federal office.[195] The *Anderson* majority ignored evidence of original intent, and based its decision in large part on structural and prudential concerns in holding that states should not have the power to enforce Section 3 because it would create a "patchwork" problem of inconsistent application of Section 3 by different states.[196] However, as Baude and Paulsen note, the Supreme Court could itself serve as a centralizing check on efforts by states to misuse or abuse Section 3 by reviewing such actions on appeal.[197]

A second alternative argument is that *Anderson* undermined the framework by which the framers of the Fourteenth Amendment sought to deploy electoral disqualification in order to safeguard the newly transformed Constitution after the Reconstruction Amendments.[198] The Republicans who enacted Section 3 sought to define the parameters of who can run for office based on whether or not they pose a threat to the core or basic features of the U.S. Constitution which now contained prohibitions on slavery, and entrenchment of rights, equality and voting rights for African Americans. The Reconstruction Amendments fundamentally altered the Constitution by abolishing slavery and entrenching protections for equality, due process, and rights.[199] In this sense, the Reconstruction Amendments altered the basic structure by codifying these protections for rights as basic features of the Constitution. In addition, the framers of the Fourteenth Amendment added Section 3 in order to entrench a prohibition on those who engaged in insurrection or war against the Union out of concern that they would seek to undermine the newly reconstructed Constitution.[200] In this sense, Section 3 can also be understood as a basic feature of the reconstructed Constitution entrenching a form of militant democracy.

Under the basic structure doctrine, the Supreme Court in *Anderson* would have been required to reach the merits of whether the former President had engaged in insurrection or given aid or comfort to those

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[195] Baude & Paulsen, *supra* note 16, at 700–01.

[196] *Anderson*, 600 U.S. at 116–17.

[197] Baude & Paulsen, *supra* note 16, at 706.

[198] *See* GRABER, *supra* note 13. Here, I suggest that even if one does not accept a state-centric conception of elections under the U.S. Constitution, Section 3 disqualification of those who engage in insurrection is itself part of the basic structure of the federal Constitution, and as such, state government actors and state courts are required to enforce Section 3 as a basic feature.

[199] *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

[200] *See generally* GRABER, *supra* note 15.

who had engaged in insurrection and directly enforced Section 3 in order to resolve whether the President's actions violated the basic structure. Alternatively, the Court in *Anderson* could have recognized that multiple institutions and actors at both the federal and state level have a role in enforcing core or basic structure principles and affirmed the Colorado Supreme Court's decision. While insights from the basic structure could ultimately support federal judicial enforcement of Section 3 by the Supreme Court, they also could support enforcement through state courts, and non-judicial pathways including enforcement by both state election officers and via state and federal legislative pathways.

Affirming the Colorado Supreme Court decision would have also allowed other states to disqualify former President Trump.[201] At the time of the Court's ruling, Maine and Illinois had also disqualified former President Trump under Section 3, and Section 3 cases were pending in New York, Wisconsin, Vermont and South Carolina.[202] In response to commentators who expressed concern about bad faith partisan "tit for tat" invocation of Section 3, the Supreme Court could serve as a final and uniform arbiter of these disputes to assess whether particular candidates had engaged in actions covered by Section 3.[203]

Finally, in *Trump v. United States*, the Court contravened the core features of separation of powers and the rule of law in creating a new expansive conception of executive immunity for Presidents for official acts. Ironically, Chief Justice Roberts uses the term "basic structure" in defending the majority's reasoning, observing that "ensuring that the President may exercise those powers forcefully, as the Framers anticipated he would—does not place him above the law; it preserves the basic structure of the Constitution from which that law derives."[204] However, as illustrated by the Sotomayor and Jackson dissents, the majority's ruling and rationale are actually at odds with the basic structure of the U.S. Constitution. Historical evidence at the founding, together with earlier decisions, including *Marbury*, *Youngstown*, and

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[201] At the time of the Court's decision, both Maine and Illinois had taken actions to disqualify Trump from their ballots.

[202] *Trump Was Disqualified for Insurrection in the Only Three States That Heard Evidence*, CREW (Feb. 6. 2024), https://www.citizensforethics.org/reports-investigations/crew-reports/trump-was-disqualified-for-insurrection-in-the-only-two-states-that-actually-heard-evidence/ [perma.cc/98NC-ARY3].

[203] *See* Baude & Paulsen, *supra* note 16, at 706 ("If the concern is with differences among states *in interpretation of federal law*—potential disuniformity among states in interpretation of Section Three—that is a familiar species of problem and one for which there is an obvious answer and remedy: The U.S. Supreme Court has appellate jurisdiction to review decisions of state court systems on federal questions and to finally decide such questions as a judicial matter and thereby achieve uniformity of interpretation on such questions.").

[204] Trump v. United States, 603 U.S. 593, 640 (2024).

United States v. Nixon established foundational principles related to the separation of powers and executive accountability. Viewed through the lens of the basic structure, *Trump v. United States*' conception of executive immunity is inconsistent with the core understanding of separation of powers. [205] Although one critique of the basic structure doctrine is that a partisan Court could still issue decisions that fail to apply the doctrine, the doctrine would create a uniform understanding of the basic features, and creative disincentives for judges to issue rulings that disregard those features given such deviations would be readily apparent to the other branches, the public, and commentators.

First, the Court's expansion of the concept of official acts and core immunity undermines the constitutional equilibrium of separation of powers entrenched at the Founding, and later recognized in *Youngstown*. The majority relied on *Fitzgerald* in crafting a new conception of official acts immunity, including presumptive immunity, based on the application of *Fitzgerald*'s balancing test and the weighing of *prudential and consequentialist* concerns about the potential for significant intrusion into executive power if such immunity was not recognized. However, as Justice Sotomayor observed in her dissent, these intrusions "may be justified by the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions."[206] In addition, the majority's expansion of the scope of core immunity also undermines the separation of power framework set forth in *Youngstown*, and as Justice Sotomayor observes, "the majority's conception of 'core' immunity sweeps far more broadly than its logic, borrowed from *Youngstown*, should allow."[207]

Second, *Trump v. United States* undermines core or foundational principles related to the rule of law and judicial supremacy in the area of criminal prosecution entrenched by the Court in *United States v. Nixon*. *Nixon* recognized the central role played by the federal judiciary in doing justice through criminal prosecutions, including for the President and executive branch officers. The Court in *Nixon* held that an absolute unqualified conception of executive privilege "would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III."[208] The Court also arguably affirmed the spirit of *Nixon* in rejecting absolute privilege in *Trump v. Vance*.[209]

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[205] *Id.*; *see supra* notes 109–111 (discussing arguments in Sotomayor and Jackson dissents).

[206] *Trump v. United States*, 603 U.S. at 666 (Sotomayor, J., dissenting).

[207] *Id.* at 680 (Sotomayor, J., dissenting).

[208] *United States v. Nixon*, 418 U.S. at 707.

[209] 591 U.S. 786, 786 (2020); Chafetz, *supra* note 39.

In their dissenting opinions, both Justices Sotomayor and Jackson come close to articulating viable basic structure arguments. Justice Sotomayor critiqued the majority's expansion and alteration of the existing understanding of conclusive and preclusive presidential powers from *Youngstown*.[210] Justice Sotomayor also argued that the majority's new framework fundamentally alters the existing balance of the separation of powers and the relationship between the President and the people, suggesting that the President is now "a king above the law."[211] Justice Jackson also discussed how the majority, in altering the "accountability paradigm" for executive power, "has unilaterally altered the balance of power between the three coordinate branches of our Government as it relates to the Rule of Law, aggrandizing power in the Judiciary and the Executive, to the detriment of Congress."[212] The basic structure of the U.S. Constitution can balance the conception of separation of powers that limits executive immunity in order to ensure that the President is not above the law. Viewed through the lens of the basic structure, recognizing expansive executive immunity undermines the role of the judiciary in enforcing the law against Presidents who seek to undermine other core features of the U.S. Constitution, including free and fair elections and democracy, and the rule of law.

IV. CONCLUSION

The Court's approaches to constitutional structure in the 2020 election cases undermined the constitutional capacity to respond to threats to democracy and constitutionalism. Collectively, the 2020 election cases offered the Court an opportunity to harmonize and entrench principles of constitutional structure. *Moore* arguably came the closest to meeting the moment in its close analysis of evidence of historical intent and practice in line with a framework originalist approach, and the Court's rejection of the ISLT affirmed the power of state courts to respond to the challenge posed by state legislatures seeking to undermine the will of the majority of the electorate.[213] By contrast, *Anderson* and *Trump v. United States* failed to ground structural and prudential reasoning in evidence of original and historical intent and practice with dire consequences.[214] *Anderson* failed

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[210] *Trump v. United States*, 603 U.S. at 680 (Sotomayor, J., dissenting).

[211] *Id.* at 685 (Sotomayor, J. dissenting) ("Even if these nightmare scenarios never play out, and I pray they never do, the damage has been done. The relationship between the President and the people he serves has shifted irrevocably. In every use of official power, the President is now a king above the law.").

[212] *Id.* at 697 (Jackson, J. dissenting).

[213] *See* Seifter, *supra* note 48; Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021).

[214] *See supra* Sections II.B., II.C.

to affirm core principles of federalism, including the power of state courts to enforce Section 3, and *Trump v. United States* failed to affirm and entrench core principles of horizontal separation of powers as a check on the excesses of executive power.[215]

The Court's selective reliance on prudential reasoning in *Anderson* and *Trump v. United States* suggest the need for an overarching and unified framework for identifying and analyzing core attributes of constitutional structure, including federal supremacy, federalism and the separation of powers. In this Article, I suggested that a particular conception of the basic structure doctrine can serve as an interpretive guide that informs how evidence of original and historical intent and practice can be marshaled in support of decisions that entrench core constitutional features against abrogation by government actors.[216] In addition, the basic structure doctrine could be applied to uphold government actions that are necessary to protect core features of the Constitution.

As noted in Part III, conceptualizing the U.S. Constitution in terms of its core or basic features is consistent with framework originalist or living constitutionalist approaches that can account for constitutional change from constitutional construction.[217] A basic structure approach also helps lead to a more coherent approach to constitutional structure in cases involving threats to democracy and constitutionalism. Instead of producing dissonance and uncertainty, such an approach would require courts to examine how certain government actions or conduct violate core or basic features of the constitutional framework, and to ground analysis in original and historical understandings of the operation of constitutional structure, guided by the wisdom of precedent that acknowledges constitutional change through constitutional construction. The basic structure doctrine could thus provide an interpretative framework that would restrain judges from applying modalities of interpretation in ways that undermine core features of the Constitution.

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[215] *See supra* Sections II.B., II.C., and III.

[216] *See* BALKIN, *supra* note 28, at 100.

[217] *Id.*