



## The Supreme Court Says States Can't Keep Trump Off the Ballot

Thursday, March 7, 2023

*Visit our media library at [constitutioncenter.org/medialibrary](https://constitutioncenter.org/medialibrary) to see a list of resources mentioned throughout this program, listen to previous episodes, and more.*

**[00:00:00.4] Jeffrey Rosen:** On March 4th, the Supreme Court reversed Colorado's decision to remove President Trump from its primary ballot. The court unanimously held that individual states can't bar insurrectionists from holding federal office under Section 3 of the 14th Amendment. Five justices went further, ruling that Congress alone may enforce Section 3.

**[00:00:23.5] Jeffrey Rosen:** Hello friends, I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We The People, a weekly show, of constitutional debate. The National Constitution Center is a non-partisan non-profit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, we'll discuss the court's unanimous decision to avoid a chaotic patchwork of state-level ballot eligibility decisions, and the five to four majority view that Section 3 requires Congress to act before an insurrectionist can be disqualified from office. Joining me for this discussion are two of America's leading constitutional thinkers, two of our leading experts on the history and meaning of Section 3 and two guests who it's always an honor to welcome to We the People. Mark Graber is the Jacob A. France Professor of Constitutionalism at the University of Maryland School of Law. He recently wrote the highly relevant book, "Punish treason, Reward loyalty: The forgotten goals of constitutional reform after the Civil War."

**[00:01:27.5] Jeffrey Rosen:** Mark wrote an amicus brief in support of the state of Colorado. Mark, it is wonderful to welcome you back to We The People.

**[00:01:34.9] Mark Graber:** Thank you for having me.

**[00:01:35.9] Jeffrey Rosen:** And Michael McConnell is the Richard and Francis Mallory Professor and Director of the Constitutional Law Center at Stanford Law School. He is also a senior fellow at the Hoover Institution. He's published widely about religious liberty, equal protection and separation of powers. Michael, it's always an honor to welcome you to We the People.

**[00:01:52.5] Michael McConnell:** Thank you, and a special pleasure to be on again with Mark.

**[00:01:57.6] Jeffrey Rosen:** Wonderful. Well, let's begin with your broad reactions to the decision. Michael, what did you think of the decision?

**[00:02:06.1] Michael McConnell:** Well, I'd like to begin with a word of praise because a lot of what I'll have to say is somewhat critical, but for the Supreme Court to decide this case unanimously, I think deserves comment and commendation, this must have been a very tough thing for them to do, now, I do wish they had just stopped with the unanimous holding, which was momentous enough in itself, but I agree with the concurring justices and especially with Justice Amy Coney Barrett, who said they should have stopped, one, it's not just that as a general matter the court should not decide things that are not necessary to decide, which I do believe and is often violated, I think, but not just that, but on each of the issues where they opined, in addition to the unanimous holding, I find myself scratching my head, it's a very odd hold, a series of odd, almost casual throw-away holdings, and when I say odd, I mean I don't understand why they're right, and don't certainly don't see any support for them in the opinion itself and inclined to think. At least on some of them, that they are just either wrong or overstated or too broadly conceived, so I wish they had stopped there.

**[00:03:46.8] Jeffrey Rosen:** Very interesting, and thank you so much. We will break down the decision in a moment, but first I wanna ask you, Mark, what is your broad reaction to the decision?

**[00:03:55.9] Mark Graber:** I'm inclined to say ditto to what Michael said, which will make things very boring, but also to point out that on the issues the court decided or over-decided, we might say, there was very little briefing, there was very little history. This court contends that it relies a lot on history, it's a period I've studied, I do not know the historical answers to some of the additional questions the court reached out on. They aren't in the briefs, there are policy questions about what the court reached out on, they are not in the briefs, so we're all left puzzling, is it right? People ought to be able to argue these things, at least the court give the pretense of listening to the historical arguments, the policy arguments, the aspirational arguments, instead it seemed they wanted to sort of shut things down. And in many ways, say the court is the primary enforcer of Section 3 of the 14th Amendment where it's highly probable based on the debates that the persons responsible for the post-Civil War constitution thought Congress. So to limit Congress in an issue where Congressional power has not been exercised is a funny thing for the courts to do.

**[00:05:33.9] Jeffrey Rosen:** Well, since that is the central area of disagreement, let's focus on the court's conclusion that Section 3 is not self-enforcing and that only Congress can pass enabling legislation. Michael, did you agree with that part of the decision or not?

**[00:05:50.3] Michael McConnell:** I do not agree that Congress has to do so by passage of legislation, we should drill down into other things Congress might do, but something. Mark just said, with Congress hasn't done it, I think too little attention has been paid to the fact that Congress actually has passed something and it is still on the books, and it's called The insurrection Act, and it empowers the Justice Department the Biden administration Justice Department to bring charges and if they're so sure that Mr. Trump engaged in an insurrection, they were under, I believe an obligation to charge him with the crime that is actually on the books, and the penalty for which is disqualification from office.

**[00:06:48.4] Michael McConnell:** I think it's just really strange, that people are fluttering all around saying, "Oh the court has rendered Section 3 unenforceable", when in fact, there is a law on the books, which is a perfectly sensible, reasonable way to enforce Section 3 and would provide due process. It would provide for orderly procedures and review, unlike the shambolic five-day weird proceeding in Colorado where they didn't even follow their own law in doing it. So let's. I think if you're parceling out responsibility for this, let's not forget where the responsibility really lies, which is with the Biden administration.

**[00:07:36.3] Jeffrey Rosen:** Mark responds to the claim that the Biden administration could always prosecute President Trump as an insurrectionist, and then your thoughts on whether or not the court was right to hold that Section 3 is not self-enforcing.

**[00:07:51.1] Mark Graber:** Well, prosecuting Trump under a different statute, is not enforcing Section 3, it's enforcing the criminal law of the United States, it's important to understand that the Andrew Johnson administration was not bringing treason prosecutions, and everybody knew this. So with Section 3 dependent on presidents bringing insurrection prosecutions, it was a dead letter at day 1, so clearly they meant something else, and the reason why prosecutors bring charges, sometimes I say, This is what we can prove before a jury because it's less complex, it doesn't mean. They think a person is not guilty of X or Y when they say it's Z, it means for lots of reasons, including simply what's the simplest to explain to a jury. We go for Z, it's well known, a person can be found not guilty of a criminal offense, but libel under a civil offense, and all this. The framers understood. Framers understood Presidents might not prosecute, they explicitly said there might be a congress uninterested in implementing Section 3, but they still want Section 3 to be on the books and who could enforce it otherwise.

**[00:09:26.9] Mark Graber:** The states it'll note, Trump was asked in the Colorado proceeding, "Do you need more?" He said "No." If Donald Trump was a poor African-American whose public defender failed to raise issues, people would say It is waved. You can't raise it again, Donald Trump had every opportunity to say, "This is a shambolic proceeding." He didn't. He presented the evidence he wanted to present, and now he's claiming the rules that apply to every other criminal defendant in the country, don't apply to him.

**[00:10:07.5] Jeffrey Rosen:** Michael, let's drill down as it were, on the self-enforcement question you and Mark are the world experts on Section 5 of the 14th Amendment and whether or not Congress or judges are primarily supposed to enforce it, what did you make of the majority's Textual and originalist argument about Section 3 and self-enforcement?

**[00:10:31.5] Michael McConnell:** Well, I agree that it is not self-enforcing, but I also do not think that's really the question, the question is whether it can be enforced through other mechanisms that are already existent in the law, and if the court really means that Congress that it can't be enforced except pursuant to a statute passed by Congress, I just think that is demonstrably incorrect, as a matter of history, that there were disqualifications that took place in somewhat less than four years, that the Section 3 was operative, and so one person was elected a Confederate Officer was elected to the Senate from North Carolina. And he presents his credentials in the Senate pursuant to its power under Article One Section 5, they say he's not qualified to be a senator, and so he can't sit even though he had been elected and there were. It's hard to know exactly how many there were, but roughly four members of people who had been elected to the House of Representatives from the house concluded were insurrections and disqualified under Section 3, there were some other people who were challenged as insurrectionists in the house, neither concluded that they were not.

**[00:11:56.0] Michael McConnell:** That they hadn't committed the necessary acts or for some other reason, such as their opposition to secession they seated them, but this was, this is one clear way, we know that this is the historic way in which elections to Congress were enforced and it did not. There was no statute about this, in fact, when Congress passed the Enforcement Act of 1870 that did provide specific enforcement of Section 3 it exempted elections to legislative bodies, and the obvious reason they did that is because the Constitution already gives the house and the Senate the authority to be the judge of the qualifications of its members.

**[00:12:42.9] Michael McConnell:** But that's probably not the, that I wouldn't wanna stop there because there are other people in the process who have pre-existing authority that could be used, I think, to enforce Section 3, and I worry that the Supreme Court's over-broad language here may be taken as gospel because I don't understand how it could be, for example, that Congress is stripped of its ability when it is counting electoral votes to assess whether the electoral votes were regularly given and in the past, when someone was ineligible, a clearest example of this is when Horace Greeley was dead, and you have to be alive to be president, at least it used to.

**[00:13:35.0] Michael McConnell:** That used to be the case, and they declined to recognize the electoral votes cast for Horace Greeley the electoral count Reform Act that just passed on a bipartisan basis in congress last year, makes it difficult, makes us procedurally difficult, but in the end if both houses of Congress concluded that a particular candidate is not eligible to hold

the office, they have the power to do that, and it doesn't require any additional legislation by congress, so congress has substantial powers. And some of those relate to qualifications for office for president, and I think the Supreme Court was just too. They were too hasty and too over-broad in their descriptions and failed to take account of some of these other possible enforcement measures.

**[00:14:38.1] Jeffrey Rosen:** Mark, I think you agree that the court was too broad in saying that Congress alone can enforce the provisions of Section 3, tell us why. In what ways was the court too broad and do you see any alternative opportunities for enforcement in the electoral college or elsewhere in light of the court's decision or not?

**[00:15:00.0] Mark Graber:** Well, I would start by saying ditto to about 95% of what Michael said and only leaving out 5% just to give me some wiggle room, but you started by asking text and history, and there's very little text and history. If we look at the text of Section 3, and we add in Section 5, there is nothing to suggest. The rules for disqualifying state officials are different than the rules for disqualifying federal officials. I've gone through the history, I've read through the entire congressional globe I am now going through the debate, state newspaper by state newspaper, I have yet to find a single individual who thought the rules for disqualifying state officials were different than the rules for disqualifying federal officials. Now, the truth is, in 1866, 1868, they really weren't all that sure of the rules, and there's a lot of sort of playing it by ear see what works.

**[00:16:09.4] Mark Graber:** Now, if you were to ask me, and I think a lot of progressives, would it be a good rule to leave federal elections in charge of the federal government as a pragmatic matter. As a pragmatic matter, might it be a good thing to say. What states ought not to be able to disqualify candidates for the presidency. It's not a bad rule as a pragmatic matter, but this is a court that claims to be committed to the logic of history and text this is a court that in other circumstances, give states substantial leeway in running federal elections. So I think for many of us, the objection is to our saying, Well, now it seems your principles benefit our side. Why are you changing your principles?

**[00:17:10.0] Jeffrey Rosen:** Michael, Mark has suggested that the decision was not Textualist or originalist but pragmatic, and in that sense, it sounds quite a bit like *Bush v Gore* which also seemed to exalt pragmatism over text and history. Do you agree with that? And you said there were many parts of the decision that you disagreed with, are there other elements of the claims about self-enforcement that you think are not consistent with text and history, including. Let me ask, the majority did seem to say that any enforcement legislation would have to meet the congruence and proportionality requirements set out in the *City of Boerne* case. Does that seem right to you or not?

**[00:17:51.5] Michael McConnell:** So this was not a textualist opinion in no way did the holding of the case, the interpretation rest upon the words of Section 5 or other. I think it was largely a structural opinion, I think the essential argument here that all nine justices shared was that it would be. It's highly implausible that the framers of the 14th Amendment would have empowered. What this is all about is re-admitting the confederate states that they would have empowered the confederate states to decide who could run for President of the United States, that just does not seem implausible.

**[00:18:33.8] Michael McConnell:** Now, Mark says that he sees no evidence of a difference between state elections and federal elections, I'm not sure what kind of evidence he's looking for, but how about this? I don't understand why it isn't evidence that when Congress passed bills about the subject, that they required state legislatures to enforce Section 3 with respect to state elections, and they passed something. In addition to the insurrection Act, that's still on the books, they passed a provision providing for federal enforcement by the Justice Department in federal courts for federal offices, and then relied upon the Federal Congress, the House and the Senate to enforce it with respect to House and Senate elections, leaving it to the.

**[00:19:32.0] Michael McConnell:** And for state legislatures, again, it was being left to the states. So, I can't point you to any speeches where people pointed this out, but when they got around to enforcing Section 3, they left state offices to state governments and federal offices to federal procedures and that's what persuaded nine. I don't know if they knew the history, because the opinion is quite scant on actual citation of historical authority, but nine justices seemed to be persuaded of that, of the structural logic of that. Now, I also have a few other points where I think that they stepped out over their skis, but I've probably spoken long enough.

**[00:20:27.7] Jeffrey Rosen:** Thanks for that, Mark. Your response to Michael's suggestion that there is a structural reason for distinguishing among state and federal officers, and do you agree with the part of the opinion that all nine justices accepted, which is that state officials can't do it on their own or not?

**[00:20:43.1] Mark Graber:** I think there's a structural reason, as I said, for distinguishing between state and federal elections. And I wish the court in other cases had in fact acted on that structural reason. My point was less that you're right or wrong, but consistency with a set of norms that a court that purports to be textualist and originalist suddenly become structuralist when text and originalism are not there. Now, the mere fact that in implementing Section 3 Congress chose a way of implementing, doesn't indicate that the text required this. Otherwise, we wind up saying, for example, that an official who say violates section one of the 14th Amendment gets \$100 fine, aha, that shows a \$200 fine would be unconstitutional. There were very good reasons for convenience as to say, you know what? We're gonna have states, monitor states, and the federal government monitor federal, but no one, absolutely no one. As in zero

said, the reason we're doing this is it's constitutionally required rather, what you see in the debate over the enforcement act of 1870 is people saying, states are not doing a good job, not that they're doing an illegal job, they're not doing a good job, here is an enforcement scheme that will do it better, but doing it better is not a constitutional mandate.

**[00:22:33.2] Jeffrey Rosen:** Michael, you've written in other context that the court was wrong to suggest that judges of the primary enforce of the 14th Amendment, in fact, it was supposed to be Congress, and, and yet here they seem to have imposed maybe even some limits on Congress's ability to enforce Section 3 by saying that it would have to be congruent and proportionate. What would a congressional statute enforcing President Trump look like? Would it name him or not? And what do you make of the court's limitations on Congress's authority to enforce Section 3?

**[00:23:05.4] Michael McConnell:** I have to say that paragraph about congruence and proportionality leaves me baffled. I've given that those words come from the city of Bernie case, this is something that was practically my life's work, I've thought a lot about what those terms might mean, it isn't that I disagree with them here, it's that I literally do not know what they could mean in this context, it just makes no sense, to me, and they go on to make the point that therefore, because of congruence and proportionality, therefore, having, us allowing states to pass laws on this would give states more power than Congress implication being states wouldn't have to be congruent and proportional. But of course, state law on this would also be subject to judicial review, I would assume, and if it's inconsistent with Section 3, then, I just don't understand the point that the court is making here, insofar as the court is saying that enforcement has to be, not just by Congress, but through the passage of statutes, I don't see the basis for that one. We absolutely know to a historical certainty that enforcement was done by the House and the Senate without the basis and statute. So surely the court doesn't mean to cast doubt on that, extremely well-established practice. So at best, I think they are just speaking in overly broad terms.

**[00:25:00.5] Jeffrey Rosen:** Mark, what are your thoughts about the congruence and proportionality requirement? What would a statute enforcing Section 3 look like? And broadly, what do you think motivated the justices to reach this broad decision on the Section 3 and self enforcement?

**[00:25:16.0] Mark Graber:** Once again, I think it's every other question I'm inclined to say, ditto Bravo, professor McConnell. I'll add, I think both of us would have thought, and maybe I'm putting words in Professor McConnell's mouth, and if I am, I apologize, and please correct me. But I think both of us would have thought if the narrow decision was made, Congress could pass a law that would say we authorize anyone states, courts to enforce Section 3. We might have thought this was a bad idea, but it would be a bad idea and not an unconstitutional idea. Now, given the proportional congruence language, given the, it's got to focus on particularized

individual language, this seems puzzling, consider one law, I suspect again, both of us agree on. The Attorney General of the United States is empowered to bring lawsuits against those persons they believe have engaged in insurrection against the United States.

**[00:26:28.7] Mark Graber:** I know Professor McConnell and I disagree on a definition, but we'll come up with a definition. We both agree on that, this will be a hearing where all due process positions you might want are accepted. We would've thought, that's gotta be constitutional, we would've fought over the details. It's not even clear, that's constitutional. Now, what I think the court was worried about was, as many people believe they don't like Section 3, they are worried about the politicization of Section 3, where Joe Biden gets Section 3 because you disagree with his border policy. Nikki Haley gets Section 3 because her best friend once shoplifted when they were 13 years old, and she did nothing about it. You get the idea. And what the court is really trying to do is saying, we don't like this part of the second founding constitution, let's shut it down, it's been shut down for 180 years. Nothing bad has happened, let's shut it down for another 180 years.

**[00:27:50.2] Jeffrey Rosen:** Michael, do you agree with Mark's characterization of the court's motives, or not.

**[00:27:58.6] Michael McConnell:** Disqualifying people from running for office is very strong medicine. This is something we mostly see in authoritarian countries around the world where legitimate candidates are thrown off the ballot, we don't do that here, the qualifications for office are very spare. Now, Mark says they wanna shut it down, I think that's a little unfair, I think what they want to do is enforce it, but no more than the words of the amendment actually mean. And I'm a little critical, I think they went a little too far in going into some of these other, circumstances. But I think that is their motive and by the way, I don't think this is for Donald Trump, maybe I give them too much credit, but the people whose rights are at stake here, nobody has the right to run for president, but people do have the right to vote for the people that they want to. And I think the court was very cognizant of the tens of millions of our fellow citizens who believe that Donald Trump should be the next president of the United States. And unless you've got a really strong, compelling basis in the Constitution for saying otherwise, that's the way it ought to be, so I think that was what was motivating them. Even for some of the portions that I don't fully agree with.

**[00:29:32.0] Jeffrey Rosen:** Mark, some of the liberal justices express concern about politicization along those lines, Justice Kagan said, we really want a state to be able to disqualify President Biden. Mike, do you think that that combined with the structural concerns about state enforcement justified the narrow holding of the decision that all nine justices joined or not?

**[00:29:56.5] Mark Graber:** Well, I'm inclined not to. Now in part, my Section 3 is bigger than Professor McConnell so in fact, where the court was, may shut down a part of his Section 3, it shuts down more of my Section 3. I should note that the United States is almost unique among constitutional democracies in not having strong disqualification provision. So you can have a democracy, most democracies disqualify. Now, I guess my response to, well, if we disqualify Donald Trump, all of us are at risk. Well, in one sense, some murderers were convicted today, and if somebody really wants to get Professor McConnell, me, Mr. Rosen, they can charge us with murder but presumably one of the reasons why a court exists is to require, within some reason, those charges have evidence so to use an example or in the briefs that if we impeach, or sorry, disqualify Trump, what will happen to Democrats who paid for Lawyers for Black Lives Matter?

**[00:31:21.0] Mark Graber:** Well, supplying lawyers is a constitutional action, it's not an insurrection. In another case, they pointed to a gentleman who pulled a fire alarm, but the law of insurrection requires an assemblage. Whatever else an assemblage is, it's not one person. In other words, most of the examples, not all of the examples, that's important to understand, but most of the examples people commonly use to say, well, if we disqualify Donald Trump, these people are at risk, they are not at risk. If by any reasonable understanding, the broadest rules for insurrection are followed, and if we cannot trust our fellow citizens to follow the law, we are in a lot more trouble.

**[00:32:13.5] Jeffrey Rosen:** Michael, as Mark mentioned, and as we, the people listeners know, the two of you do disagree about the question of whether or not President Trump's conduct, met the standard of engaging and insurrection, remind us 'cause your argument is important, why you think that, January 6th was not an insurrection and President Trump didn't engage in it. And if Congress were to draft a law to disqualify January 6th people for engaging in insurrection, what would it look like?

**[00:32:47.9] Michael McConnell:** Let me take your last question first. So what would legislation look like? I think it might look a lot like what Congress passed in 1870 in the Enforcement Act, which provided that the Department of Justice would bring a civil action, this is, actually, there were two provisions, one was criminal and one civil, but let's focus on the civil, a common writ of Quo Warranto which is used to challenge someone's, qualifications to serve an office. And they would bring an action in court, and then, all the evidence would be presented and you'd get a decision that could then be appealed up. I think Congress in 1870 was, that was a perfectly reasonable way of enforcing the statute, it got repealed in 1948 in a kind of thoughtless way when they were re-codifying the statutes.

**[00:33:42.5] Michael McConnell:** Nobody really focused on this, but I think the reason why nobody focused on it is that most people believed, and I think most people believed until last

year that Section 3 was about confederates, and there weren't any confederates around anymore. And so it was no longer a relevant provision. I think that's not right, I think it does look forward, but I think it is understandable how people read it the other way. I think that's a perfectly sound way of enforcing it. Now, you ask about the particular day, was it an insurrection? And did Donald Trump engage in it? Well, no one was charged, insurrection is a crime, there've been what, I forget the number now, but a very large number of prosecutions of people who participated in January 6th.

**[00:34:39.9] Michael McConnell:** None of them were charged with insurrection. My guess is that that's because the Justice Department concluded that what they did wasn't approvable, insurrection. An insurrection is when you think about, the only one we really know is an insurrection is a civil war and it's a widespread attempt to overturn the government, and January 6th looks like a protest that turned into a riot and got completely out of hand, it doesn't look like anybody actually trying to overthrow the government, with a couple of small exceptions, people weren't even armed, their intention was to try to put pressure on Congress to vote the way they wanted to on the, electoral college, that doesn't look like an insurrection. But even if, and if it were, I think the Justice Department would've charged it.

**[00:35:36.1] Michael McConnell:** 'Cause they brought all kinds of creative, aggressive legal theories, even Sarbanes-Oxley of all things. So they didn't mind stretching the envelope on charges, but they didn't bring an insurrection charge. And then there's Donald Trump, he wasn't even there. I've listened to his inflammatory speech at the ellipse and I've listened to it several times, and I blame him morally for what happened, I think if it weren't for his throwing gasoline on this fire, the fire wouldn't have happened, but he was careful in what he said, he told them to be there, to be peaceful. I think he was kind of lawyered up for his speech and did not actually, step over any kind of a legal line that would make him liable. Even for, I think he was worried about incitement, that was actually the criminal charge I think he was worrying about. And I think he was careful not to step over that line. And right after the event, there were a number of legal analyses by people extremely hostile to Mr. Trump, but on the subject of incitement and explaining why it would be a bad precedent to treat him as having incited the riot. But insurrection is yet a higher burden, even than that.

**[00:37:07.9] Jeffrey Rosen:** Mark, do you agree with Michael or not that Congress could, under the court's decision, resurrect the enforcement Act of 1870, which would allow prosecutors to bring civil actions in court for people who engaged in insurrection? And if Congress did that, do you think that President Trump met the standard for engaging in insurrection or not?

**[00:37:21.9] Mark Graber:** Yes and yes. And Professor McConnell made it easy for me to focus on the second question. 'cause I agree with everything you said on the first. Insurrection has a clear definition in 1866, all the textbooks agree you need an assemblage, there was an

assemblage on January 6th, they must be resisting federal law, they were resisting the transfer of power from Donald Trump to Joseph Biden and the constitutional laws that permitted that transfer of power by force, violence or intimidation. They used force violence or intimidation for a public purpose. They were not there to get congressional furniture to sell on eBay, they were there to prevent what they believed was a stolen election. So from the perspective of 1866, this is an insurrection and everybody from Joseph's story, John Marshall, Francis Lieber says, an insurrection does not require the overthrow of the government. Did Donald Trump participate?

**[00:38:46.0] Mark Graber:** It's not simply his speech. There are texts from which a reasonable person could believe two things. First, that it was not simply a spontaneous act of violence. A spontaneous act of violence is in fact a riot. Professor McConnell, I agree on that. The question is, did people intend for violence to take place? There is substantial evidence that people in the crowd intended that violence take place. There is substantial evidence that Donald Trump intended for violence to take place. Now, if you are going to ask me, can I prove this beyond the shadow of a doubt, the answer is no. I think Professor McConnell offers an interpretation of the events. I do think the interpretation of the events offered by the Select Committee of the House, the Colorado Supreme Court, and the Main Secretary of State is nevertheless, the better one, the best that could be said, I think in its important part of litigation is maybe Donald Trump is an inch away from the line, but then the question goes to the enforcement of Section 3. In a way, I think Professor McConnell agree, and that everybody listening to this podcast can enforce Section 3 by not voting for Donald Trump. And if you come to the conclusion that he was an inch, two inches a foot away from the line of insurrection, shouldn't he be disqualified by the voters?

**[00:40:32.2] Jeffrey Rosen:** Michael, the distinction you introduced between an insurrection and a riot, is seen throughout American history. John Adams worried whether overreaction to Fry's rebellion might convert a riot into an insurrection. And that reflects a concern about not, using federal response to riot or spontaneous protests, that broke into violence. Might that mean that the court was right to be concerned about an overly broad definition of insurrection? And if Congress were to resurrect the Insurrection Act of 1870, would that adequately enforce Section 3 in your view or not?

**[00:41:18.0] Michael McConnell:** I do think we need to be very cautious about overbroad and interpretations. If I understand Professor Graber correctly, it constitutes an insurrection when people use force violence or intimidation to resist the enforcement of federal law. Well, that does mean that the Black Lives Matter riots, in so many of our cities a few summers ago, were insurrections. They did involve violence. They did involve intimidation, and they were designed to resist the enforcement of law. The federal and state law. The whole blocks were declared off limits to law enforcement. Courthouses were under attack, and there were a number of people whose, who were there supporting them verbally and present, whom I imagine may have

political futures, there, and, if 20 years from now, somebody is running for the Congress and their opponent brings an action saying, you were present at the Black Lives Matter riot in Seattle, in 2020 or whenever it was, I think we'd be opening a Pandora's box.

**[00:42:51.5] Michael McConnell:** And it is better. I mean, it can't be shut entirely because it's there in the Constitution and has to be enforced, but it sure doesn't have to be opened as any more broadly than is absolutely necessary. And I think the court was quite worried about that. Now, I applaud the court, by the way, for not getting into the definition because I think that part of their task was to calm things down, not to get us any more inflamed and angry with one another as it is. And I think that for them, I think a unanimous decision on this topic of who has the authority to enforce is a much more likely candidate for bringing about civic harmony than if they had waded into what really almost amounts to a Rorschach test. People look at exactly the same events and they come to quite different conclusions and passionately. So, and on both sides, they are absolutely sure that their interpretation is right. And it was a, it, I think the court was wise, not to go there.

**[00:44:12.8] Jeffrey Rosen:** Mark, what's your response to Michael's argument that your definition of insurrection using force or violence to resist the enforcement of federal law could include Black Lives Matter protesters? And do you think the court should have addressed the definition of insurrection? And what definition do you think it should have adopted?

**[00:44:31.4] Mark Graber:** Interestingly, the conservative is going to protect Black Lives Matter. The progressives isn't, and in one sense, I'm very comfortable if in fact, you're a part of an assemblage that consciously resists federal estate law by force of violence for a public purpose. I have no problem throwing the Section 3 book at you with two qualifications, one of which I'm sure professor McConnell will accept, which is a young person has not been a previous office holder. So in fact, if the young person was not a previous office holder, it will turn out this person isn't subject to Section 3. But if there's an office holder involved in a Black Lives Matter protest, and the office holder is participating consciously in the violence, it's not a spontaneous outburst. It is planned violence. I am for disqualification. And the reason is, in some ways, I don't think disqualification is as much of a hardship as some others do.

**[00:45:39.7] Mark Graber:** And the reason is that there are lots of people out there who want to run for public office. And are public officials, despite what they may think, they are not irreplaceable. Notice if Donald Trump was disqualified, Republicans could vote for someone who would say, I'm gonna call Donald Trump up every morning and do whatever he says. He'll have a phone whenever he wants me to do something. He can do it. And we can imagine for a Black Lives Matter person disqualified again, don't worry, that guy, that woman, they'll be pulling the strings when elected. In many ways, American disqualification, it's unlike European. In European, we disqualify a whole party. You can't vote for a person with that belief. The

difference is in the United States, we believe that when the election is over, the winners get to do whatever laws they can pass, and the losers are not allowed to prevent those laws by violence, whether the losers are Black Lives Matter or Donald Trump, because when you prevent majorities or pluralities from implementing the laws they pass, you're in effect disenfranchising the people who voted for them. So Donald Trump on January 6th was seeking to disenfranchise the greater number of Biden voters who voted for Biden than the voters who voted for him. And we don't allow that in our system.

**[00:47:21.6] Jeffrey Rosen:** Final questions on the separate opinions of Justice Barrett and the liberals, and then we'll have closing thoughts. Michael Justice Barrett did not join her conservative colleagues. You've both suggested that this decision was more structuralist or pragmatic than Textualist or originalist. Why didn't she join? Is she a better originalist than her conservative colleagues, or is there some other reason?

**[00:47:46.9] Michael McConnell:** Well, I think the relevant category here is not so much originalism or textualism, as it is judicial restraint or judicial minimalism that is, and that could cut, that could apply equally to any substantive mode of interpretation and originalism, living constitutionalism, whatever it is. But the idea is that the court, should, decide the case in front of it and no more, or, at least when they go beyond that they very rarely stick to that, stringent, statement of no more. But it's certainly if they're going to do anything beyond what is actually at issue and has been briefed and argued, they need to be much more careful than they were here. There are a number of important legal points made in this opinion with no explanation whatsoever.

**[00:48:54.6] Michael McConnell:** And just an assertion, just a rejection. My, the most consequential, I think, has to do with why state legislatures don't have authority under the, what the independent state legislature, theories. This is Article 1 that gives the state legislature's authority to determine the manner of election. And the court just says, but there is no, there is little reason, I'm reading from the opinion, there's little reason to think that these clauses implicitly authorize the states to enforce Section 3 against federal office holders and candidates. But you could just as easily say there's little reason to think that they don't. It's just a little reason to think a line of argument is just not an argument. They need to unpack. I think that a statement can be defended, but there's nothing in the opinion to defend it.

**[00:49:54.6] Jeffrey Rosen:** That distinction between judicial minimalism and the other forms of interpretation is so helpful. And indeed, Justice's Sotomayor, Kagan and Jackson begin and end their separate concurrence with statements of minimalism. They quote "the Dobbs decision, if it is not necessary to decide more to dispose of a case, then it's necessary not to decide more." And they also quote "Justice Breyer in Bush V Gore about what is done today should have been

left undone." Mark, your thoughts about the separate concurrence of justices. So Mayor Kagan and Jackson, its notes of minimalism and any other aspects of it you'd like to highlight?

**[00:50:34.1] Mark Graber:** Yeah. First I should emphasize that I've been out of the office. I'm sure the justice has called me to explain their reasons, but nobody gave me the message. So this is just speculation. In some ways from my perspective, which is a perspective of litigation as a form of politics. The most interesting thing about the three more liberal concurrences is the characterization of Donald Trump as an oath breaking Insurrectionist, a characterization that the plurality chose not to characterize. And Justice Barrett, probably that was what she was referring to when she said there's really no need for strident language, but in many ways, I don't think this litigation was brought to win much as we got caught up with, well, maybe we'll win. The litigation was brought to keep January 6th in the mind of the public. And if the phrase oath breaking Insurrectionists sticks in certain quarters, not simply progressive court, but saying independent voters, then in many ways the litigation has been successful, even if the particular patient died.

**[00:52:01.7] Jeffrey Rosen:** This has been a wonderful discussion. I've learned so much on the radar, with the people, listeners have as well. Michael, final thoughts for our listeners about the Trump versus Anderson decision?

**[00:52:16.1] Michael McConnell:** Again, I'd like to end on the happy note that I tried to begin with, the unanimity with respect to the actual holding that matters in this particular case, I think is reassuring. And I do just wish that they had stopped there because the, I think the, I think it's very difficult for not legally trained people to see all this welter of opinions and they come away. I think with the conclusion that this was a much harder and more divided decision than it actually was something short, sweet, and unanimous would've been preferable.

**[00:53:02.0] Jeffrey Rosen:** Mark, last words in this great discussion are to you.

**[00:53:07.8] Mark Graber:** First thank you to Michael. And needless to say, I like that there were divisions, that people highlighted that when somebody said, Donald Trump, you are an oath breaking insurrectionists. Trump said, essentially, I'm gonna plead procedural technicalities. And most of my efforts are not going to be, to challenge that characterization, to remind people that a lawsuit is an episode, and whether and who won Trump v Anderson is not simply for the court to decide, but for the people listening to this podcast to decide. And thank you, Jeff.

**[00:53:53.9] Jeffrey Rosen:** Dear, we the people, listeners, one of the great aspects of this wonderful job that I have is that I get to learn with you from America's most thoughtful constitutional scholars of diverse perspectives about the most contested questions of the day.

Thank you so much, Michael McConnell and Mark Grabber for having shed so much light on Trump versus Anderson. Thank you.

**[00:54:14.5] Michael McConnell:** Thanks for having me.

**[00:54:16.1] Mark Graber:** Thank you.

**[00:54:22.2] Jeffrey Rosen:** Today's episode was produced by Bill Pollock, Samson Mostashari, and Lana Ulrich, who was engineered by Bill Pollock research was provided by Samson Mostashari, Cooper Smith, and Yara Daraiseh. Dear friends, 'cause I've told you about it over the past couple episodes, I've just released my new book, the Pursuit of Happiness, how Classical Writers on Virtue inspired the Lives of the Founders and Defined America. I'm so grateful to those of you who've written in and said you've read the book and liked the podcast. Please do write. If you'd like a signed book plate, I would be honored to send one to you. And let me know if you read the book. What do you think? That's [jrosen@constitutioncenter.org](mailto:jrosen@constitutioncenter.org).

**[00:55:06.4] Jeffrey Rosen:** Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of civil and illuminating constitutional debate. Sign up for the [newsletter@constitutioncenter.org/connect](mailto:newsletter@constitutioncenter.org/connect). And always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement, the devotion to the republic of reason of people from across the country who are inspired by our nonpartisan mission, supported by becoming a [member@constitutioncenter.org/membership](mailto:member@constitutioncenter.org/membership). Or give a donation of any amount, \$5, \$10, or of course, more to support our work, including the [podcast@constitutioncenter.org/donate](mailto:podcast@constitutioncenter.org/donate). On behalf of the National Constitution Center, I'm Jeffrey Rosen.