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The Law of Democratic Disqualification

Tom Ginsburg

Aziz Z. Huq

David Landau

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The Law of Democratic Disqualification

by

Tom Ginsburg, Aziz Z. Huq and David Landau

Abstract

Almost all constitutions, including our own, include one or several ways to disqualify specific individuals from political office. The U.S. Constitution, indeed, incorporates no less than four overlapping pathways toward disqualification. This power of retail disqualification stands at the heartland of the complex project of democratic rule. In practice, it works both an instrument for preserving democratic rule, and also a knife against it. This Article is the first to analyze systematically the complex positive and normative questions raised by disqualification. It offers both a positive account of the function that disqualification plays in constitutional ordering, and a normative account of the role that it should play. Drawing on domestic and comparative evidence, it then develops the blueprint of an ‘optimal’ disqualification regime. This would aim at disqualifying officials who pose a clear threat to a relatively minimalist, electorally-focused conception of democracy, while avoiding overuse for less pressing ends or, worse, abuse for antidemocratic purposes. It would contain plural pathways, calibrated to avoid the possibility of partisan arbitrage. These would lean toward the regulation of individuals rather than groups. They would not usually run directly through elected bodies. The prerequisite for disqualification would more often be stated as a rule than as a standard. And the ensuing prohibitions would more often be temporary rather than permanent. This optimal approach leads to specific reform recommendations for the U.S. context. First, we demonstrate that Section 3 of the Fourteenth Amendment should be given greater specificity and shape via statute, as Congress indeed did after the Civil War, and as it is empowered to do now via its authority to “enforce” the terms of the Reconstruction amendments. Second, we develop a case for a framework statute setting forth a judicial mechanism for enforcing the two-term limit on chief executives under the Twenty-Second Amendment. Finally, we propose decoupling impeachment and disqualification, creating two distinct institutional pathways for disqualification.

¹ Respectively, Leo Spitz Professor of Law, University of Chicago Law School; Frank and Bernice Greenberg Professor of Law, University of Chicago Law School; Mason Ladd Professor, Florida State University College of Law. Thanks to Danielle Wenger for research assistance.

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The Law of Democratic Disqualification

Introduction

On January 6, 2021, then-President Donald Trump addressed a rally on the Capitol Mall calling on his supporters to challenge Congress’s certification of Joe Biden as president. Some of those supporters broke away and attacked the Capitol. Five people died in the resulting violence. As a second impeachment and Senate trial proceeded against President Trump, a central disagreement concerned whether he should be able to stand for public office in the future.¹ The House Impeachment brief put the case for disqualification in no uncertain terms: “To protect our democracy and national security—and to deter any future President who would consider provoking violence in pursuit of power—the Senate should convict President Trump and disqualify him from future federal officeholding.”² Law professors called for the invocation of a “little known” provision in Second 3 of the Fourteenth Amendment permitting the disqualification of those who had “engaged in insurrection or rebellion” against the United States’ Constitution.³ Disqualification, some noted, would simply relegate Trump to the same status as noncitizen residents and those who became citizens via naturalization: ineligible to run, specifically, for the presidency.⁴ Others, while sympathetic to Trump’s exclusion from public office, raised concerns about how this bar would be created in practice.⁵ And some raised a worry that, whatever its practicalities, an effort to disqualify former President Trump via the Fourteenth Amendment or otherwise would be unavailing: He would simply find a proxy to run for him, wielding formidable influence through his role as de facto head of the Republican Party rather than via a formal office.⁶

As the drive to disqualify former president Trump shows, the U.S. Constitution contains a plurality of paths to cast out specific individuals from political life. The effort to disqualify Trump is but one specific instance in a long and checkered history in which disqualification mechanisms have been used for good or ill. Disqualification is also a common feature in constitutional design beyond the U.S. Constitution. Among the many examples of disqualification that can be drawn from American history and beyond are these:

¹ See, e.g., Dennis Afergut, *Impeaching Lays Groundwork for Disqualification – Even Without a Conviction*, THE HILL (Jan. 12, 2021), <https://thehill.com/opinion/white-house/533745-impeaching-lays-groundwork-for-disqualification-even-without-a-conviction>. The Constitution identifies “disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States” as a potential downstream consequence of impeachment. U.S. CONST. art. I, § 3, cl. 7.

² Trial Memorandum of the United States House of Representatives in the Impeachment Trial of President Donald J. Trump, *In re Impeachment of President Donald J. Trump* 1 (Feb. 2, 2021), available at https://judiciary.house.gov/uploadedfiles/house_trial_brief_final.pdf?utm_campaign=5706-519.

³ Bruce Ackerman and Gerald Magliocca, *Impeachment Won’t Keep Trump from Running Again. Here’s a Better Way*, WASH. POST, Jan. 11, 2021, <https://www.washingtonpost.com/opinions/2021/01/11/impeachment-wont-keep-trump-running-again-heres-better-way/>.

⁴ Richard D. Bernstein, *Lots of People Are Disqualified From Becoming President*, THE ATLANTIC (Feb. 4, 2021), <https://www.theatlantic.com/ideas/archive/2021/02/trump-disqualification-president/617908/>.

⁵ Daniel Hemel, *Using the 14th Amendment to Bar Trump From Office Could Take Years*, WASH. POST, Jan. 12, 2021, <https://www.washingtonpost.com/outlook/2021/01/12/14th-amendment-insurrection-trump-removal-problems/>. For an extended analysis, see Daniel Hemel, *Disqualifying Insurrectionists and Rebels: A How-To Guide*, LAWFARE (Jan. 19, 2021), <https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide>.

⁶ Tom Ginsburg, *Disqualification Won’t Keep Trump Out of the White House*, BALKINIZATION (Feb. 11, 2021), <https://balkin.blogspot.com/2021/02/disqualification-wont-keep-trump-out-of.html>.

- In 1870, a U.S. Attorney in Tennessee brought actions against three members of the state Supreme Court, alleging that they had given “aid and comfort” to the “traitorous organization known as the Confederate States of America,” urging that they should be removed from office.⁷ Part of a brief period of enforcement of Section 3 of the Fourteenth Amendment after the Civil War, this was one of many instances in which Confederates were disqualified from office-holding.⁸
- In January 1966, the Georgia House of Representatives declined to seat civil rights leader Julian Bond for giving “aid and comfort to the enemies of the United States and Georgia” by criticizing the Vietnam War.⁹ The U.S. Supreme Court held that the legislature’s action violated the First Amendment.¹⁰ Three years later, the Court held, on different constitutional grounds, that the U.S. House of Representatives lacked power to exclude another African-American representative, Adam Clayton Powell.¹¹
- In 2004, Lithuania’s parliament impeached President Rolando Paksas for granting citizenship to a campaign donor. Lithuania’s constitution contained no clause whereby removed presidents are permanently barred from ever running again. But when Paksas sought another term, the legislature passed a constitutional amendment prohibiting any impeached leader from competing again for office.¹²
- In 2014, Ukrainian President Viktor Yanukovich was driven from office in mass protests, and took refuge in Russia. The Ukrainian parliament passed a “lustration” law, banning those who had worked for Yanukovich from holding office for the next several years.¹³ This swept in some 2,800 people, including the former president, who were all barred from seeking future office.¹⁴
- Also in 2014, the Constitutional Court of South Korea banned the Unified Progressive Party, which espoused pro-North Korean views, on the grounds that its activities violated the basic democratic order.¹⁵ As a consequence of that party ban, five members of the National Assembly lost their seats immediately.
- Finally in 2018, former Brazilian president Luiz Inácio Lula da Silva was ruled ineligible to run in an impending presidential election due to a corruption conviction—throwing that race into

⁷ Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court*, 49 TENN B.J. 20 (2013).

⁸ Gerald N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENTARY (forthcoming 2021)(<http://dx.doi.org/10.2139/ssrn.3748639>).

⁹ *Bond v. Floyd*, 385 U.S. 116, 123 (1966).

¹⁰ *Id.* at 136-37.

¹¹ *Powell v. McCormack*, 395 U.S. 486, 510 (1969).

¹² *See, e.g.*, CONST. ANGOLA, Jan. 21, 2010, art. 127(2). [other examples from our other paper]. *But see* Case of Paksas v. Lithuania, App. No. 34932/04, Eur. Ct. H.R. (2011)(Grand Chamber) (striking down the lifetime ban as disproportionate.)

¹³ Gabriella Griecus, *Transitional Justice: Lustration and Vetting in Ukraine and Georgia*, 2 J. LIBERTY & INT’L AFF. 26, 35-36 (2019).

¹⁴ Yuliya Zabyelina, *Lustration beyond Decommunization: Responding to the Crimes of the Powerful in Post-Euromaidan Ukraine*, 6 STATE CRIME J. 55, 71 (2017).

¹⁵ Hunbeobjaepanso [Const. Ct.], Dec. 19, 2014, 26-2 Hun-Da 1 (hereafter Dissolution of the United Progressive Party case).

disarray.¹⁶ Three years later, another court annulled Lula’s conviction—again scrambling the electoral calculus.¹⁷

In each of these cases, a democratic choice was taken away from the people. In each case, disqualification was justified by reference to past acts or affiliations—not status, origin, or identity. In each instance, no matter how popular or unpopular the individuals, they could no longer play a role in domestic politics—either temporarily or permanently.

These cases show how democracies that pride themselves on broad participation in selecting leaders and broad opportunities to run for office use disqualification as a constraint on democratic possibility. They demonstrate that the power to disqualify in practice stands at the heartland of the complex project of democratic rule. Janus-faced, it is both an instrument for preserving democratic rule, and a knife for its murder.

This Article is the first to isolate and examine *democratic disqualification* as a general problem for constitutional law. We draw here on both U.S. and comparative examples to offer both a positive account of the function that disqualification *does* play in many constitutional orders, and the normative account of the role that it *should* play.¹⁸ The focus of our inquiry is a class of mechanisms for identifying and excluding specific individuals or groups, whether by discrete adjudication or general legislative rule, from public office, whether temporarily or permanently. This distinguishes “disqualification” mechanisms from the *ex ante* categorical exclusions of certain classes of persons—such as noncitizens, minors or, even more dubiously, women or racial and ethnic minorities—from public office. Disqualification is also distinct from criminal prosecution or conviction: The latter may (but need not) be an instrument for disqualification. Furthermore, political exclusion can and often is implemented through mechanisms that go well beyond the criminal justice process. This definition enables us to develop both the positive and normative implications of allowing the polity the power to police itself through targeted, or group-focused, exclusions from political power.

Our initial aim is to surface the concept of democratic disqualification as a distinct object of constitutional choice. This unifies several, otherwise disparate elements of the U.S. Constitution and lines of caselaw that have until now been analyzed discretely. We further demonstrate that the U.S. Constitution is not alone in folding in disqualification mechanisms. Around the world, constitutions employ a range of mechanisms to allow the targeted removal of individuals or groups from political life. Drawing on the Comparative Constitutions Project database of organic documents enacted since the late 1780s, we develop a more complete typology of disqualification mechanisms than the U.S. Constitution currently allows.

Turning to the normative evaluation of disqualification, we demonstrate that this power presents a specific iteration of a more pervasive problem of democratic design: the tension between

¹⁶ Shasta Darlington & Manuela Andreoni, *Brazilian Court Rules That ‘Lula’ Cannot Run for President*, N.Y. TIMES, Aug. 31, 2018, <https://www.nytimes.com/2018/08/31/world/americas/lula-president-brazil.html>.

¹⁷ Ernesto Londoño & Leticia Casado, *Brazil’s Ex-President ‘Lula’ May Run for Office Again as Court Cases Are Tossed*, N.Y. TIMES, Mar. 8, 2021, <https://www.nytimes.com/2021/03/08/world/americas/brazil-lula-supreme-court.html?searchResultPosition=1>.

¹⁸ See Tom Ginsburg, Aziz Huq, & David Landau, *The Comparative Constitutional Law of Presidential Impeachment*, 88 U. CHI. L. REV. 81 (2021).

democratic self-realization and democratic self-destruction. Democratic institutions have a reasonable claim to set the terms of political participation. The forms of elections, the rules for candidate and voter qualification, and ballot access rules are all commonly matters for democratic decision. Yet at the same time, there is a risk that the power to set rules for the democratic game will be used to fence out disfavored groups, to entrench incumbents beyond electoral challenge, and to create an image of democratic competition without its substance. The resulting tension is apparent in debates over districting, the choice of electoral systems, and the question of who becomes a citizen in the first place. There is a large literature on the question of whether and how a democratic polity can set entrance conditions on politics focused on the question of where the ‘boundaries’ of the people lie.¹⁹ Yet even as scholars in law and political theory have paid a great deal of attention to democracy’s entry conditions, *democracy’s exit conditions* have gone without serious study.

We argue that disqualification is properly understood as a power of democratic prophylaxis but also democratic destruction. Unbounded, it imperils democracy as a going concern. Absent, it means lost opportunities to deepen and defend democracy. This paradoxical quality is not unique: A democracy can benefit from many non-democratic institutions, such as election commissions, independent prosecutors, and independent constitutional courts, which all can be turned against the larger cause of democracy.

How then, should disqualification regimes be judged? The evaluation of a constitution’s disqualification rules, we argue, requires a balancing of the risk to democracy on the one hand, and the gains to be had from democratic control of individual exit on the other. It raises the question whether a constitution’s design—say, linking disqualification to impeachment and permitting group lustration of seditionists in the U.S. case—minimizes costs while maximizing benefits to democracy. Further, the justification for a specific disqualification regime is necessarily relative. It turns not just on its absolute efficacy in advancing democracy, but also on its relative efficacy in comparison to other feasible legal devices. With these considerations in mind, we conclude that well-designed disqualification rules have a place in democracy’s arsenal. But in practice many are too imprecise in operation to be effective, or insufficiently hedged with safeguards to avoid the substantial risks of abuse.

We offer a necessarily rough estimate of what an “optimal” disqualification regime might look like. In brief, it would contain multiple pathways, calibrated to avoid the possibility of partisan arbitrage from one to another. These different mechanisms would lean toward the regulation of individuals and not groups. They would usually not run directly through elected bodies. Instead, they would leverage the distinct institutional strengths of administrative agencies and courts. The substantive threshold for disqualification would more often be stated as a rule than as a standard. And, finally, the ensuing prohibitions would more often be temporary rather than permanent.

Finally, we apply our “optimum” framework as an analytic tool to improve design and practice in the United States. The U.S. already contains a surprisingly robust set of disqualification mechanisms, but the Trump example suggests that the disqualification mechanisms in the U.S. Constitution are too fragmented and cumbersome to respond to contemporary threats to democracy. Impeachment is too difficult a tool to wield, especially in light of the modern American

¹⁹ Frederick G. Whelan, *Prologue: Democratic theory and the boundary problem*, 25 NOMOS 13 (1983).

party system. The Trump example suggests that it may be all but dead as an effective disqualification tool.

Section 3 of the 14th amendment, which has received a sudden infusion of scholarly and journalistic attention, shows more promise.²⁰ We argue that it could be revitalized and improved via a carefully-crafted statute, one which would expand on and offer precision to the substantive standard, create a heavy reliance on courts rather than political actors for enforcement, so as to limit opportunities for partisan arbitrage.

We further highlight the underappreciated role of presidential term limits, entrenched in the Twenty-second Amendment, as safeguards of democracy. Presidential term limits have costs, but their rule-like character is an important advantage, especially in light of the standard-like quality of other disqualification mechanisms. They have never, however, truly been tested in the U.S., unlike in many other countries. We fear that under stress, they could prove unexpectedly fragile; we hence suggest ways in which a statute could be used to provide clarity and to bolster prospects for enforcement, were the term limit ever truly to be tested.

Many of our suggestions could be implemented without formal constitutional change. Most ambitiously, however, we suggest the attractiveness of creating a new, non-legislative pathway for disqualification, which would work alongside the existing impeachment mechanism. The aim would be to create a channel that would be less likely to fall prey to either partisan paralysis or partisan capture, and which could be keyed to a broader range of modern anti-democratic threats than Section 3's narrow, historically-bound focus on "insurrection or rebellion."

Our argument proceeds in six parts. Part I maps the existing disqualification mechanisms found in the United States Constitution. This reveals a surprising breadth of tools, but also a high degree of fragmentation across a system riddled with ambiguities and inertia. Part II situates the U.S. design in comparative context. It provides a global, comparative map of disqualification tools. This is organized around two axes – individual versus group forms of disqualification, and forward-looking versus backward-looking restrictions. This parsimonious framework allows us to explore and classify a surprisingly varied set of tools that govern individual exit from democratic competition. These include "militant democracy" bans of antidemocratic parties; lustration or purges of "tainted" officials during democratic transitions; disqualification of officials following conviction by impeachment or via analogous judicial or administrative process, and term limits. While we show that the landscape here is broad, we also suggest that there are significant problems with the way many of these tools function in practice. Part III sharpens the problem of democratic disqualification

²⁰ Ackerman and Magliocca, *supra* note 3.; Daniel Hemel, *Disqualifying Insurrectionists*, *supra* note 5 ; Magliocca, *supra* note 8; J Gerald Magliocca, *The 14th Amendment's Disqualification Provision and the Events of Jan. 6*, LAWFARE (Jan. 19, 2021), <https://www.lawfareblog.com/14th-amendments-disqualification-provision-and-events-jan-6>; James Wagstaffe, *Time to Reconsider the 14th Amendment for Trump's Role in the Insurrection*, JUST SECURITY (Feb. 11, 2021), <https://www.justsecurity.org/74657/time-to-reconsider-the-14th-amendment-for-trumps-role-in-the-insurrection/>; Philip Zelikow, *A Practical Path to Condemn and Disqualify Donald Trump*, LAWFARE (Jan. 22, 2021), <https://www.lawfareblog.com/practical-path-condemn-and-disqualify-donald-trump>; John Nichols, *Calls to Disqualify Trump Using the 14th Amendment Grow Louder*, THE NATION (Feb. 19, 2021), <https://www.thenation.com/article/politics/14th-amendment-trump-foner/>.

by applying the lens of democratic theory. Using the insights of the first three parts, Part IV elucidates a better path forward. We outline what an “optimum” disqualification regime would look like, illuminating key choices. Part V explores how the system of disqualification tools could be improved, and better appreciated, in the United States, notwithstanding the limits imposed by the constitutional text. Part VI concludes.

I. Democratic Disqualification in the U.S. Constitution

The claim that the U.S. Constitution has “undemocratic” elements no longer surprises. Much attention has trained on the structural choices within the Constitution that constrain majoritarian rule, or that facilitate minority control of the national government.²¹ Missing from this important debate on structural elements of the Constitution is an attention to the *retail* mechanisms through which particular persons or groups can be expelled or excluded from political life based on their acts or affiliations.

This Part documents those mechanisms. Federal chief executives and legislators, we show, face different institutional risks when it comes to the prospect of disqualification.²² We begin by focusing on mechanisms of political exclusion targeting the executive, and in particular the presidency: impeachment, with its disqualification sequel; the anti-insurrectionary provision of the Fourteenth Amendment; and the two-term limit for presidents. We then turn to legislative exclusion mechanisms of the kind Julian Bond experienced in Georgia. All purport to preserve democratic rule by excluding persons from office. We also show that these various disqualification mechanisms interact: Sometimes they work as substitutes. But they can also be combined. Their effects then diverge from their discrete and isolated operation.

To emphasize, our account of disqualification mechanisms does not exhaust the boundaries to democratic participation in the United States, especially with respect to voting. Pursuant to the Twenty-Sixth Amendment, persons under the age of eighteen can be excluded from the franchise.²³ More controversially, and closer to our topic, many states exclude convicted felons from political participation in ways that have the potential to be (and result from) shifts in election outcomes. We leave felon disenfranchisement to one side because it has been construed by the U.S. Supreme Court as “an affirmative sanction” for crime that is permitted under other general protections for voting in the Constitution.²⁴ Even if felon disenfranchisement is adopted because of its partisan effects,²⁵ and

²¹ See, e.g., SANFORD V. LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2008); JACOB HACKER AND PAUL S. PIERSON, *LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY* (2020). For a deployment of the same trope aimed at the Supreme Court itself, see Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of A Minoritarian Judiciary*, 11 CAL. L. REV. ONLINE 437, 438-39 (2020).

²² Because our subject is democratic disqualification, we do not address federal judges. The latter, however, are subject to a similar impeachment regime to executive branch officials.

²³ U.S. CONST. amd. XXVI.

²⁴ *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). That said, these laws, which very commonly have racist origins, impact not only the right to vote, but also the right to *run* for state office in some states. Jeff Manza, Christopher Uggen, with Angela Behrens, *The Racial Origins of Felon Disenfranchisement*, in *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 41 (2006). The same is true for state laws that prohibit voting unless all fees and fines are paid off. See Beth Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 66-67 (2019).

²⁵ Cf. Edward M. Burmila, *Voter turnout, felon disenfranchisement and partisan outcomes in presidential elections, 1988-2012*, 30 SOC. JUST. RES. 72, 73 (2017) (noting different effects before and after 2000).

as such is well understood as part of a larger toolkit of entrenchment, it is not well interpreted as a form of democracy-promoting *individual* disqualification.

A. Disqualification Following Impeachment

Perhaps the best-known vehicle for disqualification today is the impeachment process whereby the House and Senate can act against the president, other executive officials, or judges.²⁶ The best-known effect of impeachment is removal from office. But the Constitution states that conviction on an impeachment charge may have the additional consequence of “disqualification to hold or enjoy any office of honor, trust, or profit under the United States.”²⁷ Thus, Congress has the ability not only to remove officials from office via conviction for impeachment, but also to prevent them from holding certain offices again.²⁸ In this regard, impeachment offers a durable response to the threat of “tyranny, arising out of the subversion of the constitution and the accompanying destruction of republican liberty.”²⁹

Debate on post-impeachment exclusion clarifies the certainties and ambiguities of this pathway. To begin with, it is clear that the Senate is the relevant decision-making body. Less clear is the voting rule for disqualification—a simple majority rule or a supermajority rule of the sort that characterizes impeachment itself.³⁰ The scope of the disqualification clause has also been a subject of debate.³¹ It seems reasonably clear from the phrasing that it applies to federal offices, not state ones. But which? One scholar argues that disqualification applies to all executive and judicial offices (including the presidency and vice-presidency), but not legislative ones.³² Another disagrees, finding that disqualification applies only to appointed offices, but exempts *all* elected positions, such as the presidency.³³ We find implausible the notion that disqualification was intended to prevent someone being appointed as Postmaster General (Second Class) out of concern for corruption, but not to stop them rising to the White House. The text is also unclear whether conviction in an impeachment trial is a necessary prerequisite for disqualification, or whether disqualification can be achieved via other mechanisms. Indeed, it is not clear during an impeachment trial whether two distinct votes are

²⁶ See Ginsburg, Huq, and Landau, *supra* note 18.

²⁷ U.S. CONST. art. I, § 3.

²⁸ RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 72, 80 (enlarged ed. 1974).

²⁹ Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 422–23 (2010).

³⁰ See Robert J. Reinstein, *Expulsion, Exclusion, Disqualification, Impeachment, Pardons: How They Fit Together*, LAWFARE (Feb. 11, 2021), <https://www.lawfareblog.com/expulsion-exclusion-disqualification-impeachment-pardons-how-they-fit-together>.

³¹ For representative entries in this debate, see, e.g., Frank O. Bowman, III, *The Constitutionality of Trying a Former President Impeached While in Office*, LAWFARE (Feb. 3, 2021), <https://www.lawfareblog.com/constitutionality-trying-former-president-impeached-while-office>; Keith E. Whittington, *Can a Former President be Impeached and Convicted*, LAWFARE (Jan. 15, 2021), <https://www.lawfareblog.com/can-former-president-be-impeached-and-convicted>; Jed Handelsman Shugarman, *Impeach an Ex-President? The Founders Were Clear: That’s How they Wanted It*, POLITICO MAGAZINE (Feb. 11, 2021), <https://www.politico.com/news/magazine/2021/02/11/donald-trump-impeachment-ex-president-founders-468769>; Cf. Harold J. Krent, *Can President Trump Be Impeached As Mr. Trump? Exploring the Temporal Dimension of Impeachments*, 95 CHI.-KENT L. REV. 537, 538 (2020).

³² See Benjamin Cassady, *“You’ve Got Your Crook, I’ve Got Mine”: Why the Disqualification Clause does not Always Disqualify*, 32 QUINNIPIAC L. REV. 209 (2014).

³³ See Seth Barrett Tillman, *Originalism and the Scope of the Constitution’s Disqualification Clause*, 33 QUINNIPIAC L. REV. 59 (2014); see also Seth Barrett Tillman, *Who can be President of the United States? Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BR. J. AM. LEG. STUDS. 95 (2016) (interpreting the scope of the term “office under the United States”).

necessary (one on removal and a second on disqualification), or whether both questions could be bundled into the same package.

In practice, these issues remain unresolved. This is not because of the brevity of the relevant text; many other terse elements of the Constitution have generated detailed regulatory frameworks (think of the free speech clause of the First Amendment). Rather, legal uncertainty is a function of the infrequency with which disqualification has been used. Impeachment is rare in U.S. history, invocation of the disqualification clause rarer still. The House has impeached 21 times in U.S. history.³⁴ Eight of the impeached—all federal judges—were convicted by the Senate, while the others either had their proceedings discontinued following resignation, or were acquitted.³⁵ Only three (West H. Humphreys in 1862, Robert W. Archbald in 1913, and G. Thomas Porteous, Jr. in 2010) were also disqualified from future office.³⁶ In all other cases, the judge was removed, and no vote was held on whether to disqualify. In 1989, Alcee Hastings, for instance, was impeached and removed from the federal bench for allegedly accepting bribes.³⁷ He then went on to win election to the U.S. House of Representatives in 1992, where he remained until his death in office in April 2021.³⁸ The effect of impeachment alone on qualification for elective office, therefore, is akin to that of a criminal conviction: It is a nullity so far as barriers to political entry go.

With respect to procedure, the historical practice in the Senate has been to hold two separate votes, and to disqualify officials based on a simple majority once they have been convicted (and removed) via the two-thirds supermajority specified in the Constitution.³⁹ This is arguably unconstitutional. The Constitution's text does not specify a different voting threshold for the different consequences of an impeachment conviction.⁴⁰ Further, the Supreme Court has been reluctant to countenance shifts from a supermajority to a majority rule for legislative disqualification.⁴¹ It is unclear why a different rule would apply to Article II.

B. Insurrection and Disqualification

The second constitutional pathway to disqualification was little known until January, 6, 2021, but thereafter rapidly promoted as an alternative to impeachment to wield against former President Trump.⁴² It emerged from the post-Civil War cauldron of racial conflict. In 1868, the radical Republican Congress proposed, and the states ratified, the Fourteenth Amendment in response to the continued failure of the southern states to respect Black civil rights.⁴³ In April 1868,

³⁴ Ginsburg, Huq & Landau, *supra* note 18.

³⁵ See Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529, 536, 543 (2019).

³⁶ DAVID E. KYVIG, *THE AGE OF IMPEACHMENT: AMERICAN CONSTITUTIONAL CULTURE SINCE 1960*, at 31 (2008).

³⁷ *Id.* at 308-09.

³⁸ *Id.*; Cassady, *supra* note 32, at 211-14.

³⁹ See, e.g., MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 80-81 (3d ed. 2019).

⁴⁰ See U.S. Const., art. I, § 3, cls. 6-7 (“And no Person shall be convicted without the Concurrence of two-thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor.”).

⁴¹ *Powell v. McCormack*, 395 U.S. 486, 507 (1969).

⁴² Ackerman & Magliocca, *supra* note 3.

⁴³ The historical background is summarized in ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

Representative George Henry Williams (R-OR) proposed language for a constitutional amendment that would have excluded “all persons who voluntarily adhered to the late insurrection, giving it aid and comfort. . . from the right to vote for Representatives in Congress and for electors for President and Vice-President of the United States.”⁴⁴ In the Senate, this bar on voting was amended to be a bar on office holding for those had taken an oath in support of the Confederacy.⁴⁵ Section 3 of the Fourteenth Amendment (hereinafter “Section 3”) ultimately wrought a disqualification rule along the lines approved by the Senate:

No Person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.⁴⁶

As Professor Ruti Teitel observes, Section 3 is similar to lustration provisions found in other constitutions and laws around the world. These bar officials from certain offices based on activities or affiliations with some past, tainted, regime.⁴⁷ In this case, Congress aimed to bar officials who had served with the Confederacy and made war on the United States. As such, section 3 is not just an instrument of Reconstruction. It is a means of “transitional justice.”⁴⁸

Because Section 3 is relatively unfamiliar, we begin by summarizing its historical use, and then discuss its parallels and divergences from impeachment.

1. *Historical Uses*

The active history of Section 3 is significant, albeit brief. Even before the 14th amendment was ratified in 1868, Congress relied on so-called “ironclad oaths” to bar Confederates from office.⁴⁹ These oaths were sometimes narrowed by the judiciary.⁵⁰ In 1869, Justice Samuel Chase, riding circuit, answered an important question about the scope of section 3 by holding that it was not “self-executing”: It required a congressional law to take effect, and the courts would not act on their own to remove tainted officials.⁵¹ Congress passed such a law in 1870, allowing federal prosecutors to bring *quo warranto* actions against state officials covered by section 3, stating that those actions would take priority on federal dockets, and fining ineligible officials knowingly in office.⁵² Subsequently, the

⁴⁴ BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 116 (1914).

⁴⁵ Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 CONN. L. REV. 1069, 1106 (2017).

⁴⁶ U.S. CONST. amend. XIV, § 3.

⁴⁷ RUTI G. TEITEL, TRANSITIONAL JUSTICE 152 (2000).

⁴⁸ *See id.*

⁴⁹ *Id.* at 154.

⁵⁰ *See Ex Parte Garland*, 71 U.S. 333 (1866).

⁵¹ *See Griffin's Case*, 11 F. Cas. 7 (1869).

⁵² *See Magliocca, supra* note 8, at 33-34.

Grant administration used the Enforcement Act of 1870 and related statutes against a number of officials, including three members of the Tennessee Supreme Court and the state Attorney General.⁵³

Yet the half-life of disqualifications under this act turned out to be fleeting. Almost immediately, Congress began passing many private bills, using the two-thirds supermajority to exempt thousands of former Confederates from being disqualified.⁵⁴ In 1872, as the Ku Klux Klan was conducting a campaign of racial terror across the South, Congress passed a sweeping amnesty that lifted most war-related disabilities, except for those who had held a few very high offices before the Civil War.⁵⁵ Repeal's proponents argued that the laws had not achieved their goals; attempts to tie the amnesty to new civil rights legislation failed.⁵⁶ The iron-clad oath laws were also repealed.⁵⁷ This broad amnesty legislation echoed Congress's broader retreat from Reconstruction in 1877.⁵⁸

The largely-dormant and “vestigial” section 3, as we have discussed, gained new life after the January 6, 2021, storming of the US Capitol, and the ensuing impeachment of former President Trump for his role in that event. Many commentators called for the use of section 3 as an alternative to disqualification by impeachment, particularly after it became clear that the votes would not be there for a conviction in the Senate impeachment trial.⁵⁹ It was the fact that Section 3 achieves the same end-state of disqualification via radically different channels than impeachment that made it appealing.

2. *Comparison to Impeachment*

Section 3, like impeachment, aims to defend a larger democratic order. Whereas impeachment is a prophylaxis against threats *internal* to the governing apparatus, Section 3 supplies a response to the problem of *external* threats to the federal government. Hence, Section 3's disqualification rule differs in key ways from disqualification by impeachment. As a result, it is at best a partial substitute for impeachment. At the same time, its potential for destabilizing repercussions is perhaps more pronounced than that of the impeachment mechanisms. To see this, consider four key differences between these two paths to disqualification, and their significance.

First, Section 3 likely applies to a narrower range of conduct than impeachment, but a broader range of officials. The terms “insurrection or rebellion” and “aid and comfort” are likely more targeted than the “treason, bribery, or other high crimes and misdemeanors” triggers for impeachment.⁶⁰ Even on a minimalist reading of the impeachment clause, the substantive range of

⁵³ See *id.* at 35. Subsequent debates about Section 5, however, did not touch on Section 3. Christopher W. Schmidt, *Section 5's Forgotten Years: Congressional Power to Enforce the Fourteenth Amendment Before Katzenbach v. Morgan*, 113 NW. U. L. REV. 47, 58-82 (2018) (discussing congressional debates in early twentieth century, including on anti-lynching and anti-poll tax measures).

⁵⁴ See Magliocca, *supra* note 8, at 39.

⁵⁵ Amnesty Act, ch. 193, 17 Stat. 142 (1872).

⁵⁶ See Magliocca, *supra* note 8, at 53.

⁵⁷ See TEITEL, *supra* note 47, at 155.

⁵⁸ See Magliocca, *supra* note 8, at 54.

⁵⁹ See Magliocca, *supra* note 20 (“A review of the basic parameters of Section 3 suggests it is the best legal framework available for addressing the extraordinary events at the Capitol with respect to the eligibility of participants to hold public office.”); see also Wagstaffe, *supra* note 20; Zelikow, *supra* note 20.

⁶⁰ U.S. CONST., art. II, § 4.

offenses meriting conviction would extend to a larger set of crimes than Section 3.⁶¹ The first insurrection statute was enacted in 1790.⁶² The language of “aid and comfort” tracks one kind of treason identified in Article III.⁶³ The former, however, may be limited to instances of disloyalty in favor of an enemy *state*.⁶⁴ Given the context of its adoption, Section 3 is best read to apply whenever an enemy of “the Constitution” is given aid and comfort, whether or not an enemy state is implicated. Unlike impeachment, however, Section 3 cannot plausibly be limited to a subset of federal officials. It covers a large swathe of both federal and state officers.

Second, Section 3 is categorical where impeachment is individualized. It contemplates disqualifying officials who comprise the prohibited category of having engaged in insurrection or rebellion against the United States. It applies to *any* person who has previously taken an oath to support the United States, whether as a federal or state official, with the necessary relationship to the insurrection. There is also no plausible argument that, like the impeachment power, it is triggered solely by an act covered by a criminal statute. Notwithstanding the limited concern of its drafters with Reconstruction,⁶⁵ Section 3 is framed in general and prospective terms. It applies not solely to the Confederacy but to any subsequent insurrection; it contains no sunset clause and remains part of the constitutional text. Depending on how it is used, it is either an “enduring expression of the historical politics that shaped the identity of the American Union”⁶⁶ or a “vestigial part[] of the constitution”⁶⁷ otherwise in desuetude. Further, it applies not only to incumbent officials. Rather, it suffices that a person has (a) at one point in time taken a covered oath to the Constitution, and (b) engaged in a prohibited act, whether or not they were in office at the time.

Third, Section 3 lacks even a scintilla of detail concerning the process of disqualification, particularly in respect to executive branch officials.⁶⁸ Even though the impeachment provisions leave many questions unresolved, they at least identify the relevant decision-maker and a decision rule. One possibility is that Section 3’s application is automatic: It requires no process because it operates directly on persons. This interpretation, while in harmony with the original operation of Section 3, raises due process and perhaps bill of attainder concerns. An alternative, more plausible construction gives Congress authority to determine how Section 3 is enforced. Section 5 of the Fourteenth Amendment vests Congress with authority to enforce “by appropriate legislation, the provisions of this article.”⁶⁹ On its face, this gives Congress discretion over the enforcement of Section 3.

⁶¹ A source of continuing disagreement about impeachment concerns its application to conduct for which there is no applicable criminal statute. *See, e.g.*, Raoul Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1139 (1974) (discussing and rejecting President Nixon’s lawyers’ argument that the impeachment clause extends only to statutory offenses).

⁶² Act of Jun. 5, 1794, ch. 50, § 1, 1 Stat. 381-82. Insurrection is also a state law offense, used in the early twentieth century against political radicals. *See, e.g.*, *Herndon v. State*, 174 S.E. 597, 612 (Ga. 1934).

⁶³ U.S. CONST. art. III, § 3 (“Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort.”).

⁶⁴ Charles Warren, *What Is Giving Aid and Comfort to the Enemy*, 27 YALE L.J. 331, 333 (1918) (arguing that “giving aid and comfort is generally committed in connection with a war waged against the United States by a foreign power”).

⁶⁵ Maggs, *supra* note 45, at 1106.

⁶⁶ *See id.* at 154.

⁶⁷ *See Magliocca, supra* note 8.

⁶⁸ As we explain below, there is an express constitutional power of expulsion from one of the two legislative Houses that provides an obvious procedural channel for insurrectionary legislators. *See infra* Part I.D.

⁶⁹ U.S. CONST. amd. XIV, § 5.

Although the Supreme Court has narrowed Congress's enforcement discretion with respect to the identification of rights under Section 1 of the Fourteenth Amendment,⁷⁰ Congress would seem to have sufficient leeway to opt for either some regularized mechanism for Section 3 disqualification, or, alternatively, a more ad hoc approach by which Congress itself would vote on specific disqualifications. But the latter reading is in tension with Article I's prohibition on bills of attainder.⁷¹ Assuming that Section 3 disqualification does require a congressional law laying out the overarching process, it is nevertheless procedurally distinct from impeachment. There is, for example, no requirement that individual decisions about disqualification must run through Congress. And there is no good reason for thinking that the voting rule must be supermajoritarian. Congress could hence create a wholly judicial procedure initiated by a U.S. attorney or other official. Alternatively, it could create an administrative structure akin to denaturalization, in which an administrative adjudication was subject to judicial review.⁷²

Fourth, the consequences of Section 3 are more extensive than the consequence of disqualification by impeachment. Under Section 3, disqualification extends to both federal and state offices. Federal impeachment can yield a bar to holding any "office of honor, trust or profit under the United States," but it cannot preclude future *state* office holding.

Nevertheless, the invocation of Section 3 in anticipation and response to a failed presidential impeachment underscores the important possibility that Section 3 disqualification might be invoked as a substitute for post-impeachment disqualification. This constitutional redundancy is salient because of the supermajority voting rule for conviction after impeachments. In periods of strong partisan polarization, such as our own, this voting threshold will often be difficult to attain. Where it applies, Section 3 does not require the identification of a criminal prohibition on point. In addition, Section 3 disqualification makes a larger swathe of the nation's political offices unavailable to the targeted individual or group. To understand the scope of constitutional disqualification, therefore, it is at a minimum necessary to hold both mechanisms in view simultaneously.

C. Term Limits

In October 2017, Barack Obama launched into a speech for a gubernatorial candidate in New Jersey when the audience began chanting "four more years." Obama replied, "I will refer you both to the Constitution as well as to Michelle Obama to explain why that will not happen."⁷³ The Twenty-Second Amendment to the United States Constitution, indeed, states that "[n]o person shall

⁷⁰ *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) ("Accordingly, § 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" (citation omitted)).

⁷¹ U.S. CONST. art I, § 9, cl. 3.

⁷² *See* 8 U.S.C. § 1451(e) (2018) (providing for denaturalization when a citizen has been convicted of knowing procurement of naturalization by fraud). The government has the burden of proving fraud in the acquisition of citizenship, and "the facts and the law should be construed as far as is reasonably possible in favor of the citizen." *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

⁷³ *See* CBC News, *Barack Obama Greeted with Chants of "four more years" at campaign rally*, YouTube (Oct. 20, 2017), https://www.youtube.com/watch?v=_wIgoZXNjOQ. In fact, on the first day of President Obama's term in office a resolution was introduced in Congress to amend the Constitution to do away with term limits. *See* H.R.J. Res. 5, 111th Cong. (2009).

be elected to the office of the President more than twice.”⁷⁴ As conventionally glossed, the Twenty-Second Amendment means that any president who has served for two full terms is thereafter subject to a permanent ban on again holding the presidency.

The U.S. Constitution’s presidential term limit is singular. Other federal officials, including members of Congress and federal judges, cannot constitutionally be subject to a term limit. The Court invalidated a state law imposing term limits on members of Congress on the ground that it added qualifications beyond those found in Article I.⁷⁵ Judicial term limits have been proposed, but are considered constitutionally questionable because of their conflict with textual protections from removal.⁷⁶ In contrast, many states impose term limits on their state legislatures (15) and governors (36).⁷⁷

For most of U.S. history, there were no explicit term limits even on presidents. In Federalist 72, Alexander Hamilton argued against presidential term limits. He contended that indefinite reelection would be advantageous since it allowed an experienced president to deploy his or her expertise, and that desire for reelection would help to ensure good behavior lacking in a lame duck.⁷⁸ Instead, George Washington initiated a norm that presidents would serve no more than two terms in office.⁷⁹ After Franklin D. Roosevelt swept past that informal norm in the 1940 (and 1944) election, Congress and the states acted to formalize a two-term limit via passage of the Twenty-Second Amendment.⁸⁰

In using a two-term limit on presidents, the U.S. is in good company. An overwhelming majority of presidential and semi-presidential systems around the world now have presidential term limits.⁸¹ The U.S. approach of two terms followed by an absolute bar on reelection is the modal choice worldwide.⁸² In contrast, the U.S.’s fairly quiescent history of compliance with the presidential term limit is somewhat unusual. Globally, evasion attempts are quite common, and often succeed.⁸³ This raises the question whether the Twenty-Second Amendment would be an effective constraint

⁷⁴ U.S. CONST. amend. XXII, §1. The Amendment goes on to say that “no person who has held the office of President or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.” *Id.*

⁷⁵ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

⁷⁶ Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSP. 119 (2021).

⁷⁷ See *The Term-Limited States*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Nov. 12, 2020), <https://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx>; *Which States Have Term Limits on Governor?*, US TERM LIMITS, (<https://www.termlimits.com/which-states-have-term-limits-on-governor/>).

⁷⁸ THE FEDERALIST No. 72 (Alexander Hamilton).

⁷⁹ KYVIG, *supra* note 36, at 325; Congress did consider imposing presidential term limits several times before they were enacted. See Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?* 7 CONST. COMM. 61, 63-64 (1990).

⁸⁰ See *id.* at 68. Stathis argues that party politics played a role, and notes that Republicans spearheaded the initiative, with virtually all the opposition coming from parts of the Democratic party. See *id.* at 68-69.

⁸¹ See Rosalind Dixon & David Landau, *Constitutional End Games: Making Presidential Term Limits Stick*, 71 HASTINGS L.J. 359, 372 tbl.1 (2020); Tom Ginsburg & Zachary Elkins, *One Size Does Not Fit All: The Provision and Interpretation of Presidential Term Limits*, in THE POLITICS OF PRESIDENTIAL TERM LIMITS 37 (Alexander Baturro & Robert Elgie eds., 2019).

⁸² Dixon & Landau, *supra* note 81, at 372; Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM & MARY L. REV. 1807 (2011).

⁸³ See Mila Versteeg et al., *The Law and Politics of Presidential Term Limits Evasion*, 120 COLUM. L. REV. 173 (2020).

on a White House incumbent determined to serve more than eight years by either legalistic sleight of hand or brute force.

Obviously, term limits produce a different kind of disqualification from either impeachment or Section 3. To begin with, both the latter have a negative connotation, whereas term limits constrain politicians who have done such a good job that they might otherwise continue in office. Unlike impeachment and Section 3, which are more backward-looking, term limits are a forward-looking prophylaxis. Moreover, the Twenty-Second Amendment draws the class of affected persons far more narrowly: They reach no more than a handful of people at any one time, and there is little uncertainty about their identities.

Yet like Section 3 and impeachment, the Twenty-Second Amendment safeguards the democratic character of the polity. It is a shield against an incumbent president entrenching herself beyond democratic correction. A second similarity is the absence of remedial specification. Like Section 3, the Twenty-Second Amendment set out no process for its enforcement. At least until now, the Amendment has been self-enforcing: Presidents such as Reagan, Clinton and Obama who won two terms have not tried to find workarounds to term limits. But what if a two-term president simply refused to leave office? Would it make a difference if that person had won in the Electoral College? Could a federal court enjoin them from taking the oath of office?

One plausible view is that “the Supreme Court would [not] invalidate the election of a candidate to a third term even now, with the Amendment on the books; the Court might regard the validity of the election as a kind of political question, to be determined through the electoral process.”⁸⁴ The absence of past circumvention efforts means that it is hard to know now which institution—the Electoral College, state legislatures, or the certifying Congress—would have the task of resisting an attempted violation of the Twenty-Second Amendment.

A further difficulty arises because the circumstances of evasion might vary quite dramatically from case to case. In particular, it is possible to imagine such attempts having the imprimatur of an election victory, or being in derogation of the apparent result.⁸⁵ Thus, it is hard to generalize about the political circumstances in which presidential term limits violations would play out—and hence the best institutional response.

D. Legislative Exclusion and Expulsion

The impeachment and term limit provisions apply to the federal executive branch alone. Section 3 applies to both the president and legislators. There is also a set of exclusionary possibilities that pertain solely to legislators. Again, these operate alongside—perhaps as substitutes, perhaps as complements—to the powers created by impeachment, Section 3, and term limits.

Two relevant powers merit attention here. First, each House of Congress has power to act as “Judge” of its members “Qualifications.”⁸⁶ These are “defined and fixed in the Constitution, and are

⁸⁴ David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1494–95 (2001).

⁸⁵ Or a victory in the popular vote, but not the Electoral College, or vice versa. The range of combination of possible outcomes is daunting to encompass.

⁸⁶ U.S. CONST. art. I, §5.

unalterable by the legislature.”⁸⁷ In 1965, the Supreme Court enjoined an effort by the House to prevent Rep. Adam Clayton Powell from being seated on the basis of alleged criminal conduct.⁸⁸ *Powell* holds that Congress cannot supplement the Constitution’s list of prerequisites for legislators as a means of disqualifying those selected by the voters. The matter of Julian Bond, in contrast, hedges the power of state legislators to decline to seat members by invoking the First Amendment.⁸⁹ Both cases concerned largely white chambers’ efforts to keep African-American representatives from being seated in a moment of civil-rights activism and public turmoil. Both, therefore, are properly read as reflecting the Warren Court’s awareness of the way in which racial dynamics warped facially neutral governmental processes.

Second, both the House and Senate have the power to “expel” their own members by a two-thirds vote.⁹⁰ The exclusion and the expulsion power are tightly linked. But after *Powell*, the chamber must specify up front whether it is voting for exclusion or expulsion: Having teed up an exclusion vote (which requires the identification of a constitutional ground upon which to penalize a member), the chamber cannot switch gears and claim it was expelling.⁹¹ That is, exclusion by supermajority vote is not a freely available substitute for expulsion: A House must instead turn square corners if it wants to defy the voters’ will in selecting a particular person. Many successful expulsions occurred during the Civil War to remove pro-Confederate members.⁹² But these exercises of the expulsion power have not generated a clear precedential legacy. Unlike the exclusion power, the expulsion power does not have a clear scope.

The powers of congressional exclusion and expulsion interact in rich and ambiguous ways with the impeachment and Section 3 powers. Expulsion is an obvious means to apply Section 3’s prohibition to insurrectionary legislators. Under *Powell*, a legislator who had participated in an uprising against the Constitution could not be denied her seat at the threshold on the basis of past insurrection. But she could be expelled by a supermajority vote. This raises the intriguing, and hardly implausible, possibility that a legislator might be seated by necessary force of law, with a vote to expel failing when it achieves more than a majority but less than a supermajority. The higher vote threshold for legislative exclusion on grounds of insurrection implicit in this scheme has implications for the process that might be employed for executive officials: If a supermajority rule is constitutionally mandated for insurrectionary legislators, why should a lower voting threshold be used for those in the executive branch? That is, notwithstanding the breadth of Congress’s Section 5 power to implement the Fourteenth Amendment’s terms, could the details of Article I offer an implicit procedural floor for Article II?

E. The Constitutional Matrix of Democratic Disqualification

⁸⁷ THE FEDERALIST No. 60, at 398-99 (Alexander Hamilton).

⁸⁸ *Powell v. McCormack*, 395 U.S. 486, 548 (1969) (holding that age, residency, and citizenship are the only qualifications by which the houses may judge members under their Article I, Section 5 judging powers).

⁸⁹ *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966).

⁹⁰ U.S. CONST. art. I, § 5.

⁹¹ For an argument that an expulsion cannot be a basis of a subsequent refusal to seat a member, see Dorian Bowman & Judith Farris Bowman, *Article I, Section 5: Congress’ Power to Expel—An Exercise in Self-Restraint*, 29 SYRACUSE L. REV. 1071, 1090-92 (1978).

⁹² 1 Hinds’ Precedents of the House of Representatives §§ 448-52 (1908).

This Part has identified and explored five intersecting pathways of democratic disqualification created in the U.S. Constitution: impeachment, Section 3 of the Fourteenth Amendment, presidential term limits, legislative exclusion, and expulsion. These mechanisms generate a range of ways in which individuals can be excluded from democratic office; Section 3 even adds a possible group-based disqualification.

Despite this rich constitutional framework, the law of democratic disqualification is surprisingly impoverished. Impeachments, exclusions, and expulsions are all rare events in American history. Whatever the law, the moral force of an individual's claim to office based on electoral victory seems to have had a powerful insulating effect. The net result is a paucity of "historical gloss" that could clarify ambiguity.⁹³ In particular, the procedural channels by which disqualification occurs remain highly uncertain. In the context of the second Trump impeachment and other responses to the January 6, 2021 Capitol riot, this uncertainty may have had meaningful consequences: It might have thwarted responses that would otherwise have been taken in response to those events. Inaction begets uncertainty, which in turn begets inaction.

The American law of democratic disqualification, in short, remains radically incomplete. It cries out for supplement and context through broader study. With that in mind, the next Part widens the analytic lens to develop a more general theory of disqualification in democracies.

II. The Comparative Law of Democratic Disqualification

Disqualification is as old as democracy itself. The Cleisthenic democracy of fifth-century Athens had a procedure called *ostraka*.⁹⁴ Once a year, the Assembly was asked whether it wished to conduct an ostracism. If the Assembly assented, votes would be cast by placing an ostraka, or potsherd, scratched with the name of one citizen who would be exiled from the polis for ten years (but not deprived of property or name). One day, Aristides the Just, having commanded navies against the Persian host, was stopped by an illiterate fellow citizen, and asked for help spelling the name "Aristides" for an ostraka. On being asked why by the puzzled general, the ignorant citizen explained: I'm sick of hearing him called the just.⁹⁵

Today, disqualification is employed with (we hope) greater wisdom by a number of democratic polities to safeguard democracy. This Part analyzes this comparative experience to provide a more comprehensive account of disqualification's possibilities, and to situate the American experience. We begin by offering a simple typology of disqualification strategies by identifying two main design choices—a group versus an individual approach; and then the decision whether to focus upon past actions or future threat. With this framework in hand, we identify four permutations. This yields a simple matrix of costs and benefits associated with disqualification.

A. A Map of Disqualification Rules

⁹³ Indeed, "historical practice is most commonly invoked in connection with debates over the scope of presidential power." Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417 (2012).

⁹⁴ PAUL CARTLEDGE, *DEMOCRACY: A LIFE* 70-71 (2016).

⁹⁵ *Id.* at 71.

Disqualification rules are ubiquitous in modern democracies but come in different forms. This Part maps out the major kinds of disqualification rules found in modern constitutions. Our aim is to highlight the richness of the field and the many different ways constitutional democracies have grappled with the same problem.

Table 1 provides a basic typology of the rules found in diverse constitutional, organized along two design margins. First, disqualification rules can operate either on the *group level*, or on the *individual level*. That is, they can either disqualify actors en masse, because of membership in a certain party or affiliation with a discredited regime. Or they can work more at the retail level, focusing on the conduct and characteristics of the individual actor at issue. The U.S. Constitution mainly operates at the individual level, with the exception of Section 3. The latter usefully demonstrates the possibility of ambiguity across the group/individual boundary.

Second, disqualification rules can be *backward-looking*, focusing on the prior acts of an individual or group, or *future-focused*, seeking to identify organizations or actors that pose ongoing and serious threats to constitutional stability. This distinction between punitive and deterrence functions, of course, is imperfect: even where a measure is future-regarding, its application will nevertheless turn on past actions. But the latter are important because they predict future anti-democratic acts. The distinction, familiar from the criminal law, is a useful heuristic.

Table 1: Disqualification Rules in Modern Constitutions		
	Backward looking (focused on bad past conduct)	Forward looking (focused on future threat)
Group/Wholesale	Lustration rules	Militant democracy provisions - party bans
Individual/Retail	Disqualification as a consequence of impeachment	Term limits; retirement ages

We consider each of these categories in turn. By drawing on the deeper well of comparative experience, we can identify empirical regularities in the manner in which each mechanism operates, and more robust normative implications than the minimal U.S. experience can support. To be sure, we also recognize other important design decisions. To supplement our parsimonious taxonomy, we flag three other design margins worth noting: *substantive scope* (the basis for disqualification); *temporal reach* (how long disqualification lasts); and *mechanism* (who decides on disqualification and under what decision rule). The distinctive costs and benefits of democratic disqualification, in each case, shape the way in which choices along these three design margins play out.

B. Lustration: Group-Based, Retrospective Disqualification

Many transitional democracies have some kind of lustration rules “screening,” “barring,” or even removing candidates from “public office” based on their association with a prior regime.⁹⁶ The latter is characterized as “tainted” in some fashion.⁹⁷ By nature, lustration is often an instrument of political transitional justice: Appropriate in extraordinary circumstances such as the wake of civil wars or authoritarian regimes, it is harder to justify during times of “normality” given rule-of-law and due-process objections.⁹⁸

Lustration is closely associated with the transition from Communism after the Iron Curtain fell. In the Czech Republic, for example, some fifteen thousand individuals were removed or barred from public office.⁹⁹ In the eastern portion of reunified Germany, lustration under reunification treaty provisions resulted in some 54,926 people being removed or barred from office.¹⁰⁰ It has also been used in post-invasion Iraq and elsewhere.¹⁰¹ The obvious domestic U.S. analogue to these measures is Section 3, targeting Confederate supporters.¹⁰² Unlike the American example, however, lustration programs elsewhere have been implemented in concerted and sustained ways. That experience hence provides a clearer perspective on the practical and normative questions that ensue.

The best-understood lustration policies are those deployed in post-Communist Eastern Europe in the 1990s.¹⁰³ Despite the many similarities among countries in the former eastern bloc, these nations adopted diverse approaches to Communist collaborators and officials. In some, such as Czechoslovakia (and later in the Czech Republic) and the Baltic states, robust lustration measures disqualified those who had carried out certain functions within the old regime, such as informing for the secret police, from certain state functions within the new order.¹⁰⁴ Other countries adopted less draconian measures. A newly-unified Germany, for example, did not automatically disqualify those who had served as secret informants for the former East German regime. Instead, it subjected them to a process that evaluated their fitness to serve on a case-by-case basis.¹⁰⁵ Similarly, Hungary and Romania did not disqualify *en masse*. Officials instead had a choice of resigning and keeping records secret, or staying in their positions and having them released.¹⁰⁶ In Poland, officials were asked to confess whether or not they cooperated with the security apparatus of the old regime; only those who made *false* denials were disqualified.¹⁰⁷ Bulgaria and Albania opted for limited or no lustration.¹⁰⁸

⁹⁶ Jens Meierhenrich, *The Ethics of Lustration*, 20 ETHICS & INT’L AFF. 99, 99 (2006).

⁹⁷ See Adam Czarnota, *Lustration, Decommunisation and the Rule of Law*, 1 HAGUE JOURNAL ON THE RULE OF LAW 307, 326-327 (2009).

⁹⁸ For a summary, see Cynthia M. Home, *International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context*, 34 LAW & SOC. INQUIRY 713, 716-17 (2009).

⁹⁹ Natalia Letki, *Lustration and Democratisation in East-Central Europe*, 54 EUROPE-ASIA STUD. 529 (2002).

¹⁰⁰ Katy A. Crossley-Frolick, *Sifting Through the Past: Lustration in Reunified Germany*, in LUSTRATION AND CONSOLIDATION OF DEMOCRACY AND THE RULE OF LAW IN CENTRAL AND EASTERN EUROPE 197, 208-09 (2007).

¹⁰¹ Meierhenrich, *supra* note 96, at 101.

¹⁰² See *supra* Part I.C.

¹⁰³ MONIKA NALEPA, AFTER AUTHORITARIANISM (forthcoming 2022).

¹⁰⁴ See Czarnota, *supra* note 97, at 319-22, 326-28.

¹⁰⁵ See A. JAMES MCADAMS, JUDGING THE PAST IN UNIFIED GERMANY 64-65 (2001).

¹⁰⁶ See ROMAN DAVID, LUSTRATION AND TRANSITIONAL JUSTICE: PERSONNEL SYSTEMS IN THE CZECH REPUBLIC, HUNGARY, AND POLAND (2011); Czarnota, *supra* note 97, at 325-26.

¹⁰⁷ See ALEKS SZCZERBIAK, POLITICIZING THE COMMUNIST PAST: THE POLITICS OF TRUTH REVELATION IN POST-COMMUNIST POLAND (2018).

¹⁰⁸ Home, *supra* note 98, at 718.

Considerable debate rages as to which of these approaches was most effective at achieving goals such as building trust in government, promoting social reconciliation, or preventing the “demoral[ization]” that ensues when those in power under an old regime remain in office despite complicity with past wrongs.¹⁰⁹

Regardless of these differences in approach, the design of lustration mechanisms implicates common challenges. A first concerns the range of activities under the old regime that lead to disqualification, and the range of positions from which one is disqualified. In practice, legislatures tend to draw such boundaries narrowly, sometimes increasingly so over time. At times, courts have further narrowed definitions. Respecting those who have been listed as collaborators in the files of secret police forces, courts and administrative actors have often found that merely being named on a list is not enough for disqualification; there needs to be evidence of a person’s activities on behalf of the regime.¹¹⁰ Further, regimes often circumscribe the range of posts from which a lustrated official is disqualified relatively narrowly, to include only certain high positions. As a result, even under more aggressive regimes such as that of the Czech Republic, the actual number of barred officials appears to be (relatively) small in relation to the potential set of former officials.¹¹¹

A major driver of the relative narrowness of lustration measures is practical: Successor regimes often face shortages of qualified personnel.¹¹² And while lustration may send an important signal about the moral commitments of a new regime,¹¹³ overly broad lustration risks seeming vindictive and may even hinder reconciliation, if the prior regime’s social basis was significant. The U.S.’s “de-Baathification” policy after the 2003 Iraq war has become a prominent symbol of the dangers of casting too broad a net.¹¹⁴ Initially, the US disqualified all members of the ruling Baath party without inquiring into individuals’ motives or activity. Later, the occupying coalition switched to a more discretionary model, but damage had already been done.¹¹⁵ Iraq lost much of its capacity across the security services and other areas of the state. De-Baathification inevitably tracked key cleavages in Iraqi society.¹¹⁶ This helped to fuel an insurgency in the years after the initial U.S. invasion.

A second, related design question is temporal: How long should lustration endure? In some cases, the temporal scope is explicit. Bulgaria, for example, passed a lustration law imposing a five-year ban on certain kinds of Communist collaborators from holding core offices; in Lithuania the period covered by the lustration law was ten years.¹¹⁷ But despite their temporal stops, regimes

¹⁰⁹ Eric A. Posner & Adrian Vermeule, *Transitional Justice As Ordinary Justice*, 117 HARV. L. REV. 761, 808 (2004); Nalepa, *supra* note 103.

¹¹⁰ See MCADAMS, *supra* note 105, at 79.

¹¹¹ See DAVID, *supra* note 106.

¹¹² Posner & Vermeule, *supra* note 109, at 777.

¹¹³ See, e.g., Aysegül Keskin Zeren, *From de-Nazification of Germany to de-Baathification of Iraq*, 132 POL. SCI. Q. 259, 261 (2017) (explaining how de-Baathification in Iraq was justified by comparisons to the Nazi regime).

¹¹⁴ See Cherish M. Zinn, *Consequences of Iraqi De-Baathification*, 9 CORNELL INT’L AFF. REV. (2016); JAMES P. PFEFFNER, *US BLUNDERS IN IRAQ: DE-BAATHIFICATION AND DISBANDING THE ARMY* 76 (2010).

¹¹⁵ See DAVID, *supra* note 106; David Pimentel & Brian Anderson, *Judicial Independence in Postconflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy*, 46 GEO. WASH. INT’L L. REV. 29, 33 (2013) (noting that in the Iraqi context, “lustration [ran] the risk of interfering with the independence of the judiciary by allowing politically-motivated lustration proceedings to threaten and coerce judges”).

¹¹⁶ Zeren, *supra* note 113, at 276-77.

¹¹⁷ See Adam Czarnota, *Lustration, Decommunisation and the Rule of Law*, 1 HAGUE JOURNAL ON THE RULE OF LAW 307, 326-327 (2009). Note that the Bulgarian law was struck down on other grounds. See *id.*

sometimes seem to struggle to contain them. Whereas in the U.S., federal authorities quickly ended disqualification of most former Confederates, across Eastern Europe, lustration and the communist legacy shapes political debate to this day. In the Czech Republic, lustration rules were initially put in place with a time limit; they have been continuously extended.¹¹⁸ According to one perceptive observer, the country's exclusionary approach to lustration created a culture where social actors became accustomed to such exclusions as an ordinary part of public administration.¹¹⁹ In other words, the program became quasi-permanent well after the bureaucracy itself had been effectively cleansed of the worst hold-overs from the *ancien regime*.

A different dynamic seems at work in Poland. Lustration was applied later and in a weaker fashion. Used only to disqualify officials who falsely stated that they had not been collaborators, the lustration rule was further narrowed by the Polish Constitutional Court and ordinary judiciary to ensure compliance with due process.¹²⁰ These judicial interventions fed a political movement, associated with the Law and Justice Party, for more aggressive action. Indeed, the current administration, which is viewed as driving democratic erosion in Poland, has made anti-communism into an important rallying cry to “purge” the judiciary and other institutions alleged to still be “tainted.” Recent moves weakening judicial independence, for example, were defended by the government in part as necessary “anti-communist” measures. The government has defended its actions by saying that Poland previously “lack[ed] a practical method to hold to account judges who were directly and shamefully involved with the communist system,” and that this failure “negatively affects the public trust in the judiciary –and thus the rule of law itself.”¹²¹

A third design margin concerns enforcement mechanisms. Jurisdictions use both administrative officials and judges, and apply either unified or variegated standards. In Germany and the Czech Republic, officials conducted initial screenings after consulting state security service files, with a possibility of ex post judicial review.¹²² In Germany, courts often reversed dismissals, narrowing the scope of acts for which someone could be disqualified.¹²³ Different German states, however, applied widely different standards, with some (such as Saxony) taking an aggressive approach, while others were far more restrained.¹²⁴ In Poland, by contrast, a special lustration court, modelled on criminal adjudication in many respects, had initial responsibility for disqualification.¹²⁵ After criticism that it was unduly slow and too favorable to the accused, the Polish Parliament in 2007 assigned primary responsibility for lustration to an administrative body, the Institute of National Remembrance, with more limited possibilities of judicial review and a broader remit.¹²⁶ This new

¹¹⁸ See David, *supra* note 106.

¹¹⁹ See *id.*

¹²⁰ See, e.g., Trybunał Konstytucyjny [Polish Constitutional Tribunal] May 11, 2007, Constitutional Case K2/7, Jurisprudence of the Constitutional Court (narrowing a major amendment to the law); Trybunał Konstytucyjny [Polish Constitutional Tribunal] May 28, 2003, Constitutional Case K 44/02 (striking down an amendment to the law); Trybunał Konstytucyjny [Polish Constitutional Tribunal] Oct. 26, 2005 K 31/04 (holding that former security service personnel had a right to see their own files).

¹²¹ Chancellery of the Prime Minister, White Paper on the Reform of the Polish Judiciary 13 (2018), available at <https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chancellor-white-paper-3-18.pdf>.

¹²² MCADAMS, *supra* note 105, at 74.

¹²³ *Id.* at 77.

¹²⁴ *Id.* at 75.

¹²⁵ SZCZERBIAK, *supra* note 107; see Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 LAW & CONTEMP. PROBS. 181, 192-94 (1997).

¹²⁶ See Ellis, *supra* note 125, at 192-94.

body's proponents argued that the change would accelerate lustration; critics complained of politicization and a loss of due process.¹²⁷

While the sheer diversity of its forms belies any easy inference, certain conclusions do emerge from this survey. First, like disqualification mechanisms in the U.S., lustration in practice often proves narrower than its formal scope might suggest. Practical and political concerns limit its operation. Second, where lustration has been widened, as in Iraq, it has interacted with ongoing political fissures in socially and politically damaging ways. Only when narrowly focused does it seem to advance its goal of facilitating transitions. Finally, the tendency of lustration regimes to linger points to a risk that what is initially intended to be tightly circumscribed to a transitional period ends up leaching out into "ordinary" politics. Transitional mechanisms can help ensure that legacy officials are not too "tainted" by association with the old regime. But a tightly limited and sunsetted mechanism will work best to this end, while minimizing spillover disruptions into ordinary politics.

C. Militant Democracy/Party Bans: Group-Based, Prospective Disqualification

German jurist and refugee from Nazi rule Karl Loewenstein coined the term "militant democracy" shortly before World War II. He aimed to capture the idea that a democratic system might take proactive steps to thwart anti-democratic actors seizing power from within.¹²⁸ The term has come to encompass "the use of legal restrictions on political expression and participation to curb extremist actors in democratic regimes."¹²⁹ Nazi use of tools such as legislative prorogation and rule by emergency decree loomed large for scholars such as Loewenstein, whose ideas went on to influence constitutional designers in Germany and beyond.¹³⁰ Today, militant democracy's most important institutional form is the ban on anti-democratic parties, deployed at various times in Germany, Finland, Czechoslovakia, Korea, France, Spain, and the United Kingdom.¹³¹ Although not formally a bar against specific persons' participation in politics, a party ban is often *de facto* a disqualification of known individuals. We start here by outlining core historical experiences with this instrument, and then once more draw out the way in which its design illuminates both costs and benefits of disqualification.

The *primus inter pares* of militant democratic constitutional provisions is Article 21 of the 1945 Basic Law promulgated in West Germany after World War II. Pursuant to this provision, political "[p]arties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional."¹³² Further, all parties' "internal organization must conform to democratic principles"; their use of funds must also be transparent.¹³³

¹²⁷ *See id.*

¹²⁸ The two key articles are Karl Loewenstein, *Militant Democracy and Fundamental Rights I*, 31 AM. POL. SCI. REV. 417 (1937), and Karl Loewenstein, *Militant Democracy and Fundamental Rights II*, 31 AM. POL. SCI. REV. 638 (1937).

¹²⁹ Giovanni Capoccia, *Militant Democracy: The Institutional Bases of Democratic Self-Preservation*, 9 ANN. REV. L. & SOC. SCI. 207, 207 (2013).

¹³⁰ *See, e.g.*, Jan-Werner Müller, *Militant Democracy*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1253 (Michel Rosenfeld & Andras Sajó, eds., 2012).

¹³¹ Capoccia, *supra* note 129, at 209.

¹³² Grundgesetz [GG] [Basic Law] art. 21(2), translation at <http://www.gesetze-im-internet.de/>.

¹³³ *Id.*

The Constitutional Court has power to enforce Article 21.¹³⁴ In 1951, the federal government asked the Constitutional Court to ban both the Socialist Reich Party and the Communist party. In the Socialist Reich Party case of 1952, the Court acted quickly and with relative ease.¹³⁵ It found that the party's platform leaned heavily on former Nazi ideas and imagery, that the party recruited unrepentant former Nazis to fill its ranks, and that it was organized in a top-down, undemocratic manner. In essence, the Court found, the party was an attempt to revive a totalitarian Nazi-like regime. The Court had more difficulty in the Communist Party case, which came down four years later. It ultimately upheld the ban in a long, detailed opinion.¹³⁶ The Court focused on the ideological goal of the party. It held that its ultimate ambition for a Communist dictatorship of the proletariat was inconsistent with fundamental values in the German Basic Law, including human dignity and multi-party democracy, even if pursued via constitutional means. Lurking in the background of the decision, of course, was the threat posed by then-Communist East Germany.

After these decisions, Article 21's party-ban mechanism fell into desuetude. The only cases filed in recent years have been two attempts to ban a new far-right party, the National Democratic Party (NDP). The first foundered in 2003 on procedural ground.¹³⁷ In the second, in 2017, the Court reached the merits and denied the petition.¹³⁸ It held that the NDP indeed had an anti-constitutional platform, which aimed to create an exclusively ethnically-based National State that rejected liberal democratic values. Even though the platform was anti-constitutional, the Court concluded that there was no need for a ban, because the prospects of the party actually achieving its aims were slight. So doing, it rejected its earlier view in the Communist Party case that a party need not have a realistic near-term prospect of achieving its aims to be banned.

The NDP holding has potential ramifications for any extension of Article 21's prohibitory scope. In March 2020, the Federal Office for the Protection of the Constitution ("BfV") classified the Alliance for Germany ("AfD") party as "not compatible with the Constitution."¹³⁹ A year later, AfD was placed under electronic surveillance by the BfV.¹⁴⁰ The agency's underlying report stated that a "substantial portion of the party ... seeks to awaken or strengthen a fundamental rejection of the German government and all other parties and their representatives."¹⁴¹ Many use "Nazi-era insults like 'Volksverräter' when discussing their political competitors, a racially laden term which essentially means 'traitor to your own people.'"¹⁴² In light of this evidence, and given the AfD's consistent

¹³⁴ *Id.* art 21(2); Müller, *supra* note 130.

¹³⁵ BVerfGE, 1 BvB 1/51, Oct. 23, 1952,

<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/1952/bvg52-059.html>. For discussion, see Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1431-32 (2007).

¹³⁶ 5 BVerfGE 85, Aug. 17, 1956.

¹³⁷ See Thilo Rensmann, *Procedural Fairness in a Militant Democracy: The "Uprising of the Decent" Fails Before the Federal Constitutional Court*, 4 GERMAN L.J. 1117 (2003).

¹³⁸ BVerfG, 2 BvB 1/13, Jan. 17, 2017,

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/01/bs20170117_2bvb000113.html.

¹³⁹ Katrin Bennhold, *Germany Places Part of Far-Right Party Under Surveillance*, N.Y. TIMES, Mar. 12, 2020, <https://www.nytimes.com/2020/03/12/world/europe/germany-afd.html>.

¹⁴⁰ *Id.*

¹⁴¹ Jörg Diehl et al., *German Officials Seek to Turn up the Heat on the AfD*, DER SPIEGEL (Mar. 5, 2021), <https://www.spiegel.de/international/germany/monitoring-the-right-wing-german-officials-seek-to-turn-up-the-heat-on-the-afd-a-c44c0a38-ec6b-4dc1-ac94-9fbee59b706f>.

¹⁴² *Id.*

resistance to moderation, an exercise of Article 21 power seems a feasible subsequent step.¹⁴³ The NDP case’s predicate of “potentiality,” moreover, would be far easier to satisfy in respect to the AfD, which became the largest opposition party in the Bundestag in 2017.

From its German roots, the militant-democratic idea of party bans has diffused around the world.¹⁴⁴ Some 29 percent of constitutional courts have the ability to adjudicate the legality or constitutionality of political parties.¹⁴⁵ Party bans have been imposed recently across regions and contexts, from Spain and Turkey to Israel and South Korea.¹⁴⁶ For example, in 2014, a Korean court disqualified the United Progressive Party, a small left-wing party, citing alleged links with North Korea, at the behest of former president Park Geun-Hye, after affiliates were arrested for an alleged plot with North Korea.¹⁴⁷ The idea of party bans has gained international-law recognition.¹⁴⁸ The modern U.S. approach, where party bans stand in clear tension with the First Amendment, is exceptional, not the rule.¹⁴⁹

A militant democracy regime, like a lustration regime, entails a set of design decisions that determine its scope and manner of operation. Choices for the calibration of these design margins turn on the costs and benefits of party-focused disqualification. Article 21 of the German Basic Law and many other militant democratic provisions are durable rather than transitional. On the one hand, it might be argued that such provisions should be rationed in the same way as lustration rules—and cabined to transitional periods in which democracy is “fragile.”¹⁵⁰

Party bans present many of the same design choices as lustration. A first question, as with lustration, is scope: What should the substantive trigger be for a prohibition? And who should it affect? The first question is relatively straightforward in a democracy’s early years, when the ‘anti-canonical’ party is likely to be easily identified based on the nature of the preceding regime. Hence the ease of the 1952 Socialist Reich Party decision. Over time, the question of how to identify a threat to democracy—as opposed to the manifestation of a substantial portion of public opinion with a legitimate claim to voice—becomes more difficult. Exacerbating the problem, modern authoritarian

¹⁴³ Article 21 also forbids officials from “interven[ing] in the electoral campaign in favor or to the detriment of a political party.” Thomas Kliegel, *Freedom of Speech for Public Officials vs. the Political Parties’ Right to Equal Opportunity*, 18 GERMAN L.J. 189, 203-04 (2017). Criticism by the federal minister of education of AfD has been found to violate that rule. *Id.* at 203-04. The creates an odd dynamic in which ministers cannot criticize a political party but a domestic intelligence agency can investigate it, and then move to have it proscribed.

¹⁴⁴ See Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1, 38 (1995) (finding that “some form of party prohibition procedure is common to most democratic systems”).

¹⁴⁵ See Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1443 tbl.1 (2008).

¹⁴⁶ See, e.g., Basic Law: the Knesset § 7A (1958) translated in ISRAEL’S WRITTEN CONSTITUTION (5th ed. 2006) (excluding from the electoral arena any party that rejects the democratic and Jewish character of the state, as well as any party whose platform is deemed an incitement to racism); Víctor Ferreres Comella, *The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batasuna*, in MILITANT DEMOCRACY 133, 133-34 (András Sajó ed., 2004).

¹⁴⁷ Hunbeobjaeopanso [Const. Ct.], Dec. 19, 2014, 26-2 Hun-Da 1.

¹⁴⁸ Fox & Nolte, *supra* note 144, at 69-70 (finding that “the international community is not hopelessly divided on the problem of anti-democratic actors”).

¹⁴⁹ See Issacharoff, *supra* note 135, at 1415; Miguel Schor, *Militant Democracy in America*, INT’L J. CONST. L. BLOG (Feb. 16, 2021), <http://www.iconnectblog.com/2021/02/militant-democracy-in-america/> (arguing that “militant democracy runs counter to contemporary American views of free speech”). Even in U.S. law, there is an exception for speech coordinated within foreign terrorist organizations. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25 (2010).

¹⁵⁰ Issacharoff, *supra* note 135, at 1421.

parties tend to have more ambiguous ideologies.¹⁵¹ Their aims are not flagrantly anti-democratic; instead they seek to win power through democratic means, and then use their power to consolidate their position, effectively tilting the electoral playing field in their favor. The relatively ‘mainstream’ nature of modern authoritarian threats makes them challenging to ban and raises the prospect of errors in both directions.

Hence, the 2014 South Korean opinion on the United Progressive Party was criticized for not correctly applying the proportionality analysis by questioning whether the party’s alleged aims were realistically achievable or sufficiently “imminent.”¹⁵² There are two overlapping rationales for such a risk requirement.¹⁵³ First, banning a party unlikely to inflict damage is not worth it, and second, a ban might make the situation worse, for example by driving the party’s supporters and financing networks underground.¹⁵⁴

Any forthcoming adjudication in Germany about AfD will also be explosively difficult. It may well be that AfD both reflects the preferences of a substantial minority of the German electorate, and also that it disdains and will predictably act against the systemic institutional foundations of electoral democracy. Either banning or permitting AfD’s operation would impose substantial strains on democratic institutions. It would burden the “legitimate interests in participation” that even antidemocratically inclined citizens possess.¹⁵⁵ Deciding which is more costly places immense epistemic burdens on the BfV and the German Constitutional Court. The uncertainty and difficulty attendant upon the decision makes it much easier for officials acting in bad faith to misuse the disqualification authority.

Then there is the question of temporal scope. Militant democracy provisions are generally part of the permanent constitutional order, and are not transitional. But the risk of their abuse might increase as time elapses because the merits of its application will become harder to settle over time. However, the threat to democratic order will not necessarily decline over time. A convergence of political dynamics and structural constitutional features might provoke unexpected recursions of the threat after a constitutional order has matured.¹⁵⁶ An important question is how courts and other actors should treat these provisions as time goes on: Should party bans be read more restrictively to account for increasing regime stability (as the German Constitutional Court has done), or should they be given a static meaning that makes bad-faith manipulation more difficult?

Further, just as with lustration, there is a question of what the downstream consequences of the prohibition ought to be, and how long they should last. In some countries, a ban of a party only

¹⁵¹ See Tom Gerald Daly & Brian Christopher Jones, *Parties Versus Democracy: Addressing Today’s Political-Party Threat to Democratic Rule*, 18 INT’L J. CONST. L. 509 (2020); David Landau, *Abusive Constitutionalism*, 47 UC DAVIS L. REV. 189, 219-220 (2013).

¹⁵² See Jongcheol Kim, *Dissolution of the Unified Progressive Party Case in Korea: A Critical Review with Reference to the European Court of Human Rights Case Law*, 10 J. E. ASIA & INT’L L. 139, 147-50 (2017).

¹⁵³ Geliijn Molier & Bastiaan Rijpkema, *Germany’s New Militant Democracy Regime: National Democratic Party II and the German Federal Constitutional Court’s ‘Potentiality’ Criterion for Party Bans*, 14 EUR. CONST. L. REV. 394 (2018).

¹⁵⁴ See *id.* at 399.

¹⁵⁵ ALEXANDER S. KIRSHNER, *A THEORY OF MILITANT DEMOCRACY: THE ETHICS OF POLITICAL EXTREMISM* 4 (2014).

¹⁵⁶ Paul Pierson and Eric Schickler, *Madison’s Constitution Under Stress: A Developmental Analysis of Political Polarization*, 23 ANN. REV. POL. SCI. 37, 38-39 (2020) (developing that argument for the U.S. context).

covers the party itself, not the individuals comprising it. This is true in Germany, where the Constitutional Court has held that mere membership in a proscribed party or organization is insufficient to ban someone from politics or the civil service.¹⁵⁷ In South Korea, however, the Court held that the effect of its decision stripped five legislators of the banned party of their seats.¹⁵⁸ It noted that while the constitution itself was silent on this issue, failing to remove the legislators would mean that the Court had not fully protected the constitutional order.¹⁵⁹ Similarly, in Turkey when the Court banned the Welfare Party in 1998, it removed the party's parliamentary members from their seats and banned them from founding or joining any political party for five years.¹⁶⁰

Finally, and again parallel to the lustration context, there is a question of mechanism. Precisely because party-banning is such a sensitive function, it is often given to Constitutional Courts, not left to administrative actors or ordinary courts.¹⁶¹ But there are contexts where critics have raised concerns that the machinery is being unfairly targeted against minority groups. The risks here of majoritarian tyranny are close to the surface. The most well-known such cases stem from Turkey, where Kurdish parties have often been banned by the Constitutional Court.¹⁶² Reviewing these bans, the European Court of Human Rights has often reversed them, finding them unjustified or disproportionate. In 2010, the ECHR hence ruled that a ban on the Kurdish People's Democracy Party was inconsistent with the European Convention because the party was merely critical of the regime, without actually advocating armed resistance or violence.¹⁶³

Even in cases where party bans are not targeted at discrete ethnic minorities or similar groups, there are still risks of misuse. In the extreme, a ban can be used to remove a pro-democratic party, rather than inhibit an anti-democratic one. Consider a 2013 case from Cambodia. There, the Constitutional Court, acting at the behest of the ruling party, banned the upstart opposition Rescue Party on the fabricated ground that it was linked to foreign actors (the U.S.) and somehow posed a threat to the "liberal multi-party democracy."¹⁶⁴ Ironically, the decision's effect was to sink the only opposition party, stripping it of all 55 of its seats, and banning its leaders from politics for five years. In the subsequent election of 2018, the ruling party won all 125 seats in the National Assembly.¹⁶⁵

The difficulty posed by each of these design decisions is compounded by the fact that militant democracy simply might not work. In Turkey, Islamist parties were banned numerous times in the 1970s, 1980s, and 1990s, but nonetheless managed to reform each time. By the time the Welfare party was banned in 1998, it was the single largest party in Parliament and its leader served as prime minister.¹⁶⁶ The Court held that the party violated constitutional provisions on secularism because of

¹⁵⁷ Muller, *supra* note 130.

¹⁵⁸ Dissolution of the United Progressive Party, *supra* note 15, at 169.

¹⁵⁹ *Id.* at 167-69.

¹⁶⁰ Refah Partisi v. Turkey, 2003-II Eur. Ct. H.R. 20.

¹⁶¹ See Ginsburg & Elkins, *supra* note 81.

¹⁶² See Issacharoff, *supra* note 135, at 1440-42.

¹⁶³ See HADEP and Demir v. Turkey, Eur. Ct. Hum. Rts., App. No. 28003/03 (2010).

¹⁶⁴ Supreme Court of Cambodia, Plenary of Trial Chamber, Nov. 16, 2017, Verdict No. 340.

¹⁶⁵ See *Cambodia Top Court Dissolves Main Opposition CNRP Party*, BBC NEWS (Nov. 16, 2017), <https://www.bbc.com/news/world-asia-4200682>; Hannah Beech, *Cambodia Re-elects its Leader, a Result Predetermined by One*, N.Y. TIMES, July 29, 2018, <https://www.nytimes.com/2018/07/29/world/asia/cambodia-election-hun-sen.html>.

¹⁶⁶ Refah Partisi, *supra* note 160.

its Islamic bent, and the ECHR upheld the prohibition.¹⁶⁷ Although much of its leadership was banned, affiliates would subsequently found the Justice and Development Party in 2001. After being nearly banned itself in 2008, the latter became Turkey's dominant party. It has taken the country in an increasingly authoritarian direction.¹⁶⁸ The Turkish experience may suggest a limit on the ability of mass disqualification and militant democracy to repress movements with genuine popular support within a democracy. Designers can perhaps slow the emergence of such a movement – acting as a speed bump¹⁶⁹ – but not delay it indefinitely.

Concern about the efficacy of party bans has led constitutional designers to develop a set of 'softer' mechanisms. Hence, in Germany, following the failure to ban the NDP, parliamentary leaders pushed through an amendment that added new sections to Article 21. In part, these new provisions allow the state to deny government funding to any parties that have an anti-democratic platform, regardless of the probability or imminence requirement that animated the 2017 Constitutional Court decision.¹⁷⁰ Denial of public funding—especially crucial in Germany—may be a lesser but still potent alternative to a ban.¹⁷¹ Israel illustrates another alternative. Its legal order creates a gap between the dissolution of a party and a prohibition on its running for political office, requiring parties to meet a higher standard for the latter.¹⁷² As a result, a political system may allow space for some parties organized around even “reprehensible” ideas to exist and recruit, while still denying them the right to seek elected office.¹⁷³

D. Impeachment and Other Forms of Individual, Retrospective Disqualification

Whereas lustration and militant-democracy party bans operate against groups, impeachment-linked disqualification rules are often applied in individual cases. Recent comparative studies of impeachment address its substantive scope and its mechanism choices, and provide a baseline empirics of its substantive scope and procedural vehicles.¹⁷⁴ After briefly summarizing what is known about impeachment, we focus upon a question previous work has not addressed: How is the choice to disqualify either linked to, or decoupled from, the mechanism for removal from office?

1. *Impeachment Regimes*

Almost all (90 percent) of constitutions with a presidency speak to impeachment.¹⁷⁵ The substantive scope of impeachment varies. Crimes and constitutional violations supply the most common bases for removal.¹⁷⁶ Although the procedural parameters of impeachment vary greatly

¹⁶⁷ *See id.*

¹⁶⁸ Meltem Müftüleri-Baç & E. Fuat Keyman, *Turkey Under the AKP: The Era of Dominant-Party Politics*, J. DEMOCRACY 87 (Jan. 2012).

¹⁶⁹ *See* Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606, 615 (2015) (developing the idea of law as a speed bump or deterrent, rather than an absolute prohibition).

¹⁷⁰ *See* Molier & Rijpkema, *supra* note 153, at 406-08.

¹⁷¹ *See id.* at 408 (noting that parties in Germany “are highly dependent on state funding” and questioning whether this would in fact be a “de facto party ban”).

¹⁷² *See* Issacharoff, *supra* note 135, at 1449-50.

¹⁷³ *See id.*

¹⁷⁴ *See* Ginsburg, Huq & Landau, *supra* note 18.

¹⁷⁵ *Id.* at 117.

¹⁷⁶ *Id.* at 127.

among different national constitutions, it is typically a lower legislative chamber that begins an impeachment by a supermajority vote.¹⁷⁷ Ex post judicial review is often, but not always, available.¹⁷⁸ As in the United States, successful impeachment globally is quite rare. One recent study found “between 1990 and 2018 ... at least 210 proposals in 61 countries, against 128 different heads of state,” but only ten successful removals.¹⁷⁹ The evidentiary basis for analyzing disqualification is correspondingly thin.

Within this array of choices about the substantive, temporal, and procedural parameters of impeachment, we focus on the decision whether to link impeachment and disqualification, and if so, in what fashion. Unlike the relative convergence in comparative constitutional design in respect to impeachment, there is sharp disagreement over the connection between removal and disqualification of individual political malefactors. Disqualification is not always even a potential consequence of impeachment. Some constitutions limit its effects to removal alone, leaving open the possibility of a subsequent run.¹⁸⁰ On the other extreme, some constitutions make disqualification an *automatic* consequence of impeachment alongside removal.¹⁸¹ Yet others allow (but do not require) the relevant institution to impose disqualification as a supplemental penalty for impeachment.¹⁸² Finally, some constitutions are simply unclear about the relationship between impeachment, removal, and disqualification.

The Brazilian Constitution, for instance, permits the Senate to remove a convicted official from office and also to deprive them of political rights, including the right to hold office, for eight years. Yet the Brazilian constitution is ambiguous on whether or not both consequences automatically apply upon conviction.¹⁸³ During the 2016 impeachment trial of President Dilma Rousseff in 2016, the Senate decided to vote separately on these two questions. Its choice was endorsed by the President of the Supreme Federal Tribunal, who was presiding over the trial.¹⁸⁴ The Senate then voted to remove Rousseff by a 61 to 20 vote, comfortably exceeding the two-thirds needed. But the disqualification vote was closer—42 to 36—falling short of the needed two-thirds margin. In consequence, Rousseff remained free to run for future office (and indeed ran unsuccessfully for a Senate seat in 2018).¹⁸⁵ The Rousseff example is a reminder of how the voting rule can be a dispositive factor.¹⁸⁶ It also suggests that the decision to *split* voting into separate removal

¹⁷⁷ *Id.* at 129.

¹⁷⁸ *Id.* at 131-32.

¹⁷⁹ *Id.* at 118.

¹⁸⁰ *See, e.g.*, CONST. S. KOREA, Jul. 17, 1948, art. 65(4) (“A decision on impeachment shall not extend further than removal from public office.”); CONST. PARAGUAY, 1992, art. 225 (stating that an impeachment trial has “the sole purpose of removing [officials] from their offices”).

¹⁸¹ *See, e.g.*, CONST. OF ANGOLA, Jan. 21, 2010, art. 127 (“Conviction shall lead to removal from office and disqualification from standing for another term of office.”); CONST. CHILE, Sept. 11, 1980, art. 53(1) (“On the declaration of culpability, the accused is removed from his position and he cannot hold public function, whether of public election or not, for a period of five years.”).

¹⁸² *See, e.g.*, CONST. OF ARGENTINA, Aug. 22, 1994, art. 59.

¹⁸³ BRAZ. CONST, Oct. 5, 1988, art. 52; For discussion, *see* Alexandra Rattinger, *The Impeachment Process of Brazil: A Comparative Look at Impeachment in Brazil and the United States*, 49 U. MIAMI INTER-AM. L. REV. 129, 155 (2018).

¹⁸⁴ *See* Rattinger, *supra* note 183, at 155.

¹⁸⁵ *See Brazil's Former Leader Rousseff Fails in Bid for Senate Seat*, FRANCE 24 (Aug. 10, 2018), <https://www.france24.com/en/20181008-brazils-former-leader-rousseff-fails-bid-senate-seat>; Rattinger, *supra* note 183, at 145.

¹⁸⁶ The same lesson follows from *Powell v. McCormack*, 395 U.S. 486, 548 (1969).

and disqualification decisions can have outcome-determinative effects. That is, had legislators been forced to decide simultaneously on whether to remove *and* disqualify Rouseff, it is possible they would have reached a different outcome on the former question.¹⁸⁷

Where impeachment and disqualification are decoupled, the latter question may be channeled through administrative or judicial channels. We offer detailed accounts of the specific nonlegislative vehicles used in Pakistan, Israel, and Colombia. In these cases, substitutes for impeachment have been much more utilized than those countries that rely primarily on the relatively rare mechanism of impeachment. It is possible this is explained in terms of these countries' pervasive distrust of political actors, as well as a highly active judiciary. But it is also possible that the choice of institutional channel influences the rate of disqualification. We then introduce the more general possibility of hitching disqualification to a criminal conviction.

2. *Individual Disqualification Outside Impeachment*

Under section 7A of *Basic Law: the Knesset*, the legislature can prevent candidates from running for office if they engage in speech denying the Jewish and democratic nature of the state, inciting racism, or supporting the armed struggle of a state or terrorist organization against Israel.¹⁸⁸ The same procedure is used for party and individual bans using a central election committee comprising current legislators and a supreme court judge. In application, it has sometimes been deployed against far-right Jewish candidates who incite hatred against Arabs.¹⁸⁹

Supplementing this channel, Israeli courts have adopted an aggressive program of removing officials and blocking appointments based on a judge-made concept of “good character.”¹⁹⁰ Israeli law on the books disallows officials from serving in office upon conviction, but the Supreme Court has gone further to deem officials ineligible from remaining in or holding office if currently under indictment.¹⁹¹ More broadly, the Court has prohibited appointments within the government or military based on behavior showing poor character (such as sexual harassment) even where no criminal charges were filed.¹⁹² In such decisions, it has relied on administrative and disciplinary records, as well as other sources. A number of recent petitions targeted media statements made by prospective appointees as potential grounds for disqualification.¹⁹³ Professor Yoav Dotan shows that disqualification is becoming more frequent: there were 18 cases in the 1990s; 25 in the 2000s, but 21 in the first half of the 2010s alone.¹⁹⁴

¹⁸⁷ See Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1413-14 (2016) (analyzing this phenomenon in terms of Arrobian cycling).

¹⁸⁸ § 7(A), *Basic Law: the Knesset* (1958) (amend. 1985). The Knesset also has the power under Section 42A(3) of *Basic Law*, by a three-quarters supermajority, to expel a member if he incites racism or supports an armed struggle against the state.

¹⁸⁹ For discussions, see Gur Bligh, *Defending Democracy: A New Understanding of the Party-Banning Phenomenon*, 46 VAND. J. TRANS. L. 1321 (2013); Rivka Weill, *On the Nexus of Eternity Clauses, Proportional Representation, and Banned Political Parties*, 16 ELECTION L. J. 237 (2017); Suzie Navot, *Fighting Terrorism in the Political Arena: The Banning of Political Parties*, 14 PARTY POLITICS 745 (2008); Raphael Cohen-Almagor, *Disqualification of Lists in Israel (1948-1984): Retrospect and Appraisal*, 13 LAW & PHIL. 43, 43-45 (1994).

¹⁹⁰ See Yoav Dotan, *Impeachment by Judicial Review: Israel's Odd System of Checks and Balances*, 19 THEORETICAL INQUIRIES 705 (2018).

¹⁹¹ *Id.* at 727.

¹⁹² *Id.* at 723.

¹⁹³ *Id.* at 723.

¹⁹⁴ Data on file with authors.

Similarly, the Pakistani Supreme Court has relied on Article 62(1)(f) of the 1973 Constitution barring persons who are not “honest” and “righteous” from Parliament and Provincial Assemblies.¹⁹⁵ In 2017, the Court invoked this article to remove and disqualify then-Prime Minister Nawaz Sharif after his name was disclosed among the Panama Papers.¹⁹⁶ The Court found Sharif unfit for office because he had failed to disclose an employment relationship and assets from a Dubai-based company on his nomination documents.¹⁹⁷ The Court subsequently held that Sharif could not lead the ruling Pakistan Muslim League party because a disqualified official cannot head a political party.¹⁹⁸ Other officials have been disqualified on similar grounds. In a subsequent decision reviewing petitions filed by 17 former officials in 2018, the Court held that disqualification under Article 62(1)(f) constituted a permanent, lifetime bar from seeking office.¹⁹⁹

Colombia uses an independent administrative actor, the General Procurator, to make decisions on democratic suspensions, removals, and disqualifications. The General Procurator can act on the basis of corruption or the incompetent performance of duties. For example, in 2013, the Procurator removed Bogota mayor Gustavo Petro for botching the reverse privatization of garbage collection in the city, banning him from seeking office for fifteen years. The incompetence-based charges hinged on the allegation that Petro had used operators with insufficient experience to do the job as well as violating rights of free enterprise.²⁰⁰ While Petro was removed from office, the decision was appealed, and eventually reversed by the Council of State in 2017 on the grounds that the Procurator had shown insufficient evidence of bad intent.²⁰¹ This left Petro free to run for president in 2018, when he was the runner-up. In 2020, the Inter-American Court of Human Rights held that the Procurator’s conduct and the process used impinged on Petro’s rights under a regional human rights accord.²⁰² Nonetheless, the Procurator remains an enormously powerful figure. Removals and disqualifications continue apace. Between July 1, 2019 and June 30, 2020, the Procurator’s office took disciplinary action against 152 mayors, 113 councilors, and one governor, with about one-third being disqualified for some period of time.²⁰³ Accounting also for unelected officials, the Procurator’s disciplinary chamber issued 703 first-instance decisions imposing sanctions in that period.²⁰⁴

¹⁹⁵ CONST. PAKISTAN, Apr. 12, 1973, art. 62(1)(f). (“A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless...he is sagacious, righteous and non-profligate, honest and ameen, there being no declaration to the contrary by a court of law.”).

¹⁹⁶ Imran Ahmed Khan Niazi vs Mian Muhammad Nawaz Sharif, (2017) PLD (SC) 265.

¹⁹⁷ *Id.*

¹⁹⁸ See Kay Johnson and Asif Shahzad, *Pakistan Supreme Court Rules Ousted PM Sharif Cannot Lead his Party*, REUTERS (Feb. 21, 2018), <https://www.reuters.com/article/us-pakistan-politics/pakistan-supreme-court-rules-ousted-pm-sharif-cannot-lead-his-party-idUSKCN1G51NX>.

¹⁹⁹ See Sani Ullah Baloch v. Abdul Karim Nousherwani & others, (2018) PLD (SC) 405.

²⁰⁰ See, e.g., *Procuraduría General de La Nación, Procuraduría General de la Nación confirma fallo de destitución e inhabilidad por 15 años al alcalde Mayor de Bogotá, Gustavo Petro Urrego, por irregularidades en la implementación del nuevo modelo de aseo en la ciudad de Bogotá*, PROCURADURIA GENERAL DE LA NACION (Jan. 13, 2014), https://www.procuraduria.gov.co/portal/Procuraduria-General_de_la_Nacion_confirma_fallo_de_destituci_n_e_inhabilidad_por_15_anos_al_alcalde_Mayor_de_Bogota__Gustavo_Petro_Urrego__por_irregularidades_en_la_implementaci_n_del_nuevo_modelo_de_aseo_en_la_ciudad_de_Bogot_.news.

²⁰¹ See *Sanción anulada: Petro arrolló a Ordóñez en el Consejo de Estado*, SEMANA (Nov. 15, 2017), <https://www.semana.com/nacion/articulo/anulan-sancion-a-petro-en-el-consejo-de-estado/547323/>.

²⁰² See *Petro Urrego v. Colombia*, Inter-A. Ct. H.R. (ser. L) No. 5 (Jul. 8, 2020), available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_406_esp.pdf.

²⁰³ Procuraduria General de la Nación, Informe de Gestion 2019/2020, at 25 tbl.2.1, 2.2 (2020).

²⁰⁴ *Id.* at 14, tbl.1-1.

Finally, consider the possibility of linking disqualification to *any* criminal conviction. As noted above, Israel compels convicted officials to resign by law, and in Pakistan, certain criminal convictions require a five-year ban.²⁰⁵ More generally, some 35 countries (18%) today do not allow *any* felon to become head of state.²⁰⁶ 15 of 134 (11%) that have a separate head of government have the same restriction. 51 countries (28%) today restrict felons from serving in the lower house of the legislature, while 27 of 85 (32%) of those with an upper house have the same restriction.²⁰⁷ In many U.S. states, convicted felons cannot run for or hold elected office.²⁰⁸ However, the Constitution appears to prohibit such a restriction for federal office; the Supreme Court has held that Article I sets forth exclusive qualifications for becoming a member of Congress (or, presumably, President).²⁰⁹

Of course, the criminal-process channel can be abused for incumbency-protection ends, which might potentially lead to the political capture of prosecutorial agencies.²¹⁰ Vladimir Putin's Russia, for example, has become notorious for sidelining and discrediting political opponents via selective use of tax laws and other financial crimes.²¹¹ Prominent opposition figure Alexei Navalny, for instance, was disqualified from challenging Putin for the presidency based on an (allegedly sham) 2014 fraud conviction.²¹²

²⁰⁵ See CONST. PAKISTAN, Apr. 12, 1973, art. 63.

²⁰⁶ Data from the Comparative Constitutions Project (CCP), <https://comparativeconstitutionsproject.org/>.

²⁰⁷ See *id.* The Dominican Republic and Mexico have the same restriction for the Chief Justice, while eight countries (Afghanistan, Bolivia, Colombia, DR, Honduras, Myanmar and Panama) do so for the Supreme Court. Maldives, the Dominican Republic, and Myanmar do the same for all judges. Finally, seven countries (Bolivia, Colombia, Congo, DR, Haiti, Myanmar and Thailand) foreclose felons from serving on the Constitutional Court. See *id.*

²⁰⁸ See CONST. MICH. art. VIII; CONST. VA. art. II, §1, 5 (holding that felons may not vote or stand for elected state or local office unless their civil rights have been restored).

²⁰⁹ See *Powell v. McCormack*, 395 U.S. 486 (1969) (holding that the House of Representatives can only exclude an elected member for a reason stated in the constitution – having at least 25 years of age, having been a citizen for 7 years, and being an inhabitant of the state they represent).

²¹⁰ Aziz Z. Huq, *Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design*, 65 UCLA L. REV. 1506 (2018).

²¹¹ See, e.g., Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1708-09 (2015).

²¹² See *Alexei Navalny has been Disqualified from the Presidential Race*, FREE RUSSIA (Dec. 25, 2017), <https://www.4freerussia.org/alexei-navalny-disqualified-presidential-race/>.

3. *Implications*

Individualized, retroactive disqualification occurs across an impressively array of institutional forms and on a varied set of substantive bases. Yet despite the heterogeneity of these individualized, retrospective regimes, a number of conclusions can be drawn concerning design choices and their implications from this survey. In some contexts, they suggest the underappreciated value of using independent non-legislative bodies, albeit designed so as to avoid political capture.

First, the most important design parameter is the mechanism for applying disqualification. Perhaps surprisingly, moving disqualification decisions outside elected bodies is correlated with increases in the rate of disqualification. Contrary to the concern that elected actors would use disqualification as an instrument for entrenchment, it seems that reposing a discrete and individualized disqualification power in the legislature generates a *détente*, or a fear-based equilibrium: The focused threat of retaliation against whoever opens the possibility of individualized removal induces all to keep their powder dry. In contrast, non-elected actors labor under no parallel disincentive dampening the active deployment of disqualification powers. Where disqualification is understood to be a tool for promoting “public trust in government,”²¹³ reliance upon judicial or administrative rather than parliamentary actors may reduce the perception, and even the risk, of insider self-dealing. Because legislative disqualification is not a credible signal of commitment to the rule of law, it generates less value to the democratic system, and as such is observed less often. It may well be a self-defeating constitutional design choice.

Second, the question whether removal and disqualification should be subject to different voting rules remains undertheorized. It tends to be resolved in an ad hoc fashion in other constitutional systems, just as in the United States. Yet, as the Rouseff impeachment demonstrates, the voting rule, and the decision to hold two votes instead of one, can be highly consequential.²¹⁴ There are normative arguments in both directions. On the one hand, if one adopts an expansive, political account of impeachment and removal as an appropriate response to political seizures, then the voting rule for disqualification should be more demanding than the one used for removal. After all, once an impeachment has resolved an immediate crisis, the need for enduring exclusion becomes less clear. While the impeachment creates something like a general public good, disqualification imposes a concentrated cost on a single member of the polity. On the other hand, a high-threshold supermajority rule may in practice be impossible to meet given predictable partisan divisions over a disqualification decision. One solution to this dilemma may be to adopt a legislative impeachment rule, and then—like Israel, Pakistan, and Colombia—a judicial or administrative disqualification protocol.

Third, notwithstanding this argument in their favor, nonlegislative disqualification procedures remain quite controversial. The Israeli, Pakistani, and Colombian disqualification regimes have all been critiqued as non-democratic interventions in the political process that thwarted the popular will.²¹⁵ In addition, the vagueness of the standards that are applied—“good character” in

²¹³ See, e.g., Dotan, *supra* note 190, at 729 (noting that the Israeli Court has justified its doctrines by a need for “public trust in government”).

²¹⁴ See *supra* notes 183-187.

²¹⁵ See Dotan, *supra* note 190, at 731; Menaka Guruswamy, *Adjudicating ‘Honesty’: Prime Minister(s) and the Supreme Court of Pakistan*, INT’L J. CONST. L. BLOG (Dec. 5, 2017),

Israel, and “honesty” and “righteousness” in Pakistan—has prompted concerns about lawlessness and instability. They are vulnerable to the argument that only democratic institutions should impinge on democratic choices. Yet provided a disqualifying institution was initially established by democratic processes, there is reason to doubt the force of this objection. Concern about the ambiguity of substantive standards is also easily remedied. While textual vagueness may be an appropriate choice for the substantive standard for impeachment—since it effectively delegates normative discretion to future legislatures—the case for vesting unelected bodies with any parallel discretion is slim.

E. Term Limits: Individual, Prospective Disqualification

A final option for disqualification is an *ex ante* and determinate criterion for ineligibility, which eliminates uncertainty over substance and procedure. The archetypal rule of this kind is the term limit.

Term limits prevent officials from entrenching themselves in office by categorically barring terms of more than a certain number of years. While there a considerable debate on their merits, all sides agree that such limits do restrict the electoral choice of the polity, which would otherwise be free to reject or accept a candidate who has already served in office.²¹⁶ The justification for a categorical bar on specific individuals (as opposed to parties, which are free to continue winning elections with other candidates) turns on the large risk of personal entrenchment and corrupt enrichment via public office.²¹⁷ Incumbency advantage—earned or undeserved—may be so great that the most important predicates of democracy, such as *ex post* accountability and uncertainty of tenure in office, may be compromised in their absence.²¹⁸ The argument from entrenchment has most force in relation to chief executives. As presidents serve for more terms, they will become increasingly able use formal and informal tools to gain control over additional parts of the state, including institutions like courts.²¹⁹ In other words, experience has shown that presidents in office for long periods of time are able to tilt the electoral playing field increasingly heavily in their favor using their institutional powers.

On the other hand, a term limit provision impedes *prima facie* legitimate democratic choice. More pragmatically, the possibility of re-election might also engender electoral accountability that produces better governance. Additional time in office allows officials to gain expertise and opportunities to carry out their policy program.²²⁰ Where a policy can only be executed in the long term—think of climate-change mitigation—this may well be to a democracy’s advantage.

Legislative and presidential term limits present distinct issues. The case for legislative term-limits rests on less certain ground. They may weaken the legislature as an institution, actually allowing

<http://www.iconnectblog.com/2017/12/adjudicating-honesty-prime-ministers-and-the-supreme-court-of-pakistan-i-connect-column/> (arguing that the Pakistani Court’s review came “at the expense of constitutional democracy”).

²¹⁶ Paul Jacob, *From the Voters with Care*, in *THE POLITICS AND LAW OF TERM LIMITS* 27, 38-39 (Edward H. Crane & Roger Pilon eds., 1994); Mark P. Petracca, *Restoring “The University in Rotation”: An Essay in Defense of Term Limitation*, in *THE POLITICS AND LAW OF TERM LIMITS* 57, 65. CHARLES W. STEIN, *THE THIRD TERM TRADITION: ITS RISE AND COLLAPSE IN AMERICAN POLITICS* 14-15 (1943).

²¹⁷ Alexander Batur, *The stakes of losing office, term limits and democracy*, 40 *BRIT. J. POL. SCI.* 635, 635-36 (2010).

²¹⁸ Javier Corrales and Michael Penfold, *Manipulating term limits in Latin America*. 25 *J. DEM.* 157, 165 (2014).

²¹⁹ *See id.*; Gideon Maltz, *The Case for Presidential Term Limits*, 18 *J. DEM.* 128 (2007).

²²⁰ *See* Bruce E. Cain and Marc A. Levin, *Term Limits*, 2 *ANN. REV. POL. SCI.* 163 (1999); Ginsburg, Melton & Elkins, *supra* note 82, at 1824 (2011).

presidents to tilt the separation of powers even more heavily in their favor.²²¹ Alternatively, they might solve a collective action problem among voters who seek to limit the scale of pork-barreling while preserving their representative's ideological convergence with the median voter.²²² These effects will net off in different ways under different empirical conditions. Perhaps as a result, term limits for legislators are uncommon, but far from unheard of.²²³ For example, fifteen U.S. states include term limits for members of their state legislatures.²²⁴

Presidential terms limits in contrast have now become a “defining feature of democracy.”²²⁵ The vast majority of presidential or semi-presidential systems include a term limit for their presidents. The small percentage (16) that do not tend to be non-democracies, often because the term limit was removed at the behest of an autocratic chief executive.²²⁶ Even for presidents, only a small percent of systems (8 percent) prohibit all possibility of reelection.²²⁷ The most common design is the U.S. iteration: an absolute bar on any presidential reelection after two consecutive terms have been served. More than half of extant presidential systems choose this design.²²⁸ A sizable number of systems include an alternative form of disqualification, where presidents must leave office after serving either one or two terms, but only temporarily: They can return after sitting out a set period of time (usually one term).²²⁹ Chile offers an interesting recent example. Its last four presidencies have been held by two presidents from different sides of the political spectrum (Michelle Bachelet and Sebastian Pinera), each alternating service for one term. As with other forms of disqualification, then, term limits sometimes require only a temporary exit.

Unlike legislators, presidents seek to evade term limits and remain in office with considerable frequency. Two recent studies found that about one quarter of presidents attempted to change or circumvent term limits and remain in office, though a number of different methods such as formal constitutional amendment, judicial reinterpretation or removal, or reliance on controllable “shadow presidents.”²³⁰ Most evasion attempts succeeded. Here as elsewhere, making the disqualification effective may require some creative constitutional design. For example, use of temporary rather than permanent disqualification may make sense in this context, if only because presidents may be more willing to leave power if they think they can return down the line.²³¹ A temporary exclusion, that is, mitigates entrenchment risk without creating a perverse incentive to cling to power.

Term limits are not the only species of prospective individual disqualification, although they are the instrument most obviously salient to concerns about democracy maintenance. Other constitutions have their own rules. Article 44 of the Australian Constitution, for example, addresses

²²¹ See THAD KOUSSER, *TERM LIMITS AND THE DISMANTLING OF STATE LEGISLATIVE PROFESSIONALISM* (2005).

²²² Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 86 (1997).

²²³ *Report on Term Limits, Part II- Members of Parliament, Part III- Representatives Elected at Sub-National and Local Level and Executive Officials Elected at Sub-National and Local Level*, European Commission for Democracy Through Law (Venice Commission) (2017) 908 Council of Europe (2019).

²²⁴ *The Term-Limited States*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Nov. 12, 2020), <https://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx>.

²²⁵ Gideon Maltz, *The Case for Presidential Term Limits*, 18 J. DEM. 128, 129-30 (2007).

²²⁶ See Dixon & Landau, *supra* note 81, at 372 tbl.1 (2020); Ginsburg & Elkins, *supra* note 81.

²²⁷ Dixon & Landau, *supra* note 81, at 372 tbl.1.

²²⁸ See *id.*; Ginsburg & Elkins, *supra* note 81.

²²⁹ See Dixon & Landau, *supra* note 81, at 372 tbl.1 (finding that about 15 percent of systems take this route).

²³⁰ See Versteeg et al., *supra* note 83; Ginsburg, Melton & Elkins, *supra* note 82.

²³¹ See Dixon & Landau, *supra* note 81.

qualifications to run for parliament, including not holding foreign citizenship.²³² In 2017, seven sitting parliamentarians were found to be ineligible to run for the offices they held, in some cases because they held foreign citizenship through grandparents. The High Court confirmed their disqualification and ineligibility from future office.²³³ Other constitutions have maximum age limits or mandatory retirement ages, after which officials must leave power, although these are less common than minimum ages (which serve as entry rather than exit conditions).²³⁴ Retirement ages are common for judges both comparatively and in U.S. states, although less common for other officials.²³⁵ Maximum age limits work akin to term limits: They tend to ensure that officials will not remain in power for life, and may create room for younger politicians. They also, presumably, respond to a set of stereotypes that officials in certain positions over the specified age will be less likely to be able to carry out the job effectively, or that their levels of performance will be too risky or unpredictable.

Finally, Iran's unelected Council of Guardians vets all candidates for the presidency, Parliament, and certain other positions.²³⁶ Relevant criteria include not only age, experience and education, but commitment to religious values and the principles of the Iranian constitution. The latter criteria are non-transparent and the decision unappealable. The vast majority of potential candidates are typically excluded. In the 2021 presidential election, for instance, over 600 candidates applied to run, but only seven were approved. Among those disqualified was a former two-term president, Mahmoud Ahmadinejad, and all female candidates.²³⁷ In the 2020 parliamentary elections, about half of applicants were disqualified, including about one-third (or 90) of incumbents.²³⁸ The demerits of such a blatant system of political control need no elaboration.

In summary, there are substantial grounds for installing presidential term limits in a constitutional design—indeed, it is almost de rigor in democratic constitutions—but more fragile reasons for using them in respect to legislators. The modal form of presidential term-limit means that after a first term, presidents are lame ducks. While this has costs, it is plausible to think that the mechanism plays an important function in deterring a specific form of antidemocratic behavior.

²³² See Australia Const., sec. 44 (“Any person who: i. is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power....shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.”).

²³³ *Re Canavan* [2017] HCA 45 (Austl.).

²³⁴ See, e.g., CONST. UGANDA, Oct. 8, 1995, art. 102 (“A person is not qualified for election as President unless that person is - (b) not less than thirty-five years and not more than seventy-five years of age.”).

²³⁵ See, e.g., Alysia Blackham, *Judges and Retirement Ages*, 39 MELBOURNE U. L. REV. 738 (2016).

²³⁶ See, e.g., Mandana Naini, *Iran's Second Chamber? The Guardian Council*, 12 J. LEG. STUDS. 198 (2006).

²³⁷ See *Iran Election 2021: Seven Candidates Qualified to Run for President*, IFP News (May 25, 2021), <https://ifpnews.com/iran-elections-2021-seven-candidates-qualified-to-run-for-president/>.

²³⁸ *Iran Hardliners Bar Dozens Of Current Lawmakers From Running Again*, RADIO FARDA (Jan. 12, 2020), <https://en.radiofarda.com/a/iran-hardliners-bar-dozens-of-current-lawmakers-from-running-again/30372980.html>.

F. The Spectrum of Disqualification Rules

The constitutional design of democratic disqualification rules defies easy summary. To begin with, it divides into no less than four paths—call them lustration, party bans, impeachment, and term limits—that swell, narrow, and involute in unexpected ways. Sometimes they cut across each other; at other times, they run widely apart. All serve the same goal of securing democratic rule not just for the day, but for the longer term. Despite their importance, their heft, and the gravitational tug they exert on political life, they tend to be treated distinctly—as if they were all doing different things.

While all four vehicles for disqualification can work as bulwarks of democratic rule, some do so better than others. Three tentative conclusions, therefore, can be drawn from the available stock of comparative evidence without taking the evidence for more than it is worth.

First, comparative experience suggests that term limits, while imperiled by evasion efforts, provide a rough (if imperfect) prophylaxis against presidential entrenchment. *Second*, with regard to individual misconduct, an institutional separation between removal and disqualification seemingly yields a more robust mechanism than legislative oversight. Situating a disqualification power outside the legislature implies risks of overbreadth and capture, but, at least in the small number of cases at hand, these concerns appear not to dominate. *Third*, group-based measures have a mixed track-record: Whereas both lustration and party bans can be effective during transitions into democracy, both raise difficult questions as they endure into a maturing democracy. Where a potentially prescribed party has considerable public support, such as in the cases of the AKP party in Turkey and the AfD in Germany, both the normative and the practical problems of applying a party ban (or indeed, a lustration rule) peak. Group-based measures, in short, may have efficiencies of scale, but these seem to diminish over time.

III. The Problem of Disqualification in Democratic Theory

To complement insights from the limited empirical record of democratic disqualification, this Part turns to democratic theory as a way of analyzing the appropriate scope and operation of exclusionary procedures. We use theory to set out a more precise account of why disqualification is a double-edged sword: both a warranted protection for and also a risk to democratic government. This precise normative accounting of the values in play when disqualification is set in motion facilitates Part IV's more careful judgment about institutional design.

According to the impeachment defense of Donald J. Trump, a second impeachment and attempt to disqualify the former president from future office-holding was “about as undemocratic as you can get.”²³⁹ To understand disqualification from the perspective of democratic theory is to understand why that statement has a grain of truth while also obscuring a more powerful counterargument that builds on democracy itself. To understand the resulting tension is to better understand the central normative problem in the design of democratic disqualification rules—a problem that has been grasped and, at least in part, addressed in two other contexts.

A. *Democracy as a Problem of Ruling and Being Ruled*

²³⁹ Eric Tucker & Mary Clare Jalonick, *Trump Lawyer: Impeachment Case ‘Undemocratic,’ Ill-Advised*, ASS. PRESS, Feb. 2, 2021, <https://apnews.com/article/donald-trump-impeachment-updates-5adebdc5d8c30622f5e116e40c9396e6>.

At its linguistic root, democracy is defined by the idea of the people as their own rulers.²⁴⁰ Rule by the people requires that “all the members [of the polity] are to be treated (under the constitution) as if they were equally qualified to participate in the process of decisions about the policies the association will pursue.”²⁴¹ Democracy hence may not require elections.²⁴² But it does require that members of the polity can both make and revise decisions over time. When a democratic system ceases to be responsive to members of the polity at all—when it becomes beholden, say, to the wishes of a small clique holding power or exclusively to the top decile of the electorate as defined by wealth, that failure of ongoing responsiveness is a failure of democracy.²⁴³ A status quo “protected from the majority by all kinds of institutional trenches” is not meaningfully democratic even if elections occur, because it is not dynamically responsive to the polity over time.²⁴⁴ It is hence no accident that one of the oldest definitions of democracy, offered by Aristotle, centers on its durability over time by insisting on the idea of “ruling and being ruled in turn.”²⁴⁵

This ambition of *democratic durability* creates a foundational set of problems for democracy. Many of the decisions that a democracy necessarily takes implicate a risk of entrenchment. That is, a transiently ascendant group might seize that decision as an opportunity to entrench themselves, and thereby to end the process of “ruling and being ruled in turn.”²⁴⁶ As a result, a democratic system often requires (or at least benefits from) institutions designed to protect against entrenchment. Such institutions will often be situated outside popular control to ensure their efficacy in moments of need.

Yet the very institutions that are intended to guard democracy can also be turned to democracy’s undoing. Democratic disqualification is best understood as one of these guardianship institutions. Like many other such bodies, it can be wielded not just in defense of democracy, but also to bring the process of “ruling and being ruled in turn” to its end. The central question in the design of such guardian institutions, therefore, is to work out how to maximize their efficacy against democratic threats, while at the same time minimizing the risk that they pose to a democracy.

²⁴⁰ HÉLÈNE LANDEMORE, OPEN DEMOCRACY 1 (2020).

²⁴¹ ROBERT A. DAHL, ON DEMOCRACY 35 (1998); *see also* LANDEMORE, *supra* note 240, at 7 (describing democracy as “a regime of political equals”).

²⁴² *See, e.g.*, DAVID VAN REYBROUCK, AGAINST ELECTIONS 138-49 (2016) (arguing for a sortition-based democracy); *see also* JOSIAH OBER, DEMOPOLIS: DEMOCRACY BEFORE LIBERALISM IN THEORY AND PRACTICE 28 (2017) (noting that Athenian democracy was “never centered on the use of a majority-voting rule to elect office-holders”).

²⁴³ Alexander A. Guerrero, *Against Elections: The Lottocratic Alternative*, 42 PHIL & PUB. AFF. 135, 141 (2014). For application to the United States, *see* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 253 (2008) (finding that “senators in [1989-1994] were vastly more responsive to affluent constituents than to constituents of modest means”).

²⁴⁴ ADAM PRZEWORSKI, WHY BOTHER WITH ELECTIONS? 21 (2018).

²⁴⁵ LANDEMORE, *supra* note 240, at 10.

²⁴⁶ *Cf.* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 409 (2015) (“Political entrenchment implies not just the absence of political change but some kind of special *constraint* on the usual processes of political change.”).

B. *The Problem of Ruling and Being Ruled in Practice*

Across a range of different contexts, democratic theorists have struggled with the problem of reconciling the project of popular rule with the ambition toward durably “ruling and being ruled in turn.” Those theorists have paid particularly close attention to two problems that raise normative concerns similar to those provoked by democratic disqualification. They have first attended to a threshold question called the “boundary problem,” i.e., who is in the self-governing demos and who is outside of it.²⁴⁷ Second, they have paid attention to whether and how non-democratic (or counter-majoritarian) institutions can be justified as instruments for the preservation of democracy. The optimal design of democratic disqualification rules depends on the considerations at stake in debates about the boundary problem and counter-majoritarian checks. As in those cases, the key question is whether an institutional choice extends or undermines democracy as a durable going concern.

Consider first how democracies draw limits to the geographic and demographic scope of the polity. Citizenship rules, franchise eligibility limits, and other laws all serve this end.²⁴⁸ All implicate a difficult normative question: How can democratic power be exercised without first identifying the self-governing entity that holds such power?²⁴⁹ To avoid a fatal circularity, is it not necessary to “include all interests that are actually affected by the actual decision”?²⁵⁰ But this opens a “Pandora’s Box” since it means some large, perhaps unknowable, range of persons beyond the polity’s physical boundaries must be intermittently consulted on political decisions.²⁵¹ Any solution to the boundary problem, therefore, cannot rest simply on an appeal to democracy. It instead requires a set of normative judgments about the justifications for, and the limits to, democratic rule.²⁵²

In practice, the boundary problem is solved—and the attendant normative questions resolved—by transient holders of political power. In determining the scope of the polity, those transiently controlling the state can act in a way that redounds to their partisan interests. The long-standing exclusion of women, racial minorities and other groups obviously entrenched the power of those who were able to exercise the franchise, which in many countries was restricted to property owning white males until the early 20th century. Indeed, these exclusions were so severe as to undermine the claim of many countries to even be considered democracies.²⁵³ Rules for apportioning power within a polity can involve similar questions because they are ways of ‘zeroing out’ political power for some groups. One prominent example is the assignment of power to delimit political constituencies, which obviously shapes the electorate’s ability to express its collective preferences, but in many cases can be mechanisms for self-dealing.²⁵⁴ For example in the United States, constitutional power to manage elections is given to partisan state legislatures, which are continually

²⁴⁷ Sarah Song, *The Boundary Problem in Democratic Theory: Why the Demos Should be Bounded by the State*, 4 INT’L THEORY 39 (2012).

²⁴⁸ On the use of citizenship and immigration law for political entrenchment, see Adam B. Cox & Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 N.Y.U. L. Rev. 1403, 1447 (2009).

²⁴⁹ Whelan, *supra* note 19; see also ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 119-31 (1989).

²⁵⁰ Robert Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHIL. & PUB. AFF. 40, 52 (2007).

²⁵¹ *Id.* at 64 (citation omitted).

²⁵² See, e.g., David Miller, *Democracy’s Domain*, 37 PHIL. & PUB. AFF. 201, 225 (2007) (offering one such account).

²⁵³ TOM GINSBURG & AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 18 (2018) (arguing that the United States was not a democracy until 1919 because of its failure to accord women the vote).

²⁵⁴ See generally Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 644 (1998) (exploring “ways in which dominant parties manage to lock up political institutions to forestall competition”).

engaged in efforts to rig the rules in favor of majority parties.²⁵⁵ Because there is no unique answer to the boundary problem, it is inevitable that democratic decision-makers have the discretion to make judgments – justified or problematic – about democratic bounds. With the risk of entrenching self-dealing in mind, democratic decisions to rule out at the threshold certain groups and individuals are properly viewed with great skepticism.²⁵⁶

There is a second context in which this problem arises.²⁵⁷ Responding to the risk that elected actors will abuse their authority to entrench themselves in power, many democracies have established institutional mechanisms—call them guardian institutions—insulated from democracy that are tasked with the protection of democracy.²⁵⁸ Perhaps the most well-known argument in this vein is John Hart Ely’s famous justification of judicial review as a means of responding to, and fixing, failures in the political process.²⁵⁹ Beyond the United States, the decision to channel militant democratic principles similarly reflects a belief that judges stand outside politics, and can therefore be trusted to defend the political process. And in ancient Athens, Josiah Ober reports, a civil virtue of self-restraint was cultivated by which citizens “restrain[ed themselves] from self-aggrandizing actions that compromise another’s dignity.”²⁶⁰

But a guardian institution standing apart from democratic currents to act as a safeguard of the process of “ruling and being ruled in turn,” is also an institution that can intervene to derail that well-functioning democratic process. In the United States, of course, perhaps the best-rehearsed instance in which this is alleged to have happened is *Bush v. Gore*²⁶¹: A supposedly neutral institution meant to keep democracy on the tracks instead determined an election out of partisan self-interest.²⁶² What is intended to facilitate democracy can instead become an instrument of its degradation. The large academic literature devoted to the “counter-majoritarian” difficulty presented by the federal courts can be understood as an attempt to grapple with this double-edged quality of judicial action in relation to democracy.²⁶³ The potential for it to be both a boon to democracy, or alternatively an abuse of public trust.²⁶⁴

²⁵⁵ GINSBURG & HUQ, *supra* note 253, at 161-62 (discussing this risk).

²⁵⁶ *Cf. Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966) (holding that “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard”).

²⁵⁷ Daryl Levinson and Benjamin Sachs have pointed out that formal and functional entrenchment can be substitutes. Levinson & Sachs, *supra* note 246, at 405.

²⁵⁸ GINSBURG & HUQ, *supra* note 253, at 192-97.

²⁵⁹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

²⁶⁰ Ober, *supra* note 242, at 120.

²⁶¹ 531 U.S. 98 (2000).

²⁶² For an unusually comprehensive version of this criticism, see Michael J. Klarman, *Bush v. Gore through the lens of constitutional history*, 89 CALIF. L. REV. 1721 (2001).

²⁶³ Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 505 (1997).

²⁶⁴ See David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 UC DAVIS L. REV. 1358-60 (2020).

C. *Democratic Disqualification as a Problem of Ruling and Being Ruled*

A parallel set of normative issues arise when a polity exercises a formal legal power to exclude a person or group from political power. First, like the exercise of the power to define boundaries and safeguard democracy through independent institutions, disqualification implicates the individual entitlement to meaningful participation and the communal power of self-determination on one side, and the risk of entrenchment against “being ruled” on the other. Second, as with boundary disputes and guardianship institutions, decisions about *who, how and when* to exclude are as much an act of collective self-determination as providing qualifications for inclusion at the outset. Third, all hinge on normative and policy commitments, sometimes only implicitly, and hence require the exercise of discretion. Discretion can be used wisely, or instead abused for self-entrenchment by incumbents.

Are the normative difficulties of disqualification, though, distinct from those well-studied questions related to the boundary problem (or guardian institutions) simply because exit is different?²⁶⁵ There are differences, but not ones sufficient to change the fundamental normative calculus. As an initial matter, intuitions about due process or related protections may vary between the entry and exit contexts. An existing officeholder might plausibly demand greater procedural protection than a person who has yet to assume an office. Second, pragmatic considerations make the regulation of exit rules for sitting public officials especially challenging. Incumbents’ power makes them an especially substantial threat to the democratic order. Alternative tools of accountability, such as criminal charges, may be impossible or more difficult to deploy against incumbent officeholders.²⁶⁶ In short, while there are differences between disqualification and more well-studied contexts about who gets to participate *ex ante*, they cut in different, off-setting directions. They are unlikely to make much of a difference to the analysis.

The study of boundary problems and guardian institutions yields lessons for the design of disqualification rules beyond the clarification of the basic normative problems. *First*, there is no correlation between the democratic credentials of a given decision and a positive effect upon democracy as a going concern. Both democratic and nondemocratic guardian institutions can vindicate or threaten the durability of self-government. *Second*, the same institution can at different points in time be a defender and a threat to democratic rule. Just because the Supreme Court, for example, defends the right to vote in some cases does not mean it will not halt presidential vote counting in a potentially outcome-determinative manner. *Third*, exercises of boundary-defining and guardianship powers might demand an inevitable measure of discretion, but they are also amenable to demands for justification and account. With respect to any exercise of power, it is possible to ask and answer the question whether its costs to democracy are greater than offsetting benefits. Indeed, the Supreme Court’s jurisprudence in respect to the fundamental right to vote can be understood as

²⁶⁵ The line between entry and exit conditions is, at any rate, sometimes blurred. Some kinds of rules may function as both restrictions on entry and exit to the electoral sphere. For example, some constitutions prohibit bankrupts from running for office (an entry condition), but also require officials to leave office if they declare bankruptcy while holding it (an exit condition). *See, e.g.*, CONSTITUTION art. 99(2)(f) (2010) (Kenya) (“A person is disqualified from being elected a member of Parliament if the person...is an undischarged bankrupt.”); art. 103(1)(g) (providing for removal if the member becomes disqualified for election to Parliament under Article 99 (2)(f)).

²⁶⁶ A long-standing (although controversial) view holds that sitting presidents may not be criminally indicted while in office, for example. *See* Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11 (1997).

an effort to structure such contextual reflections on the effects of certain exclusions from the franchise.²⁶⁷

Hence, an optimal design of disqualification will demand specificity and justification. It will not be indexed to the degree of insulation from democratic process. And it will be attentive to the risk that over time a previously beneficial institution can be captured, and turned into a tool for entrenchment.

IV. Optimal Disqualification Rules

With the U.S. experience, comparative experience, and the relevant set of theoretical considerations in hand, we are in a position to propose an ‘optimal’ disqualification mechanism. We use the term optimal as a shorthand to capture the sense of design choices that are, all else being equal, more likely to promote rather than undermine democracy. Yet it would be a mistake to assume that disqualification regimes should look the same everywhere, or be insensitive to local conditions. Empirical evidence of the sort marshalled in Parts I and II, as well as the theoretical work accomplished in Part III, provide a starting point—not a fixed star in the constellation of constitutional possibilities.

A. Substantive Thresholds for Disqualification

In the abstract, the correct substantive standard for disqualification is easily stated: Disqualification is justified when specific actors or groups pose a clear anti-democratic threat. Its costs to democracy should be countenanced if and only if they are outweighed by the danger posed by an actor who threatens to erode democracy upon winning office. The case for permitting other considerations to factor in is weak, since disqualification is targeted at the specific concern that an actor who threatens to erode democracy will gain state power.²⁶⁸

Democratic preservation, admittedly, can be an ambiguous standard. It is possible to gain clarity by positing a relatively minimalist definition of democracy, which foregrounds free and fair elections, basic political rights of speech and association, and rule-of-law constraints on state power.²⁶⁹ These elements tend not to dissipate immediately. In place of military coups and sudden democratic implosions, parties and actors tend to attack democracy gradually, using legal tools and constitutional changes to consolidate power and to repress the opposition.²⁷⁰ The result may be a legal regime where elections continue to be held, but incumbents tilt the electoral playing-field heavily in their favor –

²⁶⁷ See Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1847 (2013).

²⁶⁸ See, e.g., Issacharoff, *supra* note 135, at 1410-11 (referring to the “intuition that democratic elections require, as a precondition to the right of participation, a commitment to the preservation of the democratic process”); Nolte & Fox, *supra* note 144; Refah Partisi, *supra* note 160 (“It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognized in a democracy cannot lay claim to the Convention’s protection.”).

²⁶⁹ See GINSBURG & HUQ, *supra* note 253, at 19; Rosalind Dixon & David Landau, *Competitive Democracy and the Democratic Minimum Core*, in ASSESSING CONSTITUTIONAL PERFORMANCE 268 (Tom Ginsburg & Aziz Huq, eds., 2016).

²⁷⁰ See Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 93-94 (2018).

so-called hybrid or competitive authoritarian regimes.²⁷¹ In light of the incremental way in which modern democracies tend to wither, democratic orders must be able to identify, and then act on, actors and groups that would undertake incremental authoritarian projects if they were able to gain power. The theory and practice of militant democracy, in contrast, assumes a thoroughly authoritarian or totalitarian party—a model that is increasingly inapt.²⁷²

The evidentiary difficulties attendant on discerning whether a party or official presents a future risk to democracy can be fruitfully addressed by operationalizing the norm of democratic commitment by a mix of rules and standards, but with a preference for the former.²⁷³ At present, some disqualification norms are clear and rule-like. Term limits, mandatory retirement ages, and felon disqualification have this character. Many others are standards, with a more discretionary, open-textured character.

In our view, an optimal disqualification system should lean more on rules than standards. The latter are likely to be difficult to apply because specific judgments will rest on speculative evaluation of what might come to pass. Rules, such as term limits, can be written so that officials can be disqualified without requiring open-ended assessment of the power they had accrued. Rules are also likely to have lower compliance costs than standards because it is harder to dicker with their application.²⁷⁴

Standards are warranted to the limited extent it is unfeasible to spell out all of the forms that democratic threats may take *ex ante*.²⁷⁵ Thus, a broad power to remove groups who seek to “undermine or abolish the free democratic basic order” may make some sense,²⁷⁶ as does a discretionary power to proscribe individuals who commit certain forms of impeachable offenses such as “high crimes and misdemeanors.”²⁷⁷ Standards should focus on the kinds of acts that are likely, in light of recent experience, to pose a threat to the stability of the democratic order. A broader focus on the character or morality of public officials, while appropriate in other contexts, is likely to lead to an unduly activist regime.

Standards are also warranted when rules would present a risk of overreach. This depends on context. Felon disenfranchisement and disqualification rules, for example, are sometimes used as a substitute for discretionary forms of disqualification like impeachment. In the United States, they

²⁷¹ See STEVEN R. LEVITSKY & LUCAN WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* (2010).

²⁷² See Daly & Jones, *supra* note 151; Landau, *supra* note 151, at 219-20.

²⁷³ We use Louis Kaplow’s now-canonical definition of rules and standards: A rule is a legal norm given content before regulated subjects act, whereas a standard is a legal norm that is given content after regulated subjects act. Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 *DUKE L. J.* 557, 559-63 (1992).

²⁷⁴ See Versteeg et al., *supra* note 83; Ginsburg & Elkins, *supra* note 81. Term limits provisions can and sometimes are reinterpreted by courts, for example to deny them retroactive effect so that presidents can stay in office longer. See, e.g., Versteeg, *supra* note 83, at 221; Landau & Dixon, *supra* note 264274.

²⁷⁵ See, e.g., Dixon & Landau, *supra* note 169, at 614; Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 *GEO. L.J.* 961, 1002 (2011) (citing this as a justification for the judge-made unconstitutional constitutional amendment doctrine).

²⁷⁶ Grundgesetz [GG] [Basic Law] art. 21, translation at <http://www.gesetze-im-internet.de/>.

²⁷⁷ U.S. CONST. art. II, § 4.

have an ugly, racist history.²⁷⁸ But in a different context, this history may be absent, and a focused felon disqualification rule might have a different effect.

The choice between rules and standards also turns on venue. Presently, broad standards appear in legislative processes such as impeachment; think here again of the Constitution’s “high crimes and misdemeanors” language. In legislative contexts, very broad standards may make sense because the democratic legitimacy of the legislature lends weight to the disqualification decision, even when it is made on an ambiguous substantive basis. Politics provides a constraint on abuse. The same kinds of ambiguous standards, such as “good character,” may be more dangerous when applied by administrative or judicial bodies. Such broad standards invite adjudicators to reach well beyond the protection of electoral democracy itself, which should be the core concern of a disqualification regime.

B. Individuals, Not Groups

One basic decision in disqualification regimes is the choice between groups and individuals as targets of exclusion. Lustration rules and militant democracy focus on groups. Impeachment and term limits focus on the individual. Group disqualifications are surprisingly common in constitutional democracies, especially odd in light of (well founded) modern norms against group punishment or accountability.²⁷⁹ The rationale seems to be their utility as instruments of transitional justice, not as permanent bars for “tainted” officials from the polity.²⁸⁰ In this capacity, they serve mainly to stabilize and legitimize emerging democracies. As political transitions end, lustration rules generally ease, either because laws sunset or are repealed, or officials are reinstated by the requisite actors. Of course, there is some risk that lustration provisions will become entrenched, with society becoming more accustomed to large-scale disqualifications over time.²⁸¹

The more sweeping protection provided by militant democracy and lustration norms may be important to prevent democracy from being eroded from within. But group-based measures should be considered only where individual forms of accountability such as impeachment are insufficient, and where the failure to act will imperil democracy itself.²⁸² Beyond the distinctive context of new democracies seeking to overcome previous autocratic regimes, group-based mechanisms of disqualification are likely so prone to abuse and overuse that they must be either watered down or completely abandoned. Hence, as we saw in Part II, many Eastern European countries winnowed down lustration rules by using some alternative to flat disqualification – individual assessments of suitability in Germany, revelation rather than disqualification in Hungary, and disqualification only for the dishonest in Poland.²⁸³ We also observed in Part II that temporary provisions often calcify into permanence over time. But this is undesirable. Where group-based disqualification persists out of political inertia, it should be saddled with such onerous procedural constraints that it becomes,

²⁷⁸ See, e.g., JEFF MANZA, CHRISTOPHER UGGEN, WITH ANGELA BEHRENS, *The Racial Origins of Felony Disenfranchisement*, in LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 41 (2006).

²⁷⁹ Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674 (1968).

²⁸⁰ See TEITEL, *supra* note 47, at 163-64.

²⁸¹ See DAVID, *supra* note 106.

²⁸² See, e.g., Fox & Nolte, *supra* note 144.

²⁸³ See *supra* Part II.C.

deployable only as a last resort, and, as in the NDP case showed, only where the threat is substantial rather than merely hypothetical.²⁸⁴

The task of banning from political life, moreover, raises a sufficiently weighty risk of entrenchment that it must be hedged with procedural constraints that promote individualized, and individually justified, actions. Some actor (either a court or administrative agency, or both) must decide whether a specific actor's record is sufficient for disqualification.²⁸⁵ Across nearly all lustration systems, the question of due process is contentious.²⁸⁶ Often, the process of assigning individual guilt based on long-ago actions has narrowed the effective scope of lustration considerably. Likewise, militant democracy norms wrestle with the question of how to treat individuals based on their membership of a proscribed party. German law draws a sharp distinction between the organization and the individual: A party ban only has direct effect at the level of the party itself, and mere membership in a proscribed party is insufficient for sanction.²⁸⁷ Elsewhere, this line is blurred. The South Korean Constitutional Court has punished both individuals and parties on the ground that focusing on the former alone would be insufficient to defend democracy since members of the party would remain in office.²⁸⁸

In contrast, there is no real case for minimizing or abolishing mechanisms that carry out individualized bans from political life. The very commonality of such rules would suggest a felt need for an individualized safety valve for democracy.²⁸⁹ One cannot rule out, of course, the possibility that some individual forms of disqualification might also be able to “sunset” over time. But the possibility has not to our knowledge been explored in existing scholarship or design. As a first cut, it may be more reasonable to phase out term limits than other exit rules. The balance between the protection provided by presidential term limits, and the benefits provided by reelection such as democratic accountability and continuity, may shift depending on the “fragility” of the context. But the fact that virtually all presidential systems include some form of term limit (and those lacking such limits are usually autocratic) suggests a continuing vulnerability ameliorated by presidential term limits.

Indeed, recent events have suggested that the gap between a “fragile” and a “consolidated” democracy may be far thinner than political scientists and comparative constitutional lawyers had long assumed.²⁹⁰ Arguably, democracies require some degree of “militancy” throughout their lives as a stabilization mechanism.²⁹¹ There is a much stronger case for doing so via robust enforcement of individual disqualification mechanisms, rather than through group mechanisms like lustration or party bans.

C. Process and Decision-Makers

²⁸⁴ See *supra* note 138.

²⁸⁵ See *supra* Part II.C.

²⁸⁶ See, e.g., MCADAMS, *supra* note 105, at 77-83; SZCZERBIAK, *supra* note 107.

²⁸⁷ See Muller, *supra* note 130.

²⁸⁸ See Dissolution of the United Progressive Party, *supra* note 15.

²⁸⁹ We do not mean to say, of course, that the application of these rules will be the same across all contexts.

²⁹⁰ See, e.g., CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber et al., eds., 2018); Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14 L. & ETH. HUM. RTS. 49 (2020); Jaques Rupnik, *Explaining Eastern Europe: The Crisis of Liberalism*, 29 J. DEM. 24 (2018); Madhav Khosla and Milan Vaishnav, *The Three Faces of the Indian State*, 32 J. DEM. 111 (2021).

²⁹¹ See Schor, *supra* note 149.

A second set of questions is procedural: who decides whether disqualification proceeds, and through what steps? As we have seen in Part II, the options for a decisionmaker include a court, an administrative agency, or a legislature. (Section 3 of the Fourteenth Amendment simply fails to address the question—a suboptimal approach conducing to uncertainty and desuetude.) The theoretical material we have canvassed in Part III also does not support a strong conclusion about the merits of any one or another decision-maker.²⁹²

Disqualification by the legislature may yield greater public legitimacy for decisions, but comes with a greater risk of repression. A legislative process may also prove too difficult to deploy against even clear threats to democracy. This risk may be especially acute where the legislative processes involves a supermajority voting rule, as is the case with impeachment virtually everywhere. Such processes are likely to be unresponsive even when an actor or group poses a clear threat to democracy, as many commentators argued was the case during the second Trump impeachment trial in early 2021.²⁹³

These shortcomings make impartial, expert-driven venues more appealing. Constitutional designers sometimes turn to judges because of their perceived impartiality. Courts are usually seen as the appropriate institution to handle the sensitive decision whether to ban anti-constitutional parties. They are also often charged with reviewing lustration decisions. In some contexts, courts are criticized for allowing too much process or moving too slowly. In Poland, lawmakers turned increasingly toward administrative venues over time because they felt courts were relying on a criminal-law model too cumbersome for lustration.²⁹⁴ Similarly, in the United States, courts after the Civil War were criticized for resisting the disqualification of former Confederate leaders, and more broadly for limiting and obstructing Reconstruction itself—even though it was Congress that tended to lead in removing disabilities and in retreating from Reconstruction in other areas.²⁹⁵ But courts are not necessarily restrained in disqualification decisions. Activist courts in Israel and Pakistan have constructed and applied loose standards to disqualify large numbers of officials.²⁹⁶ This suggests that there is a risk in certain contexts that courts will adopt too aggressive a standard for disqualification precisely because they do not trust the political process to police itself.

Similarly, administrative disqualifications pose a risk of excessive zeal, depending on the selection and culture of the agency. In lustration debates, opposition to administrative venues often turns on the risk that agencies will “de-civilize” lustration by weakening due-process protections.²⁹⁷ Colombia, which relies heavily on administrative institutions to disqualify political officials for perceived malfeasance or corruption on relatively vague grounds, is a potential example of this concern.²⁹⁸ Perhaps for this reason, designers rarely rely on administrative actors alone. Instead, they allow for some judicial review over administrative decisions to disqualify.

²⁹² There are parallels to the choice between courts and agencies, but disqualification raises distinctive concerns. See, e.g., Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006).

²⁹³ See, e.g., Paul Blumenthal, *A Broken Party Acquitted Donald Trump In His Second Impeachment*, HUFFPOST (Feb. 13, 2021), https://www.huffpost.com/entry/donald-trump-impeachment-acquit_n_6027e114c5b6f88289fbfc0f.

²⁹⁴ See SZCZERBIAK, *supra* note 107.

²⁹⁵ See TEITEL, *supra* note 47, at 154-57; Magliocca, *supra* note 8, at 32-33, 55.

²⁹⁶ See *supra* Part II.D.

²⁹⁷ See SZCZERBIAK, *supra* note 107.

²⁹⁸ See *supra* Part IV.D.

On balance, then, while there is no perfect procedure, it would be a mistake to rely solely on legislators and elected actors, as the United States treads close to doing. Especially where parties are very strong, disciplined, and polarized, the risk that disqualification will be instrumentalized is too great. At the same time, a purely technocratic process will suffer a potentially disabling legitimacy deficit. A better system would include parallel paths through both administrative and judicial forums. In comparison to the current scheme, making alternative venues available is likely to increase the rate of disqualification. A risk of excessive exclusion can be mitigated by relatively clear, constraining criteria for disqualification (which we refer to in more detail below) and by allowing effective procedural protections and meaningful judicial review of administrative decisions to exclude. This arrangement has the further advantage of directing attention to the key question of instrumental rationality—the link between the means of disqualification in a specific case and the end of preserving the process of ‘ruling and being ruled in turn.’

D. Consequences: Temporary, Not Permanent, Bans

Disqualification can be temporary or permanent. Attention to the trade-off to democracy-related costs and benefits suggests a reason to err on side of temporary measures . By forcing dangerous or unfit officials out of office for some period of time, a time-limited measures can protect the sound operation of democracy during a period in which it experienced stress. Permitting an eventual return to power limits the burden placed by exclusion on democratic norms. It likely also boosts the probability of compliance, limits social unrest by supporters, and avoids legitimacy costs.²⁹⁹ Despite these factors, temporary bans are presently unevenly distributed. Party bans, for example, generally seem to be permanent rather than temporary. Their durability is tempered somewhat by the possibility that adherents often have to reform under a new, slightly-altered party banner, as occurred repeatedly in Turkey.

A temporary bar, to be sure, requires *ex ante* specification of its duration. This is likely to have an arbitrary flavor. Because of its rule-like quality, it will be either under- or over-inclusive in respect to particular democratic threats. To mitigate this concern, a disqualification regime might allow a court, agency, or legislature to make case-by-case determinations that an actor is suitable for reentering the political sphere. As we discuss below, the Fourteenth Amendment arguably would permit a supermajority of Congress to make such a determination. Other lustration systems also include an implicit sunset provision.³⁰⁰ For instance, a lustration statute itself might be set to expire after a fixed period of time—although even then it might be repeatedly extended as in the Czech Republic.³⁰¹

²⁹⁹ *See id.*

³⁰⁰ *See, e.g.,* MCADAMS, *supra* note 105, at 85.

³⁰¹ *See* DAVID, *supra* note 106.

E. One Path or Many? The Advantages of Pluralism

A common feature of constitutional design in this area is the inclusion of more than one pathway to disqualification. The U.S. Constitution's four different mechanisms are exemplary rather than unique. At first blush, this seems unwise: Why risk possible "system effects" from the interactions between different mechanisms?³⁰² Why not consolidate disqualification in one venue?

But plural disqualification channels are well justified, even if their interaction effects need attention. There are compelling reasons why constitutions contain different disqualification processes. They tend to serve distinct, overlapping functions. Depending on whether an official hopes to gain an elected or a non-elected office, moreover, bars to future office holding raise different normative concerns. Varying channels may be established at different historical moments to different ends. Lustration measures, as we have argued above, are best thought of as transitional measures, phased out as a polity gains distance from its autocratic past. To force all these temporally and normatively distinct tasks into a single functional form would be undesirable.

Even as they create plural disqualification mechanisms, a constitution's designers, as well as officials executing these provisions, should attend to interactions between them. In particular, plural pathways creates a risk of inconsistent, and hence manipulable, regimes. Splitting disqualification into different processes should not allow de facto different regimes to be applied to mainstream and peripheral parties. South Korea's Constitution, for example, contains both an impeachment procedure and a procedure for prohibiting "anti-constitutional" parties.³⁰³ Both give the final word to the Constitutional Court as to whether to remove an official (after a motion has been passed by two-thirds of the legislature), or ban a party. In carrying out the former inquiry, the Court has worked out a doctrine whereby it asks not only whether the official has committed an impeachable offense, but also whether the offense warrants removal, given the substantial effect removal will have on the constitutional order.³⁰⁴

In contrast, during proceedings to ban the allegedly pro-North Korean United Progressive Party, the Court offered only a brief discussion of proportionality. Its decision, argued commentators, diverged sharply from relevant international standards.³⁰⁵ In effect, the Court focused almost entirely on the platform of the party and its activities, without taking account of whether such a small movement could realistically achieve its goals. The careful way in which proportionality was evaluated in the impeachment context is at odds with this light touch. There is no reason, in Korean law or as a matter of first principle, to think the robustness of the inquiry should vary across both contexts. Indeed, if anything the risks of abuse are greater in respect to party-bans, which are more readily used as a tool for majoritarian abuse.

In Israel and Pakistan, courts have disqualified officials on the basis of relatively vague standards of good conduct. These judge-made doctrines overlap with other textual disqualification provisions that use rather different standards.³⁰⁶ The Israeli Court's use of a "good conduct" standard,

³⁰² See Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009).

³⁰³ Const. S. Korea, art. 65, 111.

³⁰⁴ See Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53 AM. J. COMP. L. 403 (2005).

³⁰⁵ See Kim, *supra* note 152.

³⁰⁶ See *supra* Part II.D.

for instance, sits uneasily alongside statutory requirements holding that officials must be removed and disqualified from office upon conviction of serious crimes.³⁰⁷ In effect, the Court allows officials to be disqualified upon indictment, even as the laws themselves require resignation only upon conviction.³⁰⁸ Similarly, in Pakistan the Court's aggressive use of Article 62 to disqualify officials permanently is hard to square with the more carefully drawn restrictions found in Article 63. The latter states that those convicted of certain categories of serious crimes are barred from office for five years.³⁰⁹ Yet, the judicial interpretation of Article 62, which has been used to cover similar conduct, has been used to bar officials for life.³¹⁰ Such disparities invite partisan manipulation to protect incumbents—defeating the primary object of disqualification mechanisms.

* * *

To summarize, an 'optimal' disqualification regime would aim at disqualifying officials who pose a clear threat to a relatively minimalist, electorally-focused conception of democracy, in order to ensure an opportunity to "rule and be ruled in turn," while avoiding overuse for less pressing ends, or even worse, abuse for antidemocratic purposes. It would contain plural pathways, calibrated to avoid the possibility of partisan arbitrage. These would lean toward the regulation of individuals rather than groups. They would not usually run directly through elected bodies. The prerequisite for disqualification would more often be stated as a rule than as a standard. And the ensuing prohibitions would more often be temporary rather than permanent, so as to calibrate and minimize the damage done to democracy from the disqualification itself.

V. Disqualification under the U.S. Constitution: A Reconsideration

How might one apply these design principles to the undertheorized disqualification regime found in the United States? The challenges faced by American democracy, as many have noted, are not unique. There is no reason why comparative and theoretical experience cannot inform reform efforts aimed at improving the present disqualification systems. Of course, the difficulty of constitutional amendment pursuant to Article V curtails the set of feasible interventions. But the ensuing space for design changes is still significant.

As a threshold matter, Part I demonstrated that the Constitution already contains a plurality of different disqualification mechanisms. These include a presidential term limit designed to prevent strong chief executives from distorting the democratic political order; a legislative power to disqualify presidents, judges, and officials upon Senate conviction for impeachable offenses; a lustration-like provision in Section 3 of the Fourteenth Amendment; and the legislative powers of exclusion and expulsion. The U.S. thus already contains a set of different mechanisms, as we have argued the optimal regime would. But many of those mechanisms are not working well, either when interacting together or separately.

The disqualification regime faced its most significant test in modern history in early 2021, after the insurrection of January 6. The impeachment pathway gained more support for presidential removal than it had at any point since the impeachment of President Andrew Johnson in 1868. But

³⁰⁷ See *supra* text accompanying notes 188-193.

³⁰⁸ See Dotan, *supra* note 190, at 733-34.

³⁰⁹ CONST. PAKISTAN, Apr. 12, 1973, art. 63(g)-(h).

³¹⁰ See *Sami Ullah Baloch*, (2018) PLD (SC) 405.

it still failed to disqualify President Trump from office, in a Senate vote that was not close to achieving the two-thirds threshold. And this despite a set of facts that hewed quite close to the core purpose of a disqualification regime in a democracy: President Trump was accused in the article of impeachment of inciting an insurrection by setting a mob on Congress on the day that it was meeting to certify the results of the presidential election, after spending weeks attempting to delegitimize and reverse the electoral results via a number of different routes.³¹¹ This suggests a need for renewed development of alternative pathways.

A. Against “Militant Democracy”

The U.S. Constitution’s paths to disqualification largely focus on individuals rather than groups. Other nations, as we have noted, take different paths. In Canada, for example, the far-right Proud Boys were designated a terrorist group in February 2021.³¹² In the United States, this seems unlikely. Historically, Congress and state legislatures did act to outlaw some political parties (such as Communist movements) and to suppress their members until fairly recently.³¹³ First Amendment concerns have not prevented the application of group-based sanctions to foreign organizations.³¹⁴ But domestic organizations are likely to have more robust constitutional claims.³¹⁵ Militant democracy of the sort used in other systems around the world, therefore, is not readily available in the United States.³¹⁶

We think that this equilibrium is unlikely to change because of the entrenched quality of First Amendment rules. But setting aside feasibility constraints, is this a loss? Miguel Schor has recently promoted the addition of an explicit militant democracy dimension to U.S. constitutionalism.³¹⁷ He contends that the Framers envisioned a kind of militant democracy to protect against factions and demagogues, but that chose the wrong tools, and aimed against the wrong threats, for the modern age.³¹⁸

Even setting the constraints of the First Amendment aside, experiences with militant democracy elsewhere around the world are mixed enough to warrant more caution than Schor allows. In the previous part, we noted a clear preference for individual rather than group forms of disqualification. This is especially true in established rather than fragile democracies. And indeed, both lustration rules and party-banning powers often seem paired with an explicit or implicit sunsets, and so are transitional in nature.

³¹¹ H.R. Res. 24, 177th Cong. (2021).

³¹² Bill Chappell, *Canada Lists Proud Boys As A Terrorist Group, Alongside ISIS And Al-Qaida*, NPR (Feb. 3, 2021), <https://www.npr.org/2021/02/03/963682181/canada-lists-proud-boys-as-a-terrorist-group-alongside-isis-and-al-qaida>.

³¹³ See, e.g., Communist Control Act of 1954, 50 U.S.C. 841-844 (outlawing the Communist Party of the United States and criminalizing membership in it); *Whitney v. California*, 274 U.S. 357 (1927) (unanimously upholding the conviction of a member of Communist Labor Party of California under that state’s Criminal Syndicalism Act).

³¹⁴ *Aziz Z. Huq, Preserving Political Speech from Ourselves and Others*, 112 Colum. L. Rev. Sidebar 16 (2012).

³¹⁵ Brian Michael Jenkins, *Five Reasons to Be Wary of a New Domestic Terrorism Law*, RAND BLOG (Feb 24, 2021), <https://www.rand.org/blog/2021/02/five-reasons-to-be-wary-of-a-new-domestic-terrorism.html>. The most obviously relevant decision is *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

³¹⁶ See Schor, *supra* note 149; Miguel Schor, *Trumpism and the Continuing Challenges to Three Political-Constitutionalist Orthodoxies* (Jun. 2021) (unpublished article, on file with authors), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3730945.

³¹⁷ See Schor, *Trumpism and the Continuing Challenges*, *supra* note 316.

³¹⁸ See *id.*

Militant democracy clauses are surprisingly common, but in practical experience run into a predictable set of problems everywhere, where they are active. These include the risk of overuse in situations where actors pose no clear threat to the democratic order (as arguably happened in South Korea).³¹⁹ More dramatically, they include the risk of outright abuse, where party bans become an antidemocratic tool to repress the opposition, as in Turkey and Cambodia.³²⁰ And finally, they include the very common, salient risks that antidemocratic parties may not be easily identifiable in modern politics, and that bans may prove ineffective even if they are attempted.³²¹ While we share Schor’s sense that U.S. tools of disqualification must be made more robust, we are skeptical that the addition of militant democracy tools in the sense seen in comparative constitutional law is the way to do it.

B. Reviving Section 3

Section 3 of the 14th amendment raises similar concerns. It is, in a sense, also a group form of disqualification, a variant of the lustration clauses found around the world. These clauses, as we have explained at length, play an important role in transitions to democracy, or post-conflict scenarios. But they are paradigmatically transitional, with their anti-democratic risks rising (and pro-democratic benefits falling) if they become permanently entrenched in the constitutional order.

Section 3, though, is written in general terms: It is not textually limited to its origins after the Civil War. Comparative experience suggests it could be given an “individualistic” valence more appropriate for a mature democracy. In particular, Section 3 could be given greater specificity and shape via statute, as Congress indeed did after the Civil War, and as it is empowered to do now via its authority to “enforce” the terms of the Reconstruction amendments.³²²

Such a statute would be useful to clarify both the substantive standard for application and the procedure for disqualification. It might also address other issues, such as the length of any disqualification, and could incorporate our argument in favor of temporary rather than permanent bans in most cases. Via a carefully-crafted disqualification statute, Section 3 could thus be moved some distance towards the direction of our “optimal” regime, outlined in Part IV. Since Justice Chase held after the Civil War that Section 3 is not self-executing, there is a good chance that such a statute would be a prerequisite for any modern use.³²³

As it is, Section 3’s threshold of “insurrection or rebellion” invites careless application and fatal underreach. It is probably too narrow to deal with the vast majority of modern threats to democracy. Incumbents now use a variety of quite legal means to entrench themselves in office. These may be challenging to fit within the terms “insurrection or rebellion.” Different, but equally vexing, problems attend the substantive standard for impeachment. The standard for impeachment – “treason, bribery, or other high crimes and misdemeanors” – is potentially more elastic and open

³¹⁹ See *supra* text accompanying notes 152-154.

³²⁰ Ministry of Interior v. Nat’l Rescue Party, Verdict No. 340, Nov. 16, 2017 (S. Ct. of Cambodia, Plenary of Trial Chamber); HADEP & Demir v. Turkey, Eur. Ct. H. R., App. No. 28003/03 (2010).

³²¹ See Daly & Jones, *supra* note 151.

³²² U.S. CONST. amend. XIV, § 5.

³²³ See Griffin’s Case, 11 F. Cas. 7 (1869).

to a range of modern democratic threats.³²⁴ That standard has been read in a “legalistic” fashion throughout much of US history, for example as requiring or being anchored to the commission of crimes.³²⁵ President Trump’s defense team argued during his first impeachment that the acts alleged against him were not impeachable because they did not constitute express violations of criminal law.³²⁶ The fact that he may have grossly abused state power in an effort to discredit a political opponent and remain in office—precisely the kind of threat that a reasonable impeachment and disqualification regime would guard against—was irrelevant under that argument.

The threshold for impeachment is best understood, in historical, functionalist, and comparative terms, to allow a broad and relatively political, rather than narrowly legalistic, use of impeachment.³²⁷ A similar clarification is warranted for Section 3. One could, indeed, imagine a statutory framework fleshing out the meaning of “insurrection and rebellion”, elaborating in more detail a substantive threshold keyed to the need to preserve democracy as a going concern. Such a standard should be written broadly to catch future threats, rather than being confined to a particular historical incident. Attempts to subvert the electoral process should be at the core of such a “modernized” statutory definition. The standard would thus aim at specific, individualized acts undertaken to attack democracy, rather than (as with classic lustration mechanisms) membership in a tainted regime or group. Even with such a clarification, of course, Section 3 may remain – inevitably – underinclusive, and simply unusable against some kinds of democratic threats.

Further, the statute should address the process through which disqualification would proceed, as indeed the post-Civil War legislation did. Under the 1870 Enforcement Act, disqualification for most officials proceeded via the initiative of federal prosecutors in suits brought against allegedly ineligible state officials, with the federal courts acting as arbiters.³²⁸ A statute laying out a similar procedure may have some merit in the contemporary United States. A turn to courts would be a shift from the dominant constitutional paradigm for disqualification. Impeachment and legislative exclusion both operate through the political process, and not through an administrative agency or a court. Indeed, the U.S. is striking in its virtually exclusive reliance on political rather than judicial or administrative routes for disqualification.

As suggested by our analysis in Part IV, there is good reason to think that the Constitution has not struck the right balance on this question. The Constitution’s heavy reliance on elected actors (especially members of Congress) creates a risk that disqualification decisions will be based on partisan rather than system-level grounds. This can lead to either under- or over-enforcement, and the prevailing result has been paralysis. As has occurred elsewhere, judicial involvement may help to unblock the channels of disqualification where true anti-democratic threats have been identified. Courts are not a panacea – comparative and historical experience demonstrates that they may

³²⁴ U.S. CONST. art. II, § 4.

³²⁵ See, e.g., Stephen M. Griffin, *Presidential Impeachment in Tribal Times: The Historical Logic of Informal Constitutional Change*, 51 CONN. L. REV. 413, 423-25 (2019) (recounting historical developments).

³²⁶ See Trial Memorandum of President Donald J. Trump 1, *In re Impeachment of President Donald J. Trump* (U.S. Senate 2020), <https://assets.documentcloud.org/documents/6662418/Trial-Memorandum-of-President-Donald-J-Trump.pdf>.

³²⁷ See, e.g., CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* 56 (2017); CHARLES L. BLACK, JR. & PHILIP BOBBITT, *IMPEACHMENT: A HANDBOOK* 36 (2018); MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 105 (3d ed. 2019); LAURENCE H. TRIBE AND JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* 42 (2018); Ginsburg, Huq & Landau, *supra* note 18.

³²⁸ Enforcement Act, ch. 114, § 14, 16 Stat. 140 (1870).

become either too passive or too active in playing their assigned role, or merely too entangled in politics, a particularly salient risk for the already highly politicized federal judiciary.³²⁹ But they could be tapped as part of a revitalized Section 3 that holds some promise of sanctioning anti-democratic attacks on democracy.

Finally, the interaction between Section 3 and other disqualification tools in the constitution merits attention. Unsurprisingly, given that Section 3 and these other mechanisms were added to the Constitution at different times, and for different purposes, they do not always harmonize well. The events of January 2021 showed that the relationship between impeachment, legislative expulsion, and Section 3 demands closer attention. The other routes to disqualifying individuals under the Constitution based on past conduct—impeachment and legislative expulsion—require a two-thirds supermajority. These supermajority requirements help to ensure that removal and disqualification are not purely majoritarian acts.

Section 3 contains no such supermajority requirement for disqualification; indeed, it flips the script by requiring a two-thirds vote in each chamber of Congress to *lift* a disqualification, rather than imposing one.³³⁰ Its aggressive use may lead to majoritarian arbitrage from the more stringent channels. Indeed, once it became clear that impeachment would fail to disqualify former President Trump, many commentators argued in favor of Section 3 as an alternative route to disqualify him and some of his collaborators. One risk is thus that the lustration provision in Section 3 could allow majority actors a means to repress political minorities. There is no way to close this gap entirely. But the kind of statute we have envisioned in this section may ameliorate this risk. Again, providing for a primarily judicial rather than political process would lessen the concern somewhat. So would a standard keyed to categories of disqualifying threats to democracy, rather than being written exclusively regarding a particular historical event.

C. The Importance of the Twenty-Second Amendment

The near-moribund status of impeachment and (at least in its current form) of Section 3 as instruments of disqualification means that the Twenty-Second Amendment's presidential term limit is a singularly important protection for the U.S. democratic order. Placing a lifetime two-term limit on presidents, regardless of individual competence or attitude, is a crude way to protect democracy, with real costs. Popular and effective presidents with no nefarious agenda are arbitrarily forced to leave office, despite popular opinion. At the same-time, the clear, rule-like quality of the term limit can be a major advantage, avoiding the difficult and politically-fraught judgments attending the standards for disqualification found in impeachment and in Section 3.

Particularly under circumstances in which other prohibitory mechanisms have fallen into desuetude, the Twenty-Second Amendment embodies the correct calculus that on balance a hard limit wards against dangers that are greater than the costs it imposes. Hamilton in *Federalist 72* was correct to note that presidential term limits impose costs, but he underestimated their benefits as a bulwark of democracy – perhaps because he and other founders assumed impeachment and other disqualification mechanisms would be more protective than they have turned out to be.³³¹ A raft of

³²⁹ Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301.

³³⁰ U.S. CONST. amend. XIV, § 3 (“Congress may by a vote of two-thirds of each House, remove such disability.”).

³³¹ THE FEDERALIST No. 72 (Alexander Hamilton).

recent comparative work has shown that presidents who will not surrender power often do pose a threat to basic electoral democracy, as they leverage their power to tilt the playing field, making future elections increasingly unfair.³³² Furthermore, as we have already noted, the democratic records of presidential systems without term limits on their chief executives are invariably grim.³³³ One benefit of considering term limits as part of the U.S. constitution's broader disqualification regime is to highlight its underappreciated role in limiting anti-democratic threats.

Yet the US's presidential term limit regime may be more vulnerable to evasion than commonly appreciated. It has been followed relatively uneventfully since adoption in the mid-twentieth century. This period of tranquility may be deceptive.³³⁴ Unlike many democracies around the world, the United States has never experienced a serious evasion attempt. But past may not be prologue. It would be dangerous to assume that no such attempt will happen in the future.³³⁵ As we showed above in Part I, the current regime is riddled with ambiguity about enforcement. Should an evasion attempt be made, whether brazenly or with subtlety, it is unclear which institution would be responsible for stopping it. The courts might not act, deferring to political institutions that may also be paralyzed.

Thus, there is a powerful case for a framework statute setting forth a judicial mechanism for enforcing the two-term limit on chief executives.³³⁶ Ideally, enforcement would precede a presidential election, and perhaps focus on the presence on the ballot of a candidate who is barred by law. At present, courts might be likely to steer clear of such a dispute, invoking the political question doctrine.³³⁷ A new law could force their hand. Such a statute would have to identify appropriate plaintiffs (for example, the attorney general of a state), and elaborate a clear norm detailing the Twenty-Second Amendment's application to different scenarios. It would also have to specify a remedy. For example, a district court could be authorized to issue an injunction against including an illegitimate candidate on state ballots. In effect, this is the mirror image of orders now issued mandating a candidate's inclusion.³³⁸ It is also akin to orders the Supreme Court has issued recently mandating that certain votes not be counted in an ongoing election.³³⁹

D. New Institutional Pathways

Until now, we have assumed that constitutional amendment was off the table, and focused on those improvements that could be made by statute or even informal shift. What, however, if current partisan formations and amendment difficulties were bracketed? What reforms might then

³³² Versteeg et al., *supra* note 83; Ginsburg, Melton & Elkins, *supra* note 82.

³³³ See Dixon & Landau, *supra* note 81, at 372 tbl.1 (2020).

³³⁴ Cf. Andrew Solender, *Trump Says He Will "Negotiate" Third Term Because He's "Entitled" to it*, FORBES (Sept. 13, 2020), <https://www.forbes.com/sites/andrewsolender/2020/09/13/trump-says-he-will-negotiate-third-term-because-hes-entitled-to-it/?sh=4b58f6d0287c>.

³³⁵ Cf. Andrew Solender, *Trump Says He Will 'Negotiate' Third Term Because He's 'Entitled' To It*, FORBES (Sept. 13, 2020), <https://www.forbes.com/sites/andrewsolender/2020/09/13/trump-says-he-will-negotiate-third-term-because-hes-entitled-to-it/?sh=184a837f287c>.

³³⁶ See Versteeg et al., *supra* note 83, at 179; Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 507-11 (2018).

³³⁷ See Strauss, *supra* note 84, at 1494-95.

³³⁸ See, e.g., *Williams v. Rhodes*, 393 U.S. 23, 35 (1968) (affirming order to this effect).

³³⁹ See, e.g., *RNC v. DNC*, 140 S. Ct. 1205, 1208 (2020) (ordering the Wisconsin not to count ballots received postmarked or delivered after election day).

be desirable? The Twenty-Second Amendment, after all, was ratified a mere seventy years ago. The assumption that the constitutional order is frozen in time may well be an artifact of the present political moment—and that itself may be transient. Under those assumptions, more ambitious reform might be conceived.

If constitutional amendment were on the table, one could envision disqualification from the ground up, constructing a system that was very close to our theoretical optimum (although tailored to the U.S. context). One could construct a new pathway that was keyed towards the protection of democracy, focused on identifying threats posed via individual acts (rather than group membership), and placed largely in non-legislative hands. As we have noted above, a revitalization project around Section 3, which would focus on the drafting of a careful statutory framework, might be able to play that role to some degree. But Section 3 is inevitably limited, especially because of its fairly narrow substantive focus on “insurrection or rebellion,” which hardly exhausts the universe of modern anti-democratic threats.

Wholesale reform must start from the observation that no system primarily or wholly reliant on supermajoritarian decision-making by Congress is likely to work well in the current American context, given the mix of a dominant two-party system and an increasingly polarized polity. This suggests the need to rely on other institutions, such as judicial or administrative agencies. The latter approaches, we have shown, are common overseas. One way to structure such a system would be to retain the existing impeachment procedure as is, while also creating a new pathway for disqualification more reliant on administrative or judicial actors. In other words, we would propose decoupling impeachment and disqualification, creating two distinct institutional pathways. Section 3 already suggests this differentiation.

We would suggest broadening the grounds for disqualification beyond “insurrection or rebellion,” a standard designed primarily to deal with the particular problems posed by the Civil War. This new institutional pathway would almost certainly become more aggressive in making disqualification decisions. That would be its aim. There is, of course, a corresponding risk of excessive use. This risk could be controlled, however, with a clearer substantive threshold for political expulsion, and more detailed *ex ante* guidance as to the actions sufficient to warrant disqualification. The language should focus on the kinds of actions that pose a threat to democratic stability, not broader issues of the character or morality of public officials. The focus in Israel, Pakistan, and Colombia on character, and perhaps even corruption, sweep too broadly into the democratic sphere.³⁴⁰

Finally, in designing a new pathway for disqualification, the U.S. would be better served with temporary exclusions of the sort found elsewhere, rather than the more permanent bars contained in the current text of the federal constitution. Many systems around the world, as we have shown, use temporary exclusions from power as a way to defend the democratic order while softening the tension with democracy that is implicit in any disqualification regime. Disqualifications of five or eight years may help to preserve democracy against immediate threats, while also increasing both incentives for actors to deploy disqualification as a sanction and compliance.³⁴¹ Temporary bans also

³⁴⁰ See *supra* text accompanying notes 229-247.

³⁴¹ See, e.g., Dixon & Landau, *supra* note 81 (discussing how non-permanent presidential term limits may increase incentives to comply in some contexts).

allow for the length of disqualification to be calibrated to the degree of the offense and nature of the threat posed to the democratic order.

Conclusion

In this article, we have highlighted the diverse ways in which democratic constitutions, including our own, disqualify individuals or organizations from seeking future office. We have suggested that the American way of handling disqualification, while sprawling, creaky, and fragmented, has both costs and benefits. On the one hand, it has been proved resistant to capture and redeployment as an instrument of partisan entrenchment. On the other hand, it is far too slow to confront modern democratic threats. There are no perfect fixes. But reflection on comparative experience and democratic theories can help flush out opportunities for improvement. Given the prevalence of anti-democratic threats in recent years, both within the United States and globally, the need to develop more effective boundary conditions for democracy will remain an urgent and unceasing task.