PRIMER ON WHY THE FOURTEENTH AMENDMENT, SECTION 3 DOES NOT BAR PRESIDENTIAL CANDIDATES FROM RUNNING FOR THE PRESIDENCY A THIRD TIME

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A handful of law professors,[1] many in the so-called "elite" media,[2] their TV popularizers,[3] and, of course, leftwing participants in social media[4] have whipped themselves into a frenzy on a vague hope that President Trump cannot be allowed to run for President a third time. Why? Because of January 6, 2021. Their narrative is that "Jan 6" is an "insurrection" or "rebellion," which is why the shorthand version of that date has been branded and effectively trademarked as political coin of the realm.

[1] *See, e.g.*, William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, forthcoming 172 U. PENN. L. REV. __, SSRN (posted Aug. 14, 2023) *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 (last visited Sept. 9, 2023) [hereafter "Baude & Paulsen Article"].

[2] Nick Corasaniti & Jonathan Weisman, *Is Trump Disqualified? Republicans Prepare to Fight Long-Shot Legal Theory: In New Hampshire, Republicans are feuding over whether the 14th Amendment bars Donald J. Trump from running for president. Other states are watching closely*, NEW YORK TIMES (Aug. 30, 2023). At least the *New York Times* headline writers recognized the theory is a "long-shot."

[3] Steve Benen, *Arguments Over 14th Amendment, Eligibility Get Trump's Attention: I won't pretend to know what'll happen when it comes to Trump and the 14th Amendment, but it's of interest that the controversy finally has his attention*, MADDOW BLOG (Sept. 5, 2023), *available at* https://www.msnbc.com/rachel-maddow-show/maddowblog/arguments-14th-amendment-eligibility-get-trumps-attention-rcna103481 (last visited Sept. 9, 2023).

[4] *See* 14th Amendment Section 3 – PI account on X/Twitter, available at https://twitter.com/pol1tically (last visited Sept. 9, 2023).

Newsweek has gone so far as to say that the U.S. Supreme Court may imminently take up a case on this issue, which is a claim out of touch with reality.[5]

The arguments trying to stop Trump from going on the ballot are wrong both as a matter of law and as a matter of nationally adjudicated fact. The contrary claims represent yet another instance of the unrelenting "lawfare" being waged on President Trump. Beyond that, the political advocacy launched against Trump is terrible legal policy and, ironically, profoundly antidemocratic. The proponents of these claims would steal from voters the ability to debate and decide for themselves the candidate in the 2024 election that they want to become the forty-seventh President of the United States.

A. The Text of the Fourteenth Amendment's Section 3

Begin with the text of the Fourteenth Amendment. Two provisions are relevant:

Section 3

> 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.
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Section 5

> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

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[5] Katherine Fung, *Supreme Court to Decide Whether to Kick Trump Off Ballot*, NEWSWEEK (Sept. 5, 2023), *available at* https://www.newsweek.com/supreme-court-decide-whether-kick-trump-off-ballot-1824577 (last visited Sept. 9, 2023).

Newsweek is out to lunch here and just trolling "for clicks." The petition for *certiorari* they are referring to is so highly likely to be denied that one of President Trump's lawyers filed to waive his right to file a response about three weeks after the petition was filed. *See Castro v. Trump*, No. 23-117 (filed Aug. 2, 2023), *available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-117.html (last visited Sept. 9, 2023).

1. Section 3 of the Fourteenth Amendment has three elements: (1) demonstration that an individual took one or more federal or state oaths of certain kinds that (2) the individual broke by participating in an insurrection or rebellion; and then, as a result, such an individual is barred from holding (3) a defined list of federal offices.

In popular circles, including on social media, there is a tendency to play a game of word scrambling with the Fourteenth Amendment's Section 3 to stir and edit down all of these elements together to read Section 3, counterfactually, as if it said this: 'Anyone associated with a claimed insurrection/rebellion is barred from holding any federal office.' In reality, the text of this constitutional provision requires careful parsing, and the word goulash popularizers would cook up is a vast mischaracterization of what Section 3 of the Fourteenth Amendment actually says.

2. In terms of the order in which the elements are presented, the text of Section 3 can be condensed a bit for quick analysis into two halves: The first half sets out which positions a purported insurrectionist/rebel cannot hold if the second half of Section 3 is satisfied. The second half sets out what types of oaths for which prior positions such a purported insurrectionist/rebel needs to have broken to be barred from holding one of the listed positions.

3. At this point, the first thing to key into about Section 3 of the Fourteenth Amendment is that a bar on becoming the President of the United States, in particular, is ***notably absent***. Instead, here are the positions that someone who "shall have engaged in insurrection against the [United States Constitution], or given aid or comfort to the enemies thereof" are barred from holding, if they have previously taken an oath to uphold the Constitution (numbering added): "[1] Senator or [2] Representative in Congress, or [3] ***elector of*** President and Vice-President [*i.e.*, not the President or Vice President themselves], or [4] … any office, civil or military, under the United States, [5] or under any State." U.S. Const. amend. XIV, § 3 (emphasis added).

It makes no sense for the Framers to have left out explicit reference to the President and Vice President, if they intended to include them via the side door of a general, back-end reference to "any office, civil or military, under the United States." *Id.* The only proper conclusion of basic textual analysis is that the President and Vice President were seen as unique officials who would continue to be chosen in the fashion the Constitution provides. And that system is one in which the Electoral College alone is empowered to decide, consistent with state law for choosing electors sent to that College, who could hold the two highest governmental positions in the land. The Fourteenth Amendment's Framers knew how to draft with precision. And they knew

that if they had wanted to bar all potential insurrectionists/rebels from holding any federal office (broadly conceived), the text of Section 3 could have been pared down, and there would have been no need to call out Senators, Representatives, or electors specifically.

This conclusion is reinforced still further by noting that purported insurrectionists/rebels are specifically barred from being electors of the President and Vice President. The fact that potential electors set up to vote for President and Vice President are explicitly referred to as barred from holding their separate positions, but no one is explicitly barred, under the same circumstances, from becoming President or Vice President is glaring. It would make no sense to imagine the Framers thought it necessary to reference the electors of the President and Vice President but not refer to those federal positions themselves, leaving the President and Vice President perhaps to vaguely fall only into the general category of "officer[s] of the United States." *Id.*

For these reasons, the text of the Fourteenth Amendment, Section 3 does not bar purported insurrectionists/rebels from holding the office of the President or Vice President. Therefore, the reference to a bar on "hold[ing] any office, civil or military, under the United States," has to be interpreted to create a bar applicable to purported insurrectionists/rebels from becoming federal officers ***south of the Vice President***.[6]

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[6] Former Attorney General Mukasey has recently published a piece in the *Wall Street Journal* where he reaches the same conclusion reached by this Primer, but via the different route of construing the Presidency (and presumably the Vice Presidency as well) as falling outside of the span of the term "officer of the United States." U.S. Const., amend. XIV, § 3:

> The use of the term "officer of the United States" in other constitutional provisions shows that it refers only to appointed officials, not to elected ones. In *U.S. v. Mouat*[, 124 U.S. 303, 307] (1888), the Supreme Court ruled that "unless a person in the service of the government . . . holds his place by virtue of an appointment . . ., he is not, strictly speaking, an officer of the United States." Chief Justice John Roberts reiterated the point in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[, 561 U.S. 477, 497-98] (2010): "The people do not vote for the 'Officers of the United States.'"

Michael B. Mukasey, *Was Trump an "Officer of the United States"? A careful look at the 14th Amendment's Insurrection Clause shows that it doesn't apply to him*, WSJ (Sept. 7, 2023), *available at* https://www.wsj.com/articles/was-trump-an-officer-of-the-united-states-constitution-14th-amendment-50b7d26 (last visited Sept. 9, 2023).

The better path, textually and structurally, to reach this entirely correct conclusion that AG Mukasey comes to is the one set out in this Primer. Additionally, note that AG Mukasey's path would make it difficult for President Trump to remove cases filed against him using the federal officer removal statute, 28 U.S.C. § 1442 and to resist lawfare suits filed against him if he returns to office and seeks refuge in the Federal Tort Claims Act. The reality is that what the term "officer of the United States" or "federal

Additionally, Senators and House members are specifically referenced, and so they are no doubt subject to Section 3's bar—as would their staff and as would any Executive Branch office beneath the Vice President.

Lastly, just for completeness' sake, note that Section 3 is arguably ambiguous regarding its application to offices that are part of the Judicial Branch. On the one hand, contrast the explicit reference in Section 3 to a "judicial officer of any State" with the absence of an explicit reference to a federal judicial officer such as a Judge of the Supreme Court or inferior federal court.[7] This could mean that the Section 3 bar does not apply to the federal Judicial Branch at all.

However, recall the rough division of Section 3 into two halves flagged above. The first part refers to the offices or positions that purported insurrectionists/rebels are barred from holding. The second half establishes which prior oaths, coupled with insurrection or rebellion, will cause the bar to drop. And the reference to "judicial officers" at the state level comes in the second half of Section 3, not the first half. The bar on holding certain offices comes in the first half of Section 3 and is described in different terms as applicable to "civil or military" offices. *Id.* And judicial offices would seem to fall into that broad category. These structural differences are lost on those who adhere to or try to pass off as the genuine article the "word salad" interpretation of Section 3.

On balance then, the best textual reading is that those who engaged in an insurrection or rebellion are barred from any federal judicial office under the first part of Section 3, if the bar's threshold condition of the relevant prior judicial office holder having taken an oath and then broken it is also met.

In other words and in sum, the constitutional disability that Section 3 of the Fourteenth Amendment creates applies to:

(1) the entirety of the Legislative Branch, *i.e.*, all members of Congress in either house and their appointed sub-officers;

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officer," or cognate terms means often depends on context and (especially in the statutory area) depends on the purposes Congress is seeking to carry out in a given body of law. *See, e.g., UARG v. EPA*, 573 U.S. 302, 319-20 (2014) (even when the same term is used in two different parts of the same statute, such a term can carry different meanings). The best construction of the Insurrection Clause is one that ***cuts*** Gordian Knots as opposed to ones, like those of Professors Baude and Paulsen, requiring a 126-page law review articles to exposit.

[7] These days, while we commonly refer to members of the Supreme Court as "Justices," Article III actually refers to the members of the Supreme Court as "Judges." U.S. Const. art. III, § 1, cl. 2 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour ….").

(2) a large portion of the Executive Branch, *i.e.*, all federal officers south of the Vice President (including those in the military);

(3) the entirety of the Judicial Branch, *i.e.*, all Justices and Judges and their appointed officials that take oaths of office;

(4) all electors for the offices of President or Vice President; and

(5) all of those holding any civil or military office under any State.

However, the President and Vice President are not barred offices even when the other elements of Section 3 are met.

4. Applying the text to former President Donald Trump, the analysis would proceed as follows: Under the first element of Section 3, President Trump took a federal oath of office on January 20, 2017. Thus, as to him, the first element of Section 3 is satisfied (assuming the President was intended to be treated as an "officer of the United States." *See supra* n.6 (setting out AG Mukasey's argument that even this element cannot be met because the President is not such an "officer"). Assume, *arguendo*, that the second element can also be met, although there are many reasons to conclude that even that element fails, as covered below in Section D, *infra.* But, most importantly, it is easy to see that the third element ***cannot be met*** because the President is an office explicitly left out of Section 3's bar on holding certain offices.

The text of a legal provision is always the best evidence of its intended meaning. And the Framers of the Fourteenth Amendment knew how to make the presidency a barred office to any adjudicated insurrectionist/rebel if they wanted to. Doing so would have been astonishingly simple. Either of these two straightforward alternatives below would do so (changes from the Fourteenth Amendment as it was ratified, which remains in force to this day, are in blackline). One possibility is to add a few words. The other subtracts a clause (note that the subtraction possibility assumes, for the sake of argument, that AG Mukasey's reading of Section 3 could somehow be overcome):

Possibility 1

> No person shall be **President, Vice-President, or** 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.

Possibility 2

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.

The fact that the ratifiers of the Fourteenth Amendment adopted neither alternative framing of Section 3 (*i.e.*, neither Possibility 1 nor Possibility 2) shows that even someone who was an adjudicated insurrectionist/rebel is not barred from being President ***or*** Vice President. However, the electors for those offices are subject to being saddled with that disability. The internal logic of such a conclusion would be that an Electoral College free of past, oath-breaking insurrectionists/rebels was seen as providing a sufficient screen that those ratifiers were relying on to test who should be President or Vice President. In short, the Electoral College gauntlet was trusted as the exclusive screen and no amendment to the Constitution was necessary, even in the wake of the Civil War, to alter that system. By contrast, weeding out potential officers of the Legislative and Judicial Branches and from the sub-presidency and sub-vice-presidency levels was seen as requiring the creation of a new constitutional screen, which is the purpose Section 3 now serves.

B. The Text of Section 5 of the Fourteenth Amendment

1. The text of Section 5 of the Fourteenth Amendment is simple, and its implications in dooming the argument that President Trump is disqualified from running for and taking office if he wins the 2024 election are also simple. Namely, as a

general matter, Congress reserved to itself "the power to enforce, by appropriate legislation, the provisions of this article," *i.e.*, the Fourteenth Amendment.

Ergo, individual citizens, state secretaries of state, state attorneys general, state governors, and federal Executive Branch officials lack the power to pronounce Donald Trump ineligible to run for President under Section 3 of the Fourteenth Amendment.

Against this straightforward point, skeptics may argue—'Well, the Due Process and Equal Protection Clauses of the United States are enforceable by individuals and those rights without new Section 5 congressional enforcement legislation, so there is no reason that individuals could not similarly enforce Section 3 of the Fourteenth Amendment.'

The problem with that interpretation of Section 3 is that the rights to (1) due process (tracing back to the Fifth Amendment's Due Process Clause, part of the Bill of Rights) and (2) equal protection are ***individual rights***. Additionally, Congress did pass enforcing legislation as to such rights by creating private rights of action against state actors violating such constitutional rights (and others). For instance, consider 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to ***the deprivation of any rights, privileges, or immunities secured by the Constitution and laws***, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable ….

Section 1983 is clearly enforcement legislation adopted by Congress under its authority pursuant to Section 5 of the Fourteenth Amendment. *See, e.g., Overview of Ku Klux Klan Act*, *available at* https://en.wikipedia.org/wiki/_Ku_Klux_Klan_Act (last visited Sept. 9, 2023) ("The act was the last of three Enforcement Acts passed by the United States Congress from 1870 to 1871 during the Reconstruction Era to combat attacks upon the suffrage rights of African Americans.").[8]

[8] Other portions of that same Ku Klux Klan Act were considered by the Center for Renewing America in its paper, *Primer: Federal Law Does Not Criminalize the Conduct of State Officials When They Act to Repel an Invasion*, *available at* https://americarenewing.com/issues/primer-federal-law-does-not-criminalize-the-conduct-of-state-officials-when-they-act-to-repel-an-invasion/ (last visited Sept. 9, 2023) (extensively analyzing the history of the

There is, by contrast, no Section 5 of the Fourteenth Amendment enforcement legislation setting out how Section 3 can be enforced. This has led some commentators to conclude that the ratifiers of the Fourteenth Amendment who wrote that provision of law in 1866 did so to prevent insurrectionists/rebels during the recently concluded Civil War from holding certain federal offices if they could meet the threshold condition of having violated prior federal or state oaths of office. *See, e.g.*, Alan Dershowitz, *No, the 14th Amendment Can't Disqualify Trump*, COMPACT MAGAZINE (Aug. 13, 2023), *available at* https://compactmag.com/article/no-the-14th-amendment-can-t-disqualify-trump (last visited Sept. 9, 2023) ("A fair reading of the text and history of the 14th Amendment makes it relatively clear, however, that the disability provision was intended to apply to those who served the Confederacy during the Civil War. It wasn't intended as a general provision empowering one party to disqualify the leading candidate of the other party in any future elections.") [hereafter "Dershowitz Article"].

Even assuming Professor Dershowitz and others are wrong, though, in their assertion that Section 3 was intended to operate as a once-in-time bar on Civil War insurrectionist oath-breakers, in particular, from holding certain offices, there is still the matter that the Constitution has to be interpreted as a unified whole.[9] And Article III

Fourteenth Amendment and 18 U.S.C. § 242, which provides for criminal enforcement of constitutional civil rights) (hereafter "Invasion Primer"). For purposes of this Primer, it was convenient to use a simple citation to *Wikipedia* to provide an overview of the Ku Klux Klan Act. Much more detail on that statute and its history is provided in the Invasion Primer using primary sources.

[9] Note that Professor Dershowitz is quite persuasive in arguing that, if one interprets the Fourteenth Amendment as a structural matter by looking not just to Section 3 in isolation but to other parts of the Fourteenth Amendment, the references to insurrection and the like appear intended to apply to a ***particular insurrection***—namely, the Civil War, and not to any insurrection/rebellion that might occur in future. *See* Dershowitz Article ("Section 4 of the 14th amendment [U.S. Const., amend. XIV, § 4] provides the following: 'But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave.' ***It seems clear that this provision was intended to apply to a particular insurrection and rebellion—namely the Civil War*** that resulted in the 'emancipation' of enslaved people. There were no slaves to be emancipated in the United States after that war.") (emphasis added). *See also id.* ("[T]he broad language of section 2 of the equal protection clause ("nor shall any state… deny any person within its jurisdiction the equal protection of the laws") strongly suggest[s] general application without being time-bound; whereas the more specific language of sections 3 and 4 (referring to emancipated slaves and using words that were commonly used to describe the confederate insurrection and rebellion against the Union) suggests a more time-bound application.").

Professor Dershowitz is on weaker grounds in making this next supporting argument, however: "Moreover, the absence of any mechanism, procedure or criteria for determining whether a candidate is disqualified demonstrates that the amendment did not lay down a general rule for future elections involving candidates who were not part of the Confederacy. It was fairly evident who participated in the Civil War on the part of the South. No formal mechanism was needed for making that obvious determination. If the disqualification had been intended as a general rule applicable to all future elections,

provides constitutional "Case or Controversy" limits on who has the power to mount a challenge in federal court to try to enforce any given provision of federal law. Chief among these is the requirement of standing, which involves the following three-part test: "We enforce that requirement by insisting that a plaintiff satisfy the familiar three-part test for Article III standing: that he '(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.' *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)).

Meeting the three-part constitutional standing requirements is relatively straightforward where an individual right is involved, such as it is concerning the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 1. For instance, someone who is racially discriminated against in their access to the benefits of a state education program possesses constitutional standing to mount an equal protection challenge because (1) denial of the program's benefits is a concrete monetizable injury in fact; (2) exclusion from the program on account of racial discrimination satisfies the causation element; and (3) a judicial order to provide them an equal opportunity to participate in the benefits program redresses their injury.

By contrast, it is by no means obvious that any type of individualized "injury in fact" is caused to a citizen in the United States if a particular person becomes President or not. Perhaps Congress, through new Section 5 enforcement legislation, could write a statute that would newly confer standing on individuals to enforce Section 3 of the Fourteenth Amendment. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the

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it would have been essential to designate the appropriate decision maker, the procedures and the criteria for making so important a decision." Dershowitz Article. It seems quite plausible, however, that low-ranking soldiers in the Confederate Army or functionary-level members of the Confederate States Congress or those who served at low levels in the executive arm of the Confederate States of America (but who had in the past taken oaths, perhaps in connection with serving in the U.S. Army) might not have been self-evident, especially if they tried to run decades later for federal positions under the U.S. Constitution. It is not as if every aider/abettor of the Confederacy was branded with a scarlet letter, visible at all times.

The better argument is the one mounted above from Section 5—namely, that the Fourteenth Amendment's ratifiers provided Congress with the means to write any reasonably designed statute they wished in order to help ferret out participants in the Confederate rebellion (or any future rebellion). Those means were provided by Section 5 of the Fourteenth Amendment.

class of persons entitled to bring suit."). But Congress certainly has not done so yet as to Section 3 enforcement.

Indeed, one of the reasons citizens who wanted to see Donald Trump declared the winner of the 2020 presidential election lost in their litigation challenges is that they were said not to be able to show they met the requirements for standing. *See, e.g.,* Jacob Sullum, *Trump: If the President Doesn't Have Standing to Pursue Wild, Unsubstantiated Claims of Election Fraud, Who Does?* REASON (Nov. 30, 2020) (considering various standing claims and arguing that even the Trump campaign rightfully lost on standing grounds). It would be the ultimate "heads I win, tails you lose" rule of jurisprudence for the federal courts to say, on the one hand, that citizens (and even the Trump campaign itself) could not show standing to mount a litigation challenge arguing that Trump had prevailed in the 2020 election but for them, on the other hand, to say that any random citizen opposing Trump in 2024 had standing to keep Trump off of the ballot or to disqualify him from taking the oath of office for the presidency if he wins another presidential election. *See, e.g., Gill*, 138 S. Ct. at 1930 ("A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, assert[s] only a generalized grievance against governmental conduct of which he or she does not approve" and for that reason lacks constitutional standing) (cleaned up).

In short, because the Fourteenth Amendment due process and equal protection rights are ***individual rights***, whereas the right to see a purported insurrectionist/rebel disqualified from holding certain federal office if he or she broke a prior oath is a collective right, standing is lacking to try to vindicate the claimed right to enforce Section 3 of the Fourteenth Amendment. And this conclusion becomes even clearer once it is put together with the fact that Congress has never seen fit to create a Fourteenth Amendment Section 5 private right of action of Section 3 enforcement. These points should doom any affirmative litigation effort to keep Trump off the ballot for the 2024 election or to block him from taking the oath of office on January 20, 2025, if he wins the requisite number of votes in the Electoral College.

For instance, in the *Castro* litigation (*see* n.5, *supra*) that *Newsweek* breathlessly highlighted as if it put President Trump's 2024 candidacy in serious doubt, the U.S. District Court for the Southern District of Florida dismissed Mr. Castro's Section 3 lawsuit against President Trump for lack of standing. *See Castro* cert. petition, at 1 & Pet. App. 1-2 (*i.e.,* the District Court Judge took only two short paragraphs across two pages to reach this conclusion).

2. In the absence of Section 5 legislation tailored to provide specific enforcement scaffolding for carrying out Section 3 of the Fourteenth Amendment, the political question doctrine also stands as a barrier to any affirmative litigation against Mr. Trump to try to keep him off the ballot.

What is the political question doctrine? It is a recognition that certain questions lie within the political realm, not the legal realm. When such questions are presented to courts, they will not provide relief. *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 95 & n.10 (1968) ("Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question …."); *Commercial Trust Co. of New Jersey v. Miller*, 262 U.S. 51 (1923) (providing the example that a dispute about when a war ends is a political question: "A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field."); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (courts lack authority to decide which among forms of government in Rhode Island have been unlawfully established, as that power was reserved to Congress and the President).

The reality is that the text of Sections 3 and 5 of the Fourteenth Amendment—both singly and together—allow former President Trump in 2024 to run for and assume the office of the presidency in 2025. Those who argue to the contrary and attempt to establish they are correct in the courts should fail in their aims because deciding who are the President and Vice President of the United States are political questions committed to the authority of the Electoral College. The Fourteenth Amendment could have listed the offices of the President and Vice President in the list of barred federal offices covered by Section 3 of that Amendment, but the Fourteenth Amendment did not do that and instead left the matter as a political question to be resolved by the Electoral College.

Again, the contrast with the Equal Protection Clause bears important analytical fruit. In *Bush v. Gore*, 531 U.S. 98 (2000), for instance, the Supreme Court held that the manner in which Florida was conducting the 2000 presidential election recount in that State violated the individual right of equal protection. *See id.* at 104-05 ("Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."). The Section 3 bar on insurrectionists/rebels holding certain offices is not an individual right. It is not equivalent to the equal protection guarantee that kicks in as attached to individual voters when state legislatures decide to determine the identity of electors with reference to the popular vote in their respective States.

Some of Professor Dershowitz's analysis of the policy implications of attempts by state actors (likely in so-called "Blue States") to unilaterally try to disqualify President Trump in 2024-2025 also rightfully ties back to the political question doctrine:

> In the absence of any such designation [of a Section 3 decisionmaker explicitly empowered by Section 5 legislation to disqualify presidential candidates], it would be possible for individual states to disqualify a candidate, while others qualify him. It would also be possible for the incumbent president to seek to disqualify his rival, or for a partisan congress to do so. ***There is no explicit provision for the courts to intervene in what they might regard as a political question.*** So elections might be conducted with differing interpretations of eligibility and no procedures for resolving disputes about them. It is absolutely certain that if Trump were disqualified by some person or institution dominated by Democrats, and if the controversy were not resolved by the Supreme Court, there would be a constitutional crisis.

Dershowitz Article (emphasis added). ***And avoiding*** a constitutional crisis is self-evidently a policy consequence of the plain-text reading of Section 3 of the Fourteenth Amendment advocated for above.[10]

Professor Dershowitz also nicely summarizes how the political question doctrine, structural interpretation of the Fourteenth Amendment, and relevant historical analysis all fit together:

> The Constitution articulated limited qualifications for presidential eligibility.[[11]] Beyond those neutral criteria, the decision should be made

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[10] Note as well that while the political Left is focused on disqualifying Trump, were they to succeed in their aims, what's good for the goose would become good for the gander. In other words, we could then in future find so-called "Red States" keeping Democrat presidential candidates off of their ballots while so-called "Blue States" keep Republican presidential candidates off their ballots. The candidates on the ballot across the Nation would thus not be uniform but variegated, which is contrary to the obvious point in a federal Republic of holding one uniform election for national office. The result would be chaos and the direct frustration of the democratic (small "d") process—denying political minority populations in all types of States of readily voting for their preferred candidate.

Even David Frum, a fierce critic of President Trump, agrees:

> Suppose secretaries of state in 1 or more swing states succeeded in keeping Trump off the ballot. Then suppose President Biden wins re-election by winning the Electoral Votes of states that debarred Trump. What does this country look like afterward? Chaos.

https://twitter.com/davidfrum/status/1699561968636481590 (7:15 PM Sept. 6, 2023), *last visited* (Sept. 9, 2023).

[11] "No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States." U.S. Const. art. II, § 1. This is the exclusive list of qualifications for President and there

> by voters, who are free to consider the participation of a candidate in activities with which they disagree. Unless an amendment was clearly intended to further limit these qualifications, the voters are the ones to decide who is to be their president. The vague language of the 14th Amendment falls far short of what should be required for so radical a departure from our electoral process.

Dershowitz Article.

What this Primer adds to Professor Dershowitz's short overview magazine article are the robust textual arguments (unpacked above in detail) supporting why President Trump cannot be disqualified from running for and assuming the position of the presidency in 2024-2025. Indeed, the textual arguments from Sections 3 and 5 are logically prior to the structural, political question, and policy arguments the good professor presents. In most legal disputes, careful analysis of the text of any written provision of law provides clear answers. It just so happens that here the text is further buttressed by structural analysis of the Fourteenth Amendment as a whole, the standing and political question doctrines, history, and the policy consequences of allowing individuals or individual state officials to try to keep President Trump (or any candidate for the office) off the ballot based on their unilateral say-so.

C. The Counter-Argument of Professors Baude and Paulsen Construing the Insurrection Clause Differently Relies Not on a Straightforward Reading of That Clause But on Ratification History and Other Legal Arcana.

It is not until page 104 of their 124-page law review article that Professors Baude and Paulsen take up the key text of Section 3 of the Fourteenth Amendment in a section called "*What Prior Officers are Covered? What Future Offices are Barred?*" Baude & Paulsen Article at 104. One knows they are really "in for it," when a section of their analysis concerning the text of Section 3 begins like this:

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is no provision in the Constitution that disqualifies someone in 2024 who is a natural born citizen, if they are 35 or older, and 14 or more years a resident of the United States from running for and attaining the office of President. President Trump, of course, satisfies all of those conditions (as does President Biden). Finally and relatedly, putting aside the Twenty-Fifth Amendment (which is beyond the scope of this Primer), ejection from the position of the presidency is controlled exclusively by Section 4 of Article II of the Constitution: "The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." U.S. Const., amend. XXV. Structural analysis of how the Impeachment Clause fits into this analysis appears in Section D, *infra*.

> First, the language of these provisions should be read in as straightforward and common-sense a manner as possible. The text must be read precisely, of course, but also sensibly, naturally and in context, without artifice or ingenious invention unwarranted by that context. Some constitutional provisions embody precise terms of art that must be attended to. But a reading that renders the document a "secret code" loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one.

As we will see, this is an example of "The lady doth protest too much, methinks," from *Hamlet*. *See* William Shakespeare, *Hamlet*, Act III, Scene II. For it is Baude and Paulsen that are gearing up to provide an Illuminati priesthood interpretation of Section 3 of the Fourteenth Amendment. If they wanted to provide a natural textual interpretation, they would have begun their law review article there.

To make a long (very long, 124-page) story short for readers of this Primer, the professors stress that the textual interpretation of Section 3 (*i.e.,* that it glaringly leaves the President and Vice President off of the list of barred offices) is rebutted by enactment history of the Fourteenth Amendment:

> Senator Reverdy Johnson of Maryland charged that the language employed was defective because the offices of President and Vice President had inadvertently been omitted from Section Three. The amendment "does not go far enough," Johnson averred. "I do not see but that any one of these gentlemen may be elected President or Vice President of the United States, and why did you omit to exclude them?" Johnson was complaining that these two officers should be included in Section Three and there was no good reason to omit them. Whereupon Senator Morrill of Vermont interrupted: "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'" Senator Johnson promptly, and somewhat sheepishly, retreated: "Perhaps I am wrong as to the exclusion from the presidency; no doubt I am; but I was misled by noticing the special exclusion in the case of Senators and Representatives."

Baude & Paulsen Article at 109 (footnotes omitted) (quoting Cong. Globe, 39th Congress, 1st sess. at 2899 (1866)).

The punchline of the Baude and Paulsen article thus relies on a single colloquy between Senators Johnson and Morrill. *See* Baude & Johnson Article at 110 ("The question whether Section Three applied to former Presidents and Vice Presidents does not appear to have been raised again, by anyone."). Precisely.

As a general matter, this method of trying to use one data point to subvert the text of the Fourteenth Amendment smacks of many of the trenchant reasons why Justice Scalia assailed mightily against the use of legislative history: Namely, that the legislative history is not enacted, only the text is, and that colloquies between individual legislators are quite a hazardous basis from which to conclude anything definitive. Indeed, it is especially hazardous where one of the Senators involved in the colloquy saw the obvious textual meaning of Section 3 by "noticing the special exclusion in the case of Senators and Representatives." *See, e.g., Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) ("An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed. Committee reports, floor speeches, and even colloquies between Congressmen... are frail substitutes for bicameral votes upon the text of a law and its presentment to the President."). And it is the obvious textual implication of spotting that "special exclusion," in the context of the structure of Section 3 of the Fourteenth Amendment, that cannot be overcome.

Being a gentleman of the nineteenth century, the fact that Senator Johnson was polite in seemingly receding from what he noticed is far too thin a reed on which to radically change the fact that it is the Electoral College (and the people who functionally elect its electors) that generally choose the President and Vice President under our Constitution (in the absence, under the Twelfth Amendment, of elections of the President thrown into the House and elections of the Vice President thrown into the Senate). Indeed, one can even read the colloquy to the contrary of how Baude and Paulsen read it. Namely, by referring to the "special exclusion," Senator Johnson was being facetious.

I submit that taking this singular snippet of Johnson-Morrill enactment history, pretending it is unambiguous, and deploying it, for the first time in the annals of the Nation in 2024-2025, to upend the fact that the people, through the Electoral College, choose our Presidents (and Vice Presidents) is the real attempted alchemy of a legal priest-like Illuminati, not reading Section 3 just as it seemed plain to Senator Johnson in 1866. The Baude and Paulsen opinion is thus not successfully transmuted gold that blocks President Trump from taking on the presidency for a second time, but drops with a thud on the floor like untransmuted, base-metal lead. The text of Section 3, by contrast, is what should prevail.

D. Element 2 in the Text of Section 3 of the Fourteenth Amendment, Which We Assumed at the Start of the Primer Could Be Met as to President Trump (Just for the Temporary Sake of Argument), Also Cannot Be Satisfied.[12]

[12] This Section of the Primer assumes, *arguendo*, that the January 6, 2021 riot can properly be characterized as an "insurrection or rebellion." This is far from clear. It bears many hallmarks of a protest that got out of

As noted above, element 2 of Section 3 of the Fourteenth Amendment requires the individual that is proposed to be barred from certain offices (if they breached a past federal or state oath) to have participated in an insurrection or rebellion or given aid and comfort to such enemies. Talking heads on television channels like MSNBC presume this can be easily shown. They are incorrect for the reasons that follow.

First, President Trump was charged by the House in his second impeachment with one article of impeachment. The first paragraph of the relevant House Resolution that passed the House (as received in the Senate on January 25, 2021) provided as follows:

> ***[S]ection 3 of the 14th Amendment to the Constitution prohibits any person who has "engaged in insurrection or rebellion against" the United States from "hold[ing] any office … under the United States".*** In his conduct while President of the United States—and in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed—Donald John Trump engaged in high Crimes and Misdemeanors by inciting violence against the Government of the United States, in that ….

H. Res. 24 (Jan. 25, 2021) (as received in the Senate) (emphasis added), *available at* https://www.congress.gov/bill/117th-congress/house-resolution/24/text (last visited Sept. 9, 2023).

As is well known, the Senate voted to acquit Donald Trump of this single article of impeachment on February 13, 2021, with 57 voting guilty and 43 voting not guilty. *See* https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00059.htm (last visited Sept. 9, 2023). Thus, the constitutional two-thirds requirement that at least 67 of the total of 100 Senators vote to convict was not met. ***This alone means that there has been a full and final adjudication, according to the constitutionally prescribed impeach-and-trial processes of Article I and II of the Constitution, that Donald Trump did not engage in insurrection or rebellion.*** This resolution should be *res judicata*[13] on

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hand and, indeed, was, at least, exacerbated by insufficient security preparations, poorly trained Capitol Police attacking the crowd at various points, and other factors. Proponents of the January 6-as-insurrection theory also do not appear to have a theory for why protesters in and around Supreme Court Justice Brett Kavanaugh's confirmation were not involved in an insurrection against the Judiciary, one of our three federal branches of government.

[13] *Res judicata* is a legal term that *Black's Law Dictionary* defines as "1. An issue that has been definitively settled by judicial decision." BLACK'S LAW DICTIONARY (11th ed. 2019). For lay purposes, consider the term

the issue and bar any attempt to argue that element 2 of Section 3 of the Fourteenth Amendment can be met here as part of an effort to bar President Trump from running for the presidency a third time.

Worse yet for proponents of barring Trump from running for or taking the office of the presidency, Section 3 of the Fourteenth Amendment was specifically invoked as a basis for (retroactively) removing him from office under the Impeachment Clause during his Senate impeachment trial. And such a claim unambiguously failed.

Relatedly, the anti-Trump Section 3 argument failed in the ***political*** trial process of impeachment in the Senate. This is the best and highest resolution of the issue that the Constitution creates. And it means any future attempt to relitigate the impeachment acquittal merges into and is barred by the failed attempt to invoke Section 3. In effect, the second impeachment acquittal for Trump preempts and short-circuits any attempt to run smaller-gauge litigation through the federal or state judicial systems on an inherently geographically confined basis (at least until the Supreme Court could be accessed) because we already know, based on a televised, nationwide adjudication by the Senate that Trump did not engage in the high crime or misdemeanor of an insurrection or rebellion in the overall judgment of the United States Senate.

As such, it should be entirely impossible to invoke Section 3 against President Trump yet again for his actions in and around January 6. This is true even as to the sub-part of Section 3 that relates to the ban on holding certain offices by those providing "aid and comfort" to insurrectionists or rebels. This is because the failed single article of impeachment not only alleged that President Trump engaged in an insurrection or rebellion, it also claimed that he fell down on his Take Care Clause duties under Article II, Section 3 of the Constitution. This bars any attempt to relitigate the claim that he should have proceeded in a more rapid and more vehement fashion as the Chief Magistrate (*i.e.*, the chief federal law enforcer) against those who did engage in violence at the Capitol on January 6, 2021.

Professors Baude and Paulsen, in their pending *University of Pennsylvania Law Review* article, *see supra* n.1, attempt to rebut this argument as follows:

> The impeachment charges brought against President Trump as a result of January 6 were equally explicit in concluding that the events of January 6

to mean "conclusively locked in." Note as well that the Framers plainly conceived of impeachments as trials in the Senate, the American analogue to the British House of Lords, which served for much of England's history as a judicial as well as a legislative body. *See* UK Parliament, *available at* https://www.parliament.uk/about/how/business/judgments/ (last visited Sept. 9, 2023) ("The House of Lords was the UK's highest Court of Appeal until 30 July 2009. From 1 October 2009, the Supreme Court of the United Kingdom assumed jurisdiction on points of law for all civil law cases in the UK and all criminal cases in England and Wales and Northern Ireland.").

> constituted an insurrection. A majority of the House of Representatives approved (232 to 197) an article of impeachment charging then-President Trump with "incitement of insurrection" for the events of January 6th. The Senate's vote to convict Trump of this charge, while falling short of the two-thirds majority required by the Constitution's impeachment process, constituted a substantial majority (57 to 43) of the Senate endorsing the House's charge and characterization. Majorities of both houses of Congress thus determined—at least twice—that January 6th was an insurrection; and in the impeachment proceedings majorities of both houses determined that Trump was responsible for having incited that insurrection.

Baude & Paulsen at 114 (footnotes omitted).

They provide no response, however, to the obvious point that whatever majorities in both houses of Congress said, and while a majority in the House was enough to impeach (*i.e.,* accuse President Trump of participating in an insurrection), ***a majority in the Senate is insufficient to convict President Trump of that accusation***. Ergo the accusation failed, that result is preclusive of all relevant constitutional questions that would seek to undermine his acquittal, and President Trump cannot be barred from running for or attaining the presidency again.

That conclusion is not rocket science. Maybe the professors thought that if they buried a discussion of the second impeachment acquittal on page 114 out of a total of a 126-page law review article, no one would notice. Nice try, but not hardly likely.

Second, the House Impeachment Managers in 2021 tried to show that President Trump had encouraged violence (which would be paradigmatic conduct giving "aid and comfort") at the Capitol on January 6. But President Trump's defense lawyers at the second impeachment provided the full context of what Trump said at his speech on the Ellipse on January 6, 2021 to successfully rebut this claim: Trump — "Because you'll never take back our country with weakness. You have to show strength and you have to be strong. We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated. ***I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard.***" Brian Naylor, *Read Trump's Jan. 6 Speech, a Key Part of Impeachment Trial*, NPR (Feb. 10, 2021), *available at* https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial (emphasis added) (last visited Sept. 9, 2023).

Urging protestors to make demands but to do so peacefully and patriotically is the exact opposite of providing aid and comfort to the enemies of the United States.

Hence, any line of attack that President Trump falls within Section 3 of the Fourteenth Amendment because he purportedly provided aid and comfort to rebels or insurrectionists similarly collapses and is totally precluded by his acquittal at his second Senate impeachment trial.

The arguments that President Trump can be barred from running in 2024 or taking office as the forty-seventh President in 2025 are weak and shot through with errors. They should be given no credence.