

# A BRIDGE TOO FAR: SECTION 3 AFTER TRUMP V. ANDERSON

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## I. INTRODUCTION

After the 2020 presidential election, then-President Donald Trump engaged in a monthslong legal and social media campaign to undermine the legitimacy of the election.<sup>[1]</sup> On January 6, 2021, thousands of armed rioters attacked the U.S. Capitol in a failed attempt to stop Congress's certification of the 2020 presidential election.<sup>[2]</sup> In the fallout of the attack, Donald Trump was impeached by the House of Representatives for incitement of insurrection.<sup>[3]</sup> At the same time, political and legal commentators began speculating whether the Disqualification Clause of Section 3 of the Fourteenth Amendment would bar Donald Trump from seeking office again.<sup>[4]</sup> Donald Trump was eventually acquitted by the Senate<sup>[5]</sup> but the cloud of disqualification under Section 3 of the Fourteenth Amendment lingered after he left office.<sup>[6]</sup>

This would have been historically unprecedented. Beyond the initial flurry of litigation in the wake of the Civil War, the Disqualification Clause in Section 3 had only been used once since the end of Reconstruction to remove someone from federal office.<sup>[7]</sup> Previously derided as a "forgotten"<sup>[8]</sup> and "vestigial"<sup>[9]</sup> part of the Constitution, Section 3 received new life in the aftermath of January 6. Section 3 has been used as the foundation for lawsuits against officials in six states<sup>[10]</sup> and was explicitly cited by a court to justify removal from office of a county commissioner in New Mexico.<sup>[11]</sup> The clause's timeliness and relevance only grew since mid-2023 when two law professors, William Blaude and Michael Paulsen, alleged that the clause, by operation of law, automatically disqualified Donald Trump from seeking the presidency again.<sup>[12]</sup> Others disagree.<sup>[13]</sup>

In late 2023, the threat of disqualification was realized when Donald Trump was disqualified from the Colorado presidential primary under Section 3 of the Fourteenth Amendment by the Colorado Supreme Court, acting under a Colorado state law that allowed voters to petition the secretary of state to keep constitutionally ineligible candidates off of the ballot.<sup>[14]</sup> The Supreme Court reversed that decision on March 4, 2024, holding that the States could not exercise discretionary judgment on the constitutional qualifications of presidential candidates.<sup>[15]</sup> But the Court then went further, broadening their ruling and holding that Section 3 is inoperative against would-be federal officeholders unless specifically given life by Congress.<sup>[16]</sup> And while the Court was unanimous in its holding that the States are powerless to enforce Section 3, the Court's disembowelment of that Section, reasoning that Section 5 enforcement legislation was "critical" to Section 3's application, produced a much more controversial 5-4 result.<sup>[17]</sup> [1 H.R. Rep. No. 117-663, at 210-14 \(2022\)](#). <sup>[2]</sup> *Id.* at 76-77.

<sup>[3]</sup> [H.R. Res. 24, 117th Cong. \(2021\)](#). <sup>[4]</sup> See Deepak Gupta & Brian Beutler, Opinion, Impeachment Isn't the Only Option Against Trump, N.Y. Times (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/opinion/trump-impeachment-disqualification.html>; see also Noah Feldman, Opinion, Trump's 2024 Hopes Just Crashed Into the 14th Amendment, Bloomberg (Jan. 11, 2021, 3:06 PM), <https://www.bloomberg.com/view/articles/2021-01-11/trump-2024-president-may-be-ineligible-after-u-s-capitol-riot>; see also Lyle Denniston, Is 14th Amendment Sec. 3 a Dead Letter?, Lyle Denniston L. News (Jan. 10, 2021), <https://lyldenlawnews.com/2021/01/10/is-14th-amendment-sec-3-a-dead-letter/>

<sup>[5]</sup> [167 Cong. Rec. S733 \(daily ed. Feb. 13, 2021\)](#). <sup>[6]</sup> Roger Parloff, After the Cawthorn Ruling, Can Trump Be Saved From Section 3 of the 14th Amendment?, Lawfare (June 7, 2022, 1:32 PM), <https://www.lawfaremedia.org/article/after-cawthorn-ruling-can-trump-be-saved-section-3-14th-amendment>.

<sup>[7]</sup> [Marcy Kahn, Ass'n of the Bar of the City of New York, Report by the Task Force on the Rule of Law on Section 3 of the Fourteenth Amendment to the United States Constitution ? The Disqualification Clause 3 \(2022\) \[hereinafter NYC Bar Report\]](#). <sup>[8]</sup> Mark A. Graber, Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory, 62 St. Louis U. L.J. 639, 639-40 (2018).

<sup>[9]</sup> Gerard N. Magliocca, Amnesty and Section Three of the Fourteenth Amendment, 36 Const. Comment. 87, 87 (2021).

[10] NYC Bar Report, *supra* Note 8, at 4-13.

[11] See New Mexico *ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1, \*67-69 (N.M. Dist. Ct. Sept. 6, 2022).

[12] See Isaac Chotiner, *The Constitutional Case for Barring Trump from the Presidency*, *New Yorker* (Aug. 23, 2023), <https://www.newyorker.com/news/q-and-a/the-constitutional-case-for-barring-trump-from-the-presidency>; see also Matt Ford, *The Conservative Legal Roadmap to Disqualify Trump from Office*, *New Republic* (Aug. 13, 2023), <https://newrepublic.com/article/174977/baude-paulsen-trump-14th-amendment>.

[13] Josh Blackman & Seth B. Tillman, *Sweeping and Forcing the President into Section 3*, 28 *Tex. Rev. L. & Pol.* (2024).

[14] *Anderson v. Griswold*, 2023 CO 63, ¶ 257, 543 P.3d 283 (Colo. 2023), *rev'd sub nom Trump v. Anderson*, 601 U.S. 100 (2024) (*per curiam*).

[15] [Trump v. Anderson, 601 U.S. 100, 114-15 \(2024\) \(per curiam\)](#). [16] *Id.* at 104-06.

[17] *Id.* at 117-18 (Barrett, J., concurring); see also, *id.* at 121 (Sotomayor, S., Kagan, E., and Jackson, JJ., concurring).

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