POLITICS POLICY

The constitutional case that Donald Trump is already banned from being president

Two conservative lawyers make a strong 14th Amendment argument. But the politics of their theory are very, very dicey.

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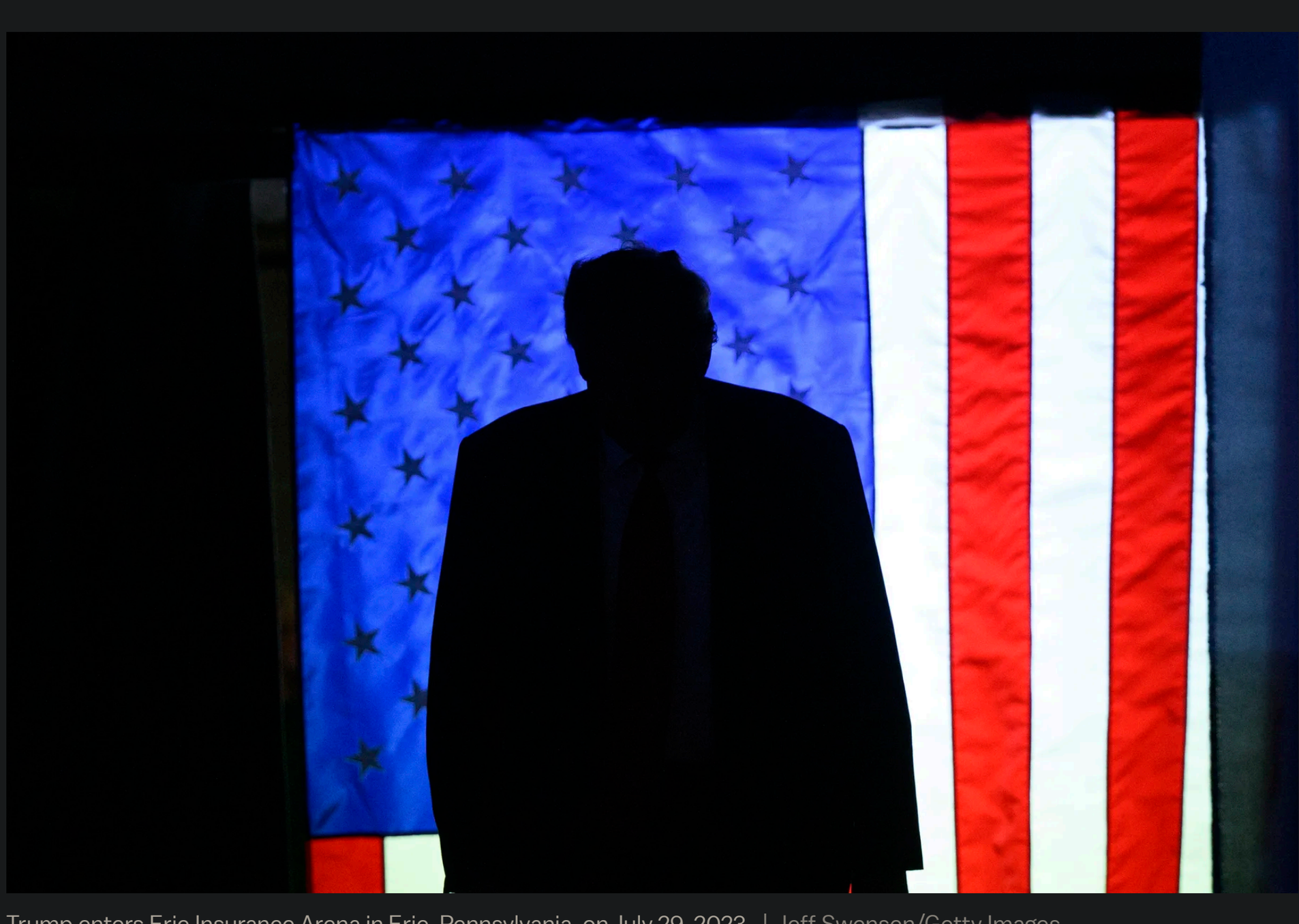

Trump enters Erie Insurance Arena in Erie, Pennsylvania, on July 29, 2023. | Jeff Swensen/Getty Images

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Two conservative legal scholars, **members of the Federalist Society in good standing**, have just published **an audacious argument**: that **Donald Trump** is constitutionally prohibited from running for president, and that state election officials have not only the authority but the legal obligation to prevent his name from appearing on the ballot.

The legal paper, authored by University of Chicago professor William Baude and University of St. Thomas professor Michael Stokes Paulsen, centers on **Section 3 of the 14th Amendment** — a provision that limits people from returning to public office if they have since "engaged in insurrection or rebellion" or "given aid or comfort" to those who have. Baude and Paulsen argue that this clearly covers Trump's behavior between November 2020 and January 2021.

"The most politically explosive application of Section Three to the events of January 6, is at the same time the most straightforward," Baude and Paulsen write. "Former President Donald J. Trump is constitutionally disqualified from again being President (or holding any other covered office) because of his role in the attempted overthrow of the **2020 election** and the events leading to the January 6 attack."

The consequences of this argument are astonishing. On Baude and Paulsen's read, Section 3 is "self-executing" — meaning it does not require an act of **Congress** to enter force and binds those public officials in the position to act on its dictates. Basically, if a single official anywhere in the US electoral system finds their constitutional analysis compelling, Baude and Paulsen urge them to act on it.

"No official should shrink from these duties. It would be wrong — indeed, arguably itself a breach of one's constitutional oath of office — to abandon one's responsibilities of faithful interpretation, application, and enforcement of Section Three," they write.

As a matter of law, I find their arguments quite compelling. If you look at Section 3 in light of the historical evidence and how restrictions on eligibility for office work elsewhere in the Constitution, it's hard to disagree with Baude and Paulen's application of its text to Trump.

But as a matter of politics, encouraging state election officials to go rogue and kick Trump off the ballot is a recipe for disaster. And that disconnect, between what the law says and the practical barriers to implementing it, speaks to some deep problems in American democracy that led to Trump's insurrection in the first place.

The (very strong) argument that Trump is ineligible for office

Baude and Paulsen's **paper**, set to be published in the *University of Pennsylvania Law Review*, focusing on plain-language readings on Section 3 of the 14th Amendment and the way its key terms were used in political discussion around the time of enactment.

To get what they're trying to do, it's worth reading the text of Section 3 in full:

> 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.

Using historical and dictionary sources, Baude and Paulsen establish clear definitions for key terms. "Insurrection" and "rebellion," in their view, "cover pretty much the entire terrain of large-scale unlawful resistance to government authority." To have "engaged in" such conduct, they claim, means being "actively involved in the planning or execution of intentional acts of insurrection or rebellion" or "knowingly provided active, meaningful, voluntary, direct support for, material assistance to, or specific encouragement of such actions."

If this interpretation is correct, then the legal case against Trump is fairly straightforward — all established by facts in public reporting, evidence from the January 6 committee, and **the recent federal indictment**.

In this well-known story, Trump was "actively involved" in an extralegal scheme to send fake electors to the Congress, and urged the vice president to unlawfully accept these fake electors over the real ones and crown Trump president. In service of his scheme, he provided "direct support for" and "specific encouragement" of the mob that ransacked the Capitol on January 6 in his speech, **his tweets**, private statements, and refusal to take actions (like **calling in the National Guard**) that could have stopped the mob.

"The bottom line is that Donald Trump both 'engaged in' 'insurrection or rebellion' and gave 'aid or comfort' to others engaging in such conduct, within the original meaning of those terms as employed in Section Three of the Fourteenth Amendment," Baude and Paulsen write. "If the public record is accurate, the case is not even close."

Normally, this kind of argument feels like a purely abstract exercise. Maybe there's a strong case that Trump running for president is unconstitutional, but who's actually going to stop him?

The answer, according to Baude and Paulsen, is literally anybody in a legal position to do so.

"Section Three's language is language of automatic legal effect: 'No person shall be' directly enacts the officeholding bar it describes where its rule is satisfied," they explain. "It does not grant a power to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself."

To underscore the point, they compare Section 3's prohibition to other constitutional restrictions on running for office. Article II, for example, says that "No Person…shall be eligible" for the presidency until they've turned 35. If a 20-year-old filed paperwork to run for the presidency, no one would object to state election officials keeping them off the ballot for being too young.

More than that: They'd be legally obligated to block the 20 year old. Even if (let's say) the members of a state board of elections think someone below the drinking age would make the best president in American history, the law is clear that such a person can't hold office and thus can't be permitted to run.

The "shall be" language of Section 3 is identical to Article II's, Baude and Paulsen note, and thus entails a similar obligation. Every official involved in the US election system, from a local registrar to members of Congress, has an obligation to determine if candidates for the presidency and other high office are prohibited from running under Section 3.

"In principle: Section Three's disqualification rule may and must be followed — applied, honored, obeyed, enforced, carried out — by anyone whose job it is to figure out whether someone is legally qualified to office," they write.

The fact that's it easier to tell someone's age than if they "engaged in" an act of "insurrection" shouldn't matter. For Baude and Paulsen, the law is the law; if you don't like it, pass a constitutional amendment to change it. The legal system provides a remedy if a person is wrongly disqualified under the 14th Amendment, just as it does if they are wrongly disqualified on any other grounds.

The practical upshot of this analysis, they emphasize, is that officials need to start applying 14th Amendment analysis to candidates *now*. Trump, and any others found to have previously sworn an oath to uphold the Constitution and then engage in the plot to overturn the 2020 election, can and should be barred from running immediately.

"It is not for us to say who all is disqualified by virtue of Section Three's constitutional rule. That is the duty and responsibility of many officials, administrators, legislators, and judges throughout the country," Baude and Paulsen conclude. "Where they are called on to decide eligibility to office, they are called on to enforce Section Three, applying the Constitution's legal standard to the facts before them in a given instance."

The (very strong) practical objection to their argument, and why it matters

There is, Baude and Paulsen admit, a "small problem" with their argument: There's legal precedent to the controversy.

In 1869's *In re Griffin* (a.k.a. *Griffin's Case)*, a circuit court judge named Salmon Chase (who would later go on to be the chief justice of the United States) **ruled on a criminal appeal** by a Black man, Caesar Griffin, convicted of attempted murder. Griffin did not contest the facts of the case, but argued that the judge who presided in the case, Hugh W. Sheffey, was not legally empowered to make a ruling.

Before becoming a judge in 1866, Sheffey had served in the Virginia state legislature and then (subsequently) its Confederate equivalent. Griffin argued that Sheffey could not legally hold public office under Section 3 of the 14th Amendment, and therefore his conviction should be vacated.

Chase disagreed. In his telling, stripping Sheffey and other former Confederates of their office and nullifying cases like Griffin's would cause chaos throughout the Reconstruction South — and would be unfair to the former Confederates themselves. Therefore, the 14th Amendment simply can't be read literally in the way Baude and Paulsen suggest.

"Surely a construction which fails to accomplish the main purpose of the amendment, and yet necessarily works the mischief and inconveniences which have been described, and is repugnant to the first principles of justice and right embodied in other provisions of the constitution, is not to be favored, if any other reasonable construction can be found," Chase **held**.

This, Baude and Paulsen show, is a very bad argument. There is no other "reasonable construction" of Section 3 beyond the literal read, nor does Chase offer one that's at all possible to square with the plain text of the amendment. Chase's ruling simply decides that the law cannot possibly be what it looks like it is, because he thinks it's bad and unfair to Confederates, and thus should be ignored.

For this reason, Baude and Paulsen conclude that "*Griffin's Case* is a case study in how not to go about the enterprise of faithful constitutional interpretation," one that should be "hooted down the pages of history [and] purged from our constitutional understanding of Section Three."

This is all well and good as a matter of legal argumentation, but the problem is that *Griffin's Case* exists as a matter of fact. Though *Griffin* was not a **Supreme Court** case, and thus Chase's ruling is not binding on higher federal courts in the same manner as a ruling by the justices, Baude and Paulsen themselves admit that "Chase's tendentious construction of Section Three has gone on to a surprisingly serious career as a precedent."

Moreover, state election officials are not federal judges; the very existence of *Griffin's Case*, however poorly reasoned, creates real doubt as to whether they are legally empowered to do what Baude and Paulsen are telling them they have to do.

This means that any serious attempt to implement the paper's findings would give rise to significant legal challenge and political chaos. Imagine — *just imagine* — that local election administration officials in states like Georgia, Wisconsin, or Arizona acted on Baude and Paulsen's advice and knocked Trump off the general election ballot.

Demonstrators attempt to breach the US Capitol after they earlier stormed the building in Washington, DC, on January 6, 2021. | Victor J. Blue/Bloomberg via Getty Images

Even if these hypothetical officials' actions were upheld by the Supreme Court, and that's a very big if, Trump and his supporters would be unlikely to accept the ruling. Instead, they would be likely to see it as more proof that the system is rigged against them — and to act extralegally to install Trump in office.

Best case, there's a write-in campaign to put Trump in the presidency, giving rise to a constitutional crisis if he won (since the Supreme Court would have ruled him ineligible in upholding the state officials' actions). Worst case — well, the January 6 riot could have been a lot bloodier than it already was.

What this illustrates is that the Trump problem is very hard to solve through the law alone.

The New York and federal indictments **seem to have strengthened** his hold on the Republican primary electorate rather than weakened it because a large percentage of the American electorate trusts Trump over neutral arbiters, like nonpartisan election officials and judges. So long as he commands this level of support, the law's ability to bind Trump will be limited: Even if he's convicted on federal charges, he could still win the election from his prison cell.

Similarly, a serious effort to render Trump ineligible would run up against the practical problem that he is a near-lock to be the candidate of one of the two major parties — which, in a highly polarized system, means he'll be the candidate of roughly half of the electorate. There is little reason to believe courts enjoy enough legitimacy among Republicans (or Democrats, for that matter) to be in a position to kick a major-party candidate off the ballot. The systemic consequences of such an attempt could well be devastating.

This is not a healthy state of affairs. Democracies depend on the rule of law, on the words on the page being respected as the rules of the game. Baude and Paulsen make a very compelling case that those rules render Trump as ineligible as a wide receiver who stepped out of bounds during his route.

But in a football game, the players feel obligated to respect the refs. In our fractured political system, it's not obvious that the refs — be they election administrators or Supreme Court justices — enjoy the same level of legitimacy. We've already seen the consequences of this legitimacy deficit during the 2020 election; we could very well see them again in 2024.

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