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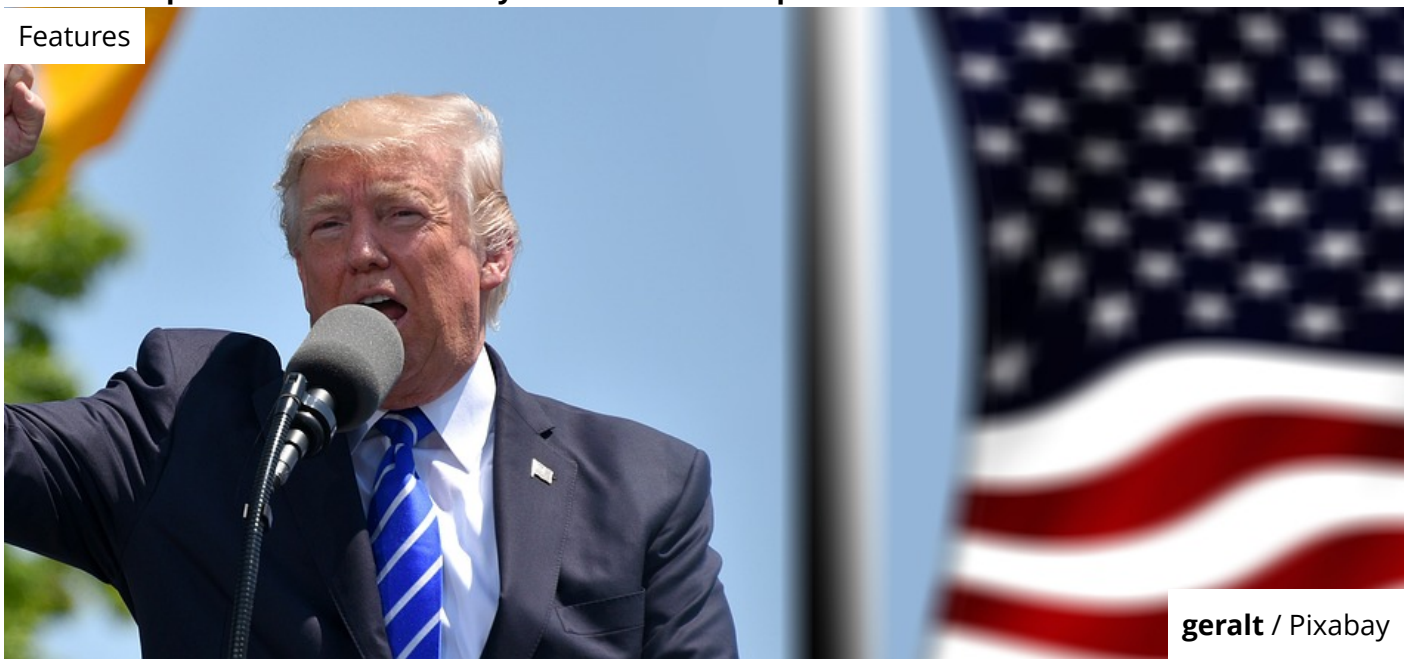

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Trump and Section 3 of the Fourteenth Amendment: An Exploration of Constitutional Eligibility

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OCTOBER 12, 2023 10:05:50 PM

Academicians, lawyers, elections officials, pundits and politicians are presently ensconced in the problem of Donald Trump's continuing constitutional qualification for presidential office. Although he plainly meets Article II of the United States Constitution's three qualifications – at least 35 years old, natural born citizen, sufficient residence in the United States – Trump arguably runs afoul of a more recent disqualification added in 1868 by way of Section 3 of the Fourteenth Amendment.

That provision was added following the Civil War to keep former state and federal

officeholders who had joined the Confederacy from once again rising to state and federal office. Its **terms** are broad and all-encompassing, with no apparent temporal limit, such that even today "[n]o person shall … hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath … as an officer of the United States … 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." Its being cast in general terms arguably makes it applicable to the events of January 6, 2021, as at least one court has already concluded. If the assault on the Capitol was an "insurrection or rebellion" against the Constitution, then any of its participants who had previously taken an oath to uphold the Constitution could be thereafter disqualified from holding state or federal office.

There is little precedent on how Section 3's disqualifying provision works and to whom it applies. Confederates were plainly subject to its terms, though Congress for the most part granted them **amnesty** in the years following the Civil War. Whether Section 3 was applied by elections officials to disqualify non-Confederate candidates in later elections is not clear. I have yet to find any examples that pre-date the events of January 6, 2021. But then again there has been nothing like the events of January 6, 2021 since the end of the Civil War.

As one might suspect, legal questions have emerged over the precise meaning of Section 3's terms. Even assuming that then-President Trump was culpably involved in the January 6 assault on the Capitol, for example, would his actions fall within the reach of Section 3's terms? More precisely, does Section 3's disqualification from holding "any office" cover the Presidency? Does its inclusion of "officer[s] of the United States" on the list of those who are disqualified because of having previously sworn to uphold the Constitution include those who took Article II's presidential oath as opposed to that required of everyone else in Article VI? And what exactly is an "insurrection." Meaty questions like these have no definitive answers (yet).

Seizing on definitional questions like these, some, like Professor Lawrence Lessig, have argued that section 3 should not be **applicable** to President Trump's involvement in the events that transpired on January 6. Worrying about the proverbial slippery-slope, Professor Lessig asks, "What is the line that would divide 'insurrectionists' from protesters?"

Professor Steven **Calebrisi** now insists (after a change of heart) that Section 3 simply does not apply to the office of the President. Professors Josh **Blackman** and Seth Barrett Tillman add that not only does Section 3 not apply to the Presidency, it is not enforceable at all without congressional action.

Rejecting all of Lessig's, Calebrisi's and Blackman/Barrett's positions, Professors William Baude and Michael Stokes Paulsen argue in their upcoming **Pennsylvania Law Review article** that "Section Three covers a broad range of conduct against the authority of the constitutional

order, including many instances of indirect participation or support as 'aid or comfort.' … And in particular, it disqualifies former President Donald Trump …because of his] participation in the attempted overthrow of the 2020 presidential election." President Trump is covered because he swore, as President, to uphold the Constitution. Section 3 applies to the Presidency as an "office of the United States." Further, Section 3 is fully enforceable with or without congressional action.

Because I am not an expert on Section 3's application to insurrections and rebellions (is anyone?) and I profess no special knowledge about whether the office of the President qualifies as an "office of the United States" under Section 3 (though I think it does), I address my focus here on something that is within my wheelhouse: the enforceability of constitutional norms, particularly those found in Section 1 of the Fourteenth Amendment. Specifically, I explore whether congressional legislation was considered necessary in 1868 (when Section 3 was ratified) to enforce the Fourteenth Amendment's restrictions. If true of Section 1, then a much stronger argument can be made that the disqualification provision in Section 3 was also meant to require enabling legislation. If not, then the argument that Section 3 was not considered directly enforceable (as Justice Salmon Chase argued in ***In re Griffin***) loses some weight.

In sum, I am confident that Section 1 of the Fourteenth Amendment was understood by the framers of the Fourteenth Amendment and the legal community to be fully enforceable without congressional enabling legislation. As I explain below, direct, positive enforcement of constitutional provisions was the norm.

Toward this end, I would first like to add a word about legalese. Unlike discussions about state constitutional laws, which frequently include digressions into whether provisions are **self-executing**, federal constitutional discussions rarely (if ever) use that term. Instead, federal constitutional analyses inquire whether powers have been "exercised," whether limitations "apply," and generally whether the Constitution is "enforceable." Addressing the Fourteenth Amendment as "self-executing" is therefore a non-starter, whether in today's terms or across history. It may be unenforceable without a statutory vehicle, or it could present a non-justiciable political question, but neither of these equates with its being non-self-executing. The question is whether it is enforceable without congressional support. And to that problem I now turn.

In support of their claim that Section 3 requires congressional support, **Professors Josh Blackman and Seth Barrett Tillman** argue for a distinction between "defensive" and "offensive" enforcement. Although a defensive use of the constitutional constraints found in the Fourteenth Amendment is always permissible, they claim, the "offensive" use of the Fourteenth Amendment's limitation (including those in Section 3) is not. "As a general matter, to sue the federal government or its officers, a private individual litigant must invoke a federal

statutory cause of action. It is not enough to merely allege some unconstitutional state action in the abstract." The same is true for suits against states and their officers, they claim. "Section 1983, including its statutory antecedents, i.e., Second Enforcement Act a/k/a Ku Klux Klan Act of 1871, is the primary modern statute that private individuals use to vindicate constitutional rights when suing state government officers." Tying this into a historical thread, they then assert that "[c]onstitutional provisions [including Section 3] are not automatically self-executing when used offensively by an applicant seeking affirmative relief," with the implication being that it has always been that way. It is in this latter regard that they are mistaken.

Section 1983 was passed in 1871 to correct state and local abuses of freed slaves throughout the Reconstructed South. It awarded, and still awards, the victims of unconstitutional conduct a private action against the offending government official. It has in modern times (defined as since 1961) become the premier mechanism for vindicating federal wrongs perpetrated by state and local officials.

But before modern developments beginning in 1961, constitutional provisions (including those in the Fourteenth Amendment) were always understood to be enforceable without federal enforcement statutes like section 1983. As explained by Professor Anne **Woolhandler**, "positive," "direct," "offensive" constitutional litigation in state and federal courts long preceded the adoption of the Fourteenth Amendment in 1868, section 1983 in 1871, and general federal question jurisdiction in 1875. "Throughout the nineteenth century, both before and after Reconstruction," she explains, "the Court saw diversity jurisdiction as an appropriate vehicle to raise federal questions, sometimes providing an expansive scope to diversity explicitly to accommodate this use of it." Consequently, "much of the Supreme Court's development of individual rights and remedies took place without reliance on either federal question jurisdiction or statutes such as § 1983, but rather under the rubric of diversity jurisdiction." Congressional enforcement mechanisms and federal question jurisdiction did not exist, were not used and were unnecessary. Constitutional provisions were fully enforceable without congressional assistance.

This remained true in 1868 when the Fourteenth Amendment was ratified. The Supreme Court in 1978 explained in ***Monell v. New York Department of Social Services*** that at the time the Fourteenth Amendment and section 1983 were put in place it had already "granted unquestionably 'positive' relief in Contract Clause cases," the question being simply whether there had been "a violation of the Constitution." It added that "federal courts found no obstacle to awards of damages against municipalities for common-law takings" at this time, either, citing an 1873 case as an example.

So-called "confiscatory" challenges under the Fourteenth Amendment's due process clause were heard in federal court in the late nineteenth century through the early twentieth century,

too, with one of the better-known examples being the 1908 case of ***Ex parte Young***, which remains a cornerstone of modern constitutional litigation. There the Supreme Court concluded that the presence of constitutional claims under section 1 of the Fourteenth Amendment, when coupled with federal question jurisdiction, was enough all by itself to support a federal court's entertaining a "positive" constitutional challenge to Minnesota's confiscatory rates. No statutory vehicle, like section 1983, was discussed. None was needed.

In 1946 the Supreme Court in ***Bell v. Hood***, without mention of any statutory enforcement mechanism, observed that "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the state to do." In support of this "established practice" the *Bell* Court cited to late nineteenth century and early twentieth century precedents under constitutional provisions including the Fourteenth Amendment.

None of this was changed by the additions of section 1983 in 1871 and the advent of federal question jurisdiction in 1875. Although having maintained a constant presence in the United States Code, albeit in various different subsections (such as 8 U.S.C. § 43 when *Bell v. Hood* and ***Brown v. Board of Education*** (1954) were decided), section 1983 remained little-used until the 1960s. Justice Scalia observed in his dissent in ***Crawford-El v. Britton*** that section 1983 produced "only 21 cases in the first 50 years of its existence." In the collection of the cases that make up *Brown v. Board of Education*, for example, most of the plaintiffs did not mention section 1983's ancestor, 8 U.S.C. § 43, at all in their pleadings, and not one mentioned it before the Supreme Court as a basis for the suit. **Judge Marsha Berzon** was thus certainly correct to state in her 2008 Madison Lecture at NYU Law School that "in *Brown* the plaintiffs grounded their claim for relief directly in the Fourteenth Amendment." Constitutional scholars, I think, tend to agree.

Professors Blackman and Tillman are thus wrong to suggest that the Fourteenth Amendment somehow distinguished or was meant to distinguish between "positive" (using the Amendment as a "sword") and "negative" (using it as a "shield") uses. Calling this an "American constitutional tradition" and claiming that the Fourteenth Amendment was meant to "be wielded as a shield without legislation" but "not self-executing in court [for] … affirmative relief unless Congress provides for its enforcement" is far-fetched to say the least. It is not a tradition and has no basis in the many cases that were directly raised under the Fourteenth Amendment throughout the late nineteenth and early twentieth centuries. The Fourteenth Amendment was directly used as a sword and a shield for more than eighty years without need of a congressional enforcement mechanism. The generation that framed the Fourteenth Amendment must have known all this. It would not have expected the Fourteenth Amendment's terms to lie moribund until Congress took action.

So what happened to change all this? Why are Professors Blackman and Tillman correct about the lay of the constitutional land today? Why are statutory remedial vehicles like section 1983 now needed? The question is a difficult one with no ready answer. The short (and admittedly incomplete) answer is that in 1961 the Supreme Court in ***Monroe v. Pape*** breathed new life into section 1983 by allowing it to be used against unauthorized governmental actions. Before that happened section 1983's "under color of law" requirement had been interpreted to required authorized governmental wrongs. When attorney's fees were added to section 1983 in 1976 that pretty much sealed the switch from direct constitutional litigation to section 1983, with the latter now being both available and preferred by the plaintiffs' bar.

Not that this killed off all direct constitutional litigation. Far from it. The Supreme Court in 1971 in ***Bivens v. Six Unknown Named Agents of Bureau of Narcotic*** recognized a direct constitutional cause of action for damages under the Fourth Amendment against federal agents, and extended this rationale in **1979** and **1980** to cover violations of the Fifth and Eighth Amendments. While it seems plain that no more direct constitutional actions will be recognized today, and in ***2010*** the Supreme Court put the final kibosh on attempts to circumvent section 1983 with direct constitutional logic, this most recent history demonstrates how powerful and lasting was the traditional use of direct constitutional causes of action.

In the end, how direct, positive, offensive constitutional actions came to be replaced by actions based on congressional legislation should prove unimportant to the debate over Section 3's enforceability. The point is that Section 3 could not have been considered offensively unenforceable as part of some "traditional view." No such tradition had ever existed. Section 1 of the Fourteenth Amendment, like just about every other constitutional provision (such as the Contracts Clause in Article I, § 10) was expected to be enforced directly in state and federal court. Further, to the extent congressional support for Section 3 is needed it is today readily found in section 1983, which has been extended to cover just about every constitutional provision worth litigating. Whether the dormant Commerce Clause, the First Amendment, the Fourth Amendment, or the Fourteenth Amendment's limits in Section 1, section 1983 has been recognized as an available vehicle. There is no apparent reason that it could not be used with Section 3 of the Fourteenth Amendment if that became necessary (though I think it should not).

None of this is meant to suggest that anybody and everybody is free to sue in state or federal court to force Trump's name from ballots. In federal court Article III standing presents a huge obstacle, as does the political question doctrine (though I think the latter is overstated). State courts have their own restrictions on who may sue for what violation. Section 3 of the Fourteenth Amendment does not override any of this. Suffice it to say that enough water has flowed under a sufficient number of bridges to prove that state elections officials and state courts generally have the authority to entertain challenges to and remove potential federal

candidates from ballots for a number of reasons, such as not having paid the required **fees**, not properly **collecting signatures** and not being **qualified** under Article I of the federal Constitution. States, moreover, have disagreed to the point that some presidential candidates, like **Ralph Nader**, have been disqualified in some states but not others. I don't see that Section 3's disqualification provision being applied to Trump should be any different.

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20th Amendment to the US Constitution ratified

On February 6, 1933, the 20th Amendment to the US Constitution was ratified by the requisite majority of states, moving the start of presidential, vice-presidential and congressional terms from March to January in an effort to shorten the problematic "lame duck" period.

Learn more about the 20th Amendment.