



Is President Trump Disqualified from Office Under the 14th Amendment?

August 31, 2023

Visit our media library at constitutioncenter.org/medialibrary to see a list of resources mentioned throughout this program, listen to previous episodes, and more.

[00:00:00] Jeffrey Rosen: Two scholars, Will Baude and Michael Paulson, have published an article arguing that President Donald Trump is disqualified for running for re-election by Section 3 of the 14th Amendment. Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

[00:00:32] Jeffrey Rosen: Section 3 of the 14th Amendment prohibits anyone who's previously taken an oath of office from holding public office if they've engaged in insurrection or rebellion against the United States. In this episode of We the People, we'll discuss what Section 3 means, whether President Trump's actions qualify as engaging in insurrection, whether or not Section 3 is self-executing, and who can enforce it. Joining me to discuss these important constitutional questions are two of America's leading experts on the 14th Amendment.

[00:01:02] Jeffrey Rosen: Mark Graber is University System of Maryland Regents Professor at the University of Maryland, Francis King Carey School of Law. He's the author of many books and articles about constitutional law, and his most recent book is Punish Treason, Reward Loyalty, the Forgotten Goals of Constitutional Reform After the Civil War. Mark, it is wonderful to welcome you to We the People.

[00:01:25] Mark Graber: Thank you. It's wonderful to be here.

[00:01:28] Jeffrey Rosen: And Michael McConnell is the Richard and Francis Mallory professor and director of Constitutional Law Center at Stanford Law School. He's also a senior fellow at the Hoover Institution and a former circuit judge on the United States Court of Appeals for the 10th Circuit. His most recent book is Agreeing to Disagree, How the Establishment Clause Protects Religious Diversity and Freedom of Conscience. Michael, it is always wonderful to welcome you back to We the People.

[00:01:54] Michael McConnell: Nice to be back.

[00:01:56] Jeffrey Rosen: Mark, what does history teach us about Section 3 of the 14th Amendment and what the standards for disqualification are?

[00:02:05] Mark Graber: Well, under the common law of insurrection, you needed four elements. Two or more people, could be two, could be 10,000. Resisting a law, any law, could be overthrowing the government, could be resisting paying your parking fines, resisting by force, intimidation, or violence for a public purpose. By a public purpose, it means you were not resisting simply because you didn't want to pay taxes or you had some benefit. It had to be some general goal, you thought the law was immoral, illegal.

[00:02:54] Mark Graber: Participating in an insurrection under the common law was doing any act, knowingly advancing the insurrection. That's all. You did not have to be the violent one. You did not have to be at the scene. And because in the 19th century, they had much narrower notions of free speech than we have, simply urging them on would have been sufficient under the common law.

[00:03:25] Jeffrey Rosen: So interesting. Michael you've heard Mark's definition, including resisting by force or intimidation or violence for a public purpose, and the common law definition saying that doing any act, knowingly endorsing an insurrection would qualify. What's your sense of what history teaches us about what constitutes participation in an insurrection for purposes of Section 3?

[00:03:46] Michael McConnell: Well, of course, we're not interpreting the common law. We're interpreting the words of Section 3 of the 14th Amendment words carefully chosen in the wake of the Civil War, and those words essentially are, the most important of them, are referred to persons having previously taken an oath of loyalty to the United States persons who engaged in an insurrection or rebellion.

[00:04:14] Michael McConnell: So, the term engaged in surely deserves some attention here. It doesn't mean urging on. It doesn't mean merely supporting. It means actually engaging in the insurrection. And they, you know, as to exactly what an insurrection was we have one principal example, which is the rebellion in the Civil War itself. The Section 3 has essentially been a dead letter since 1872. It was applied one time during the World War I era, and actually I think that's a cautionary note because a person elected to Congress was kicked out because of his opposition to a World War I.

[00:04:58] Michael McConnell: And that, I say, is a cautionary note because we do want to be sure that Section 3 does not turn into yet another means by which, you know, partisan adversaries in this country can go after their opponents and try to keep them from office.

[00:05:17] Jeffrey Rosen: Many thanks for that and for calling our attention to the text. I'll, I'll just read it again, so we have it on the table. No person shall be a senator, 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 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 give an aid or comfort to the enemies thereof, but Congress, made by a vote of two-thirds of each house, removes such disability.

[00:05:55] Jeffrey Rosen: Mark Graber, you just written an important book about the meaning of the 14th Amendment after the Civil War. Tell us about what the framers had in mind when they chose that language and why you believe that it was broader than simply engaging in the rebellion against the states but wasn't meant to apply, respectively, to other insurrections.

[00:06:19] Mark Graber: Well, there are several very good reasons. The best reason is very simple. The 39th Congress tells us so. Quite frequently, people make proposals for constitutional amendment, excluding from office participants in the late rebellion. That clearly said the Civil War. They changed the language. When asked why did they change the language, Senator John Henderson said, "Because we don't want to limit this to the Civil War. We want to include any insurrections." They were deeply worried about Southern behavior after the Civil Wars. They were worried there might be overthrows, but they're simply worried that groups might resist not all laws, but simply laws favoring African-Americans.

[00:07:16] Mark Graber: They knew what an insurrection was. The common law of insurrection was familiar to all of them. They used the terms of the common law, there's usually a presumption. When someone uses terms of a lawyer that have a well-defined legal meaning and people know what that meaning is, that's what the words meant to them. Now, I am not an originalist. I am open to ideas that maybe their understanding of an insurrection was too broad. But as an historian, I have to say, this is their understanding of what an insurrection is. It is not simply the Civil War.

[00:07:56] Mark Graber: So, you see, actually, a lot of state cases of the era say the Civil War is not a mere insurrection, it's grander, implying insurrections can be something less.

[00:08:09] Jeffrey Rosen: Michael, Professors Paulson and Baude have made a similar argument to Professor Graber drawing on some of his research, and that regardless of precisely what the 39th Congress intended, the text clearly applies to all insurrections, not just the late insurrection, and then that's combined with an intent to have it cover perspective insurrections. What do you think of the argument that for a textualist today, it's plausible and maybe even the most natural reading of the words to apply it to future insurrections, and therefore it should be applied broadly?

[00:08:42] Michael McConnell: I don't have any doubt that it applies to future prospective insurrections. I think Mark is entirely correct about that. But in trying to figure out what an insurrection is, we have to be aware of the long history of political violence in this country in which riots are relatively frequent part of our landscape. And they are not all called insurrections. There have been numerous violent occurrences in which people have obstructed the enforcement of the law for good causes and for bad causes without ever being charged with insurrection. That, I think, is also an important part of the history.

[00:09:23] Michael McConnell: So, when the framers of the 14th Amendment used the term insurrection, which is a very strong word, I do not think we should assume that they wanted to bring with it any kind of any instance in which two or more people engaged in violence designed to obstruct the enforcement of the law.

[00:09:43] Jeffrey Rosen: Mark, what's your response to Michael's argument that the text shouldn't cover mere riots or two or more people and then perhaps should be applied more narrowly?

[00:09:55] Mark Graber: There are two responses, one as a good... I'm glad that Michael is a living constitutionalist as I am, that we shouldn't, you know, be bound by the framers understanding, but in fact, one of the people responsible for continuing the understanding of insurrection was Judge Benjamin Curtis. And as a judge, Benjamin Curtis dealt with insurrection, dealing with people, freeing fugitive slaves. There weren't hundreds of them trying to free fugitive slaves by violence. Many times, there might have only been 10. But in the fugitive slave trials for insurrection, judges, Northern and Sutherland, gave the common law definition I gave during the Civil War, four or five Supreme Court justices, not even Curtis who had retired by then, gave the common law a definition. That's the definition.

[00:10:55] Mark Graber: Now we should decide for ourselves. Maybe that's too broad, but again, as a historian, I can say that's our decision. It's not their decision.

[00:11:10] Jeffrey Rosen: Michael, how would you define insurrection? The common law definition, the statutory definitions of insurrection under federal law? How should courts go about defining that?

[00:11:24] Michael McConnell: Well, I am not the historian that Mark is, and, you know, he may very well be correct about common law definitions, although what I would want to know from a historical point of view is how various forms of political violence up to the adoption of Section 3 were treated? How many of those incidents were charged with the crime, common law crime of insurrection?

[00:11:50] Michael McConnell: I think the common English distinction between insurrection and other forms of civil unrest or riots is that an insurrection is a large-scale enterprise designed to overturn the government. That is to actually eliminate the power of the government, not just to tell, not just to get the particular officials to do something different or not to do something, but actually put in a new form of government.

[00:12:20] Jeffrey Rosen: Mark, did President Trump participate in an insurrection as understood by Section 3?

[00:12:26] Mark Graber: My best guess is yes. There's a fact dispute. I was not there. I have not done the research that I could say as a scholar, I could publish. You would want to know exactly what did he know? What did he intend? It looks like to me, from the documents I have read, from some of the features of the prosecution, that he did. I have not yet fully seen his defense, but there is a strong case to be made that he did. And I apologize that I can't be more specific, but it really is. I'm a 19th century legal historian, and I can't testify to things that were said done when I wasn't in the room and that I have not researched.

[00:13:32] Jeffrey Rosen: Michael, what's your sense of whether President Trump participated in a Section 3 insurrection or what facts you'd want to know to make that determination?

[00:13:43] Michael McConnell: Well, I don't know for sure. I think the important constitutional questions have to do with the meaning of the provision and not their application to, you know, one particular individual. I do think that it's significant that the Department of Justice has charged several hundred people who were involved in the January 6th incursions with various crimes, and Donald Trump one of them, and not a single one of them has actually been charged with insurrection.

[00:14:12] Michael McConnell: Insurrection is in the criminal code. It's right there in USC and no one has been charged with that. That makes me assume that the prosecutors who have access to much more information than I do and every incentive to prosecute for this must have looked at the evidence and concluded that a charge of insurrection would not stick.

[00:14:36] Jeffrey Rosen: Mark, is the standard for common law insurrection the same or different from those statutory insurrections that no one has been prosecuted for and how should an official decide what the legal standards for insurrection are in making this determination about President Trump?

[00:14:56] Mark Graber: Okay. Well, obviously, I don't know the statutes as well. I'll note that a point that I agree with Professor McConnell. That is during the 20th century, particularly during World War II, the definition of insurrection started to look a lot more like the definition he described. I said it's a living constitution definition. If you like a living constitution, if it's more.

[00:15:24] Mark Graber: Now a crucial feature of Section 3, and this the framers were clear about. Section 3 is not a criminal statute. It is not a criminal punishment. It is simply a qualification for office. So, among other features, that means the standard is, did he do it, or didn't he? And not, did he do it beyond a reasonable doubt? Now there are all sorts of reasons people don't prosecute, and it might be they simply thought, "Well, we're very confident he did it, we're not sure we can show it to a jury beyond a reasonable doubt, here are things we can show beyond a reasonable doubt." Again, I don't know. I was not in the room.

[00:16:15] Mark Graber: Section 3 deals with the understanding of insurrection at the time, at least for the framers, as that was understood in 1865, 1868. Insurrection statutes have been reinterpreted over time. They have been repassed over time. They reflect changing notions. Now I think there's still a very strong case to be made, even if you say large scale. If you're overturning an election, I think a reasonable person could say that's overthrowing the government.

[00:16:52] Jeffrey Rosen: Michael, final thoughts about the applying the insurrection standard to President Trump. If you were a judge would you begin with the statutory definition? Do you agree with Mark that the question isn't beyond reasonable doubt, but something lower? How would you go about analyzing this?

[00:17:13] Michael McConnell: No. He's right that this isn't a criminal statute, therefore, beyond the reasonable doubt standard doesn't apply. That doesn't go to what an insurrection is, it

goes to the quantum of evidence that's needed to establish it. In this case, I think we all pretty much know what took place, although who knows?

[00:17:34] Michael McConnell: The investigators may come out with new information that that Mr. Trump was more knowledgeable and more engaged in the planning of this than it appears that he was. But as of right now it does, I haven't seen any concrete evidence that he actually even was aware that the insurrection, if it was an insurrection, was taking place or would take place. But there's another whole aspect of this that we haven't touched on yet, which is how Section 3 is going to be enforced.

[00:18:10] Michael McConnell: And I think this raises a number of very difficult questions. The Supreme Court, at least the Chief Justice of the Supreme Court way back at the end of the Civil War made the point that Section 3 isn't self-enforcing. Someone has to decide whether the individual is you know, falls within the prohibitions or the descriptions of Section 3, and that remains a very difficult question.

[00:18:36] Michael McConnell: Now, all the more difficult for the for people, for president of the United States where we have no precedent at all, we know that members of Congress and the Senate, qualifications are judged by the House, that is the House or the Senate, the particular House to which they were elected. We know that for state offices, that that's a matter of state law. It's very difficult to figure out how the prohibition would be adjudicated and enforced with respect to a presidential candidate.

[00:19:08] Jeffrey Rosen: Thank you for raising this important question of enforcement and what are the necessary procedures for a Section 3 disqualification. Let's begin with the leading precedent that you just mentioned, and that's Griffin's case which was decided in 1869, and Chief Justice Chase held, as you suggested, that Section 3 is inoperative unless and until Congress passes implementing legislation to carry it into effect.

[00:19:38] Jeffrey Rosen: Professors Baude and Paulson say that Griffin's case is simply wrong. It's inconsistent with the text and should be overturned, but it remains on the books and is the leading precedent. Mark Graber, tell us about Griffin's case. What did Chief Justice Chase hold, and do you think he was correct or not?

[00:19:55] Mark Graber: Well Professor McConnell is exactly right that in Griffin's case, which by the way is not a Supreme Court case, it's the Chief Justice acting as a judge on circuit. So, it's not Supreme Court precedent, but in that case he said, "I can only enforce Section 3 if I have a congressional statute." Curiously, the year before, the Chief Justice, to get the result he wanted, enforced or gave an interpretation of Section 3 in the trial of Jefferson Davis without a statute.

[00:20:30] Mark Graber: Chase hated Section 3. He was for universal suffrage and universal amnesty, and he was going to do anything in his power to minimize Section 3. Now, one of the things Republicans say several points in the debates over the 14th Amendment is we're a little worried about what will happen if we lose control of the national government and Democrats come in and repeal all of our statutes. That is why we've entrenched things. So, it would be

illogical to assume any provision of the 14th Amendment can't be enforced if Civil War era Democrats come into power and repeal the relevant statutes.

[00:21:28] Jeffrey Rosen: Michael, do you think that Griffin's case was correct or not? Chief Justice Chase emphasizes the argument from inconvenience, and he says that this argument can't prevail over plain words or clear reason, but on the other hand, a construction, which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither. And he just says it would be so disruptive to disqualify all of these former Confederate sympathizers that for that reason he refuses to abide by the text. Do you think he was right or not?

[00:22:04] Michael McConnell: I think that's a mischaracterization of the opinion. He does not claim to be disregarding the text. What he says is that the text should not be given a more unreasonable interpretation than the words require. And as for the need for procedures, here's what he said I'm quoting from this decision. He says, "For in the very nature of things, it must be ascertained what particular individuals are embraced by the definition before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions and enforcement of decisions, more or less formal, are indispensable."

[00:22:50] Michael McConnell: Now, I think he's right about that in the nature of things. This is not an argument that, that every provision of the 14th Amendment requires congressional legislation. It's an argument that this provision requires some kind of specification. And when you look at what they actually did, I think the best example here, because it was the most commonly done at the time was the exclusion of Confederates from the House of Representatives and the Senate. And there was no statute passed by Congress about this, but what there is, is a provision of Article One of the Constitution that gives to each House of Congress the right to judge the qualifications of their members.

[00:23:36] Michael McConnell: And that's what they did, and they excluded Confederates from being seated in the House or the Senate. And that's what we would do if senators or congressmen were involved today. As to state officials, it's a matter of state law how qualifications are determined. Unfortunately, we do not have any laws about, or any practices or any precedents about qualifications for president of the United States. And as it presents it, it precisely the difficulty that Chief Justice Chase pointed out way back when.

[00:24:18] Jeffrey Rosen: Mark in criticizing the Chase opinion, Professors Baude and Paulson say that he was exalting original intent over original meaning generally. And spending too much time asking what the historical context was and not, and nothing about the fact that the text itself is self-executing. If you're parsing this decision, do you see that it might apply differently to a presidential election than to the disqualification of state officeholders, and do you think it bars the claim against President Trump or not?

[00:24:52] Mark Graber: Well, my notion is both. As a matter of history and text, there's nothing in the text that says the president is different than the county dog catcher, assuming the county dog catcher actually is an office under the state. There is nothing in the text of the

Constitution that distinguishes the requirement that a person not have engaged in an insurrection, once again, with the proviso that they were either an officer at the time or before. There's nothing that distinguishes that from whether the person is of the right age.

[00:25:36] Mark Graber: Now again, if we want to be pragmatic, and I'm a great believer in pragmatic, there's a lot of pragmatic reasons to tread more carefully with the president of the United States than with the local dog catcher. But we should understand those are our pragmatic reasons. They're not in the text. They're not in the history.

[00:26:04] Jeffrey Rosen: Great. So, we have a sense of the complexity of the issues as it applies to presidential elections. Michael, let's now turn to the questions you raised about the difficulties of deciding if the provision is self-executing, at what stage President Trump would be disqualified in the primaries, the general election or after the general election? You think that each poses a problem? Tell us why.

[00:26:27] Michael McConnell: So, at the primary stage, well, first of all, Section 3 does not seem to apply to running for office. It applies to whether someone can be one of the named officers or hold one of the offices. So, there's a textual argument that we that we would wait until we find out who wins the election and then see whether President Trump former President Trump is entitled to be future President Trump after the election.

[00:26:58] Michael McConnell: And imagine just the practicalities of that are going to be enormous. Putting that aside, which I think is a very big put aside if we, that our elections now begin with primaries. They didn't know primaries back at the time of adoption of the 14th Amendment. But primaries are designed to, you know, help the political parties decide who their candidate is going to be. The political parties are not required to comply with what any state may decide.

[00:27:33] Michael McConnell: And so, let's say that the state of New York decides that Donald Trump can't be on the primary ballot for a presidential candidate and then the Republican convention says, "Well, we don't agree with that. We think that was just a partisan..." You know, you can imagine the rhetoric that they would use. They'll nominate him anyway. And there's nothing that can that the, you know, election officials of New York can do about that.

[00:28:01] Michael McConnell: And so now we're at the general election, and under our constitutional system, you know. It's a little bit of an oddity, but people don't actually run for president. People, what we do is we elect electors. So, we don't actually vote for Mr. Trump or Mr. Biden or anyone else. We vote for electors who then are going to elect the president. So, are they going to is the Republican slate of electors going to be disqualified under Section 3, even if they did not engage in an insurrection? I'm not sure what the legal argument would be for that.

[00:28:35] Michael McConnell: And so, now let's imagine that you get through those two hurdles and Donald Trump, you know, has a majority of the electors. What's going to happen then? So, Congress will meet Vice President Kamala Harris will be sitting there. Her, she's going to have legal advisors telling her that she should refuse to recognize the electoral votes from

electors who you know, that were going to support Donald Trump, it's going to be exactly January 6th all over again, only with everybody taking different roles.

[00:29:15] Michael McConnell: I am not saying that Section 3 doesn't apply to him here. My guess is that the Supreme Court somehow is going to find a way just to step in but when you look at this as a lawyer and, and ask procedurally how it's going to work, there are a number of unanswered questions.

[00:29:34] Jeffrey Rosen: Mark, what are your thoughts about some of the unanswered questions Michael has just raised, including the fact that Section 3 applies to office holding, not to elections, that the Republican convention could nominate President Trump even if he's barred from ballot by a state secretary of state, and that state officials couldn't exclude the entire Republican slate of electors, and also that it would be hard to enforce after the election?

[00:29:59] Mark Graber: Well, let's get rid of Trump for a second, and now imagine the Red Party is committed to making Putin the next president of the United States. And Putin says, "I'm a candidate for president, I want Secret Service protection." I think it would be entirely reasonable. I think Democrats and Republicans would agree, "No. You're ineligible to be president. You don't get Secret Service or any other benefit that the law gives to candidates for the presidency."

[00:30:34] Mark Graber: I think it's pretty obvious that if there is, you're a candidate for an office you're ineligible for, you, you don't have any legal right to that. Again, Putin is declared off the ballot in most states, but the Red Party wants to nominate Putin in one sense so they can do so. But on the ballot, while there are electors, when I vote for the president ballot, I don't see the names of electors, people I've never heard of. I see the names of the two candidates for president. Putin's name cannot be on that ballot and Democrats and Republicans would agree.

[00:31:16] Mark Graber: And if for some reason your favorite Putin supporting state, it can be Massachusetts, if you're a conservative, it can be South Carolina or Florida. If you're a liberal, some state votes for Putin, Democrats and Republicans would agree, the vice president doesn't count the votes because Putin is ineligible for the office.

[00:31:40] Jeffrey Rosen: Michael, imagine that President Trump were excluded from the ballot of the general election, because election officials agree with Mark's analysis. What would the nature of the legal dispute be and how, how would the Supreme Court decide it?

[00:32:00] Michael McConnell: Well, my guess, and of course we're all just speculating here, but my guess is that excluded candidate would immediately go to federal court and seek an injunction and then that would, and a preliminary injunction indeed, and that would get up to the Supreme Court pretty fast.

[00:32:19] Jeffrey Rosen: And how would the Supreme Court analyze it and how should it?

[00:32:23] Michael McConnell: Well, the Supreme Court then would have a choice of things to do. It could decide the case on the basis of what many of us might regard as a technicality so as not to get into the fundamental issues. That might be a decision saying something like, well, you

know, under the law of New York or that the Secretary of State did not have the authority to keep him off, or there had to be some sort of process. He was entitled to present evidence or they might actually, you know, get to all the way to the to the issues that Mark and I have been talking about today. What is an insurrection and what does it mean to engage in an insurrection? We just really don't know what they would do.

[00:33:07] Michael McConnell: I think just as a matter of realpolitik, as realism, I think that the idea that the Supreme Court would, in fact, eliminate someone supported by, you know, whatever it is, 40% of the American public, and say you're not even entitled to cast a ballot for this man I think that's an unlikely outcome.

[00:33:31] Jeffrey Rosen: Mark how do you think the court would and should decide such a case?

[00:33:36] Mark Graber: I agree with almost everything Michael said. And in fact, I'm even questioning whether I should have said almost. To some degree, you know, Michael's both right. If you put the two of us on the court, it's probably going to split one-one for reasons you've heard. So, if the court applies the law, as I understand the law, they probably disqualify Trump. If they apply the law as Professor McConnell understands the law, they probably don't.

[00:34:11] Mark Graber: I think some things we don't know and hear the political scientists and me will take over. One, as Michael said, do they want to, you know, take the risk of disqualification? Two, do they, at least some of the crucial swing votes from rumors, don't really like President Trump. They would like the Republican Party to nominate someone else. Do they think they're giving it a big push by doing so? And the justices may talk to Professor McConnell, I'm going to assure you, the crucial justices do not talk to me, they avoid me on the street when they see me, if they knew who I was.

[00:34:58] Jeffrey Rosen: We'd all benefit from reading your powerful scholarship, no question about it, but let's think Michael McConnell, about the other stages at which different actors might try to enforce Section 3 of the 14th Amendment, and at what point the court could step in. Professors Baude and Paulson imagine a whole series of possibilities that a state secretary of state could keep President Trump off the ballot, that presidential electors could enforce Section 3 in enforcing the Constitution and refuse to vote for President Trump, and that if President Trump were selected, although Baude and Paulson think that Congress and the vice president can't decide for themselves whether the electors acted correctly, a disqualified candidate should not become president even if he has the most votes and could be impeached under the impeachment clause or disqualified under the 20th Amendment, and therefore should be removed.

[00:36:00] Jeffrey Rosen: What your sense about all those possible points at which the amendment might be invoked?

[00:36:05] Michael McConnell: Well, starting at the end of course, he could be impeached. You don't need the Section 3 of the 14th Amendment for that. I thought Donald Trump should have been impeached and convicted last time, and then we wouldn't be talking about this. The could the 25th Amendment be invoked? While there are certain procedures there, I have a lot of

questions about exactly how that would work, but yes, if the vice president and the members of the cabinet all decided that he was unable to discharge the office. He could be removed in that way.

[00:36:42] Michael McConnell: Again, they don't need the Section 3 in order to do that. We're just, you know, pouring Section 3 into a previously existing ways of removing a president. Other than that, I don't know what my friends Baude and Paulson mean when they say he could not serve, because if the Congress and the vice president cannot refuse to recognize the electoral votes cast in his favor, he's going to become president of the United States. And until such time as Congress impeaches and convicts or the vice president and the cabinet remove for a, a disability, he's going to be president of the United States. And I don't see any other way around it.

[00:37:27] Jeffrey Rosen: Mark Graber, it does seem that in practice the only way to keep President Trump from becoming president under Section 3 would be to keep him off the ballot because as Michael McConnell says, if he were in fact elected, then impeachment and the constitutional disqualification don't require Section 3.

[00:37:44] Jeffrey Rosen: So, let's focus on the decision of the state secretaries of state to put him on the ballot or not. There's a movement to try and persuade some secretaries of state not to put him on the ballot, invoking Section 3. Do you think that those should succeed and what litigation do you imagine arising from them?

[00:38:02] Mark Graber: Well, one of the safest bets in American constitutional politics is to predict litigation will arise. You can almost never go wrong. And one of the interesting problems, and it's a problem with American constitutional law, in general, particularly in cases where lots of people might have standing, is anyone can raise the issue. And you can easily see there are a lot of people out there who don't like Donald Trump, a lot of people who are not legally sophisticated, but wouldn't it be nice to give Donald Trump a kick?

[00:38:45] Mark Graber: And they tried to bring the suit. And so, what you do want, and here I agree entirely with Professor McCall, is somewhere and somewhere soon, there needs to be a hearing with evidence, with all the ways in which we try to find out the truth. Now it may be the Secretary of State doesn't do it completely, but in fact what happens then the Secretary of State makes a choice is immediate litigation. Some ways that we have a permanent election is a very good thing.

[00:39:23] Mark Graber: It's not that this will just happen in October of 2024 that we can have the lawsuits now and the Supreme Court has demonstrated when they have to decide something quickly and even when you think they don't have to decide it quickly, they can make quick decisions. So, to get this cleared up long before there's an election. But it's, you know, it will be messy, but the mess really isn't Section 3. The mess is this is the way we do things.

[00:39:58] Jeffrey Rosen: Michael, imagine that a state secretary of state does decide not to list President Trump on the ballot accepting the argument that he's disqualified under Section 3. What is the nature of the lawsuit that follows that decision, and what should the to decide?

[00:40:16] Michael McConnell: Well, we are in uncharted territory. There have been a couple of cases where people who were sort of straightforwardly not qualified to run for president have been kept off the ballot. In these cases, these were people who were not native-born citizens of the United States. And that it went to lower courts twice. Interestingly, one of those courts my former court, the 10th Circuit, then Judge Neil Gorsuch was on the panel and upheld the decision of the state to keep the this not qualified person off the ballot.

[00:40:55] Michael McConnell: Now this was a case where there was no real contest over the question of whether the person was qualified. This was quite straightforward matter. I'm not at all sure that Section 3 would be the same. There's also the complication that the courts have recognized the power of states to keep non-qualified candidates off of the ballot, out of the interest of protecting the right of voters to have a ballot which isn't cluttered. The idea is that if you have like, you know, 57 different people on the ballot, it's going to make it very difficult for people to vote. Not at all clear that that justification for the state's power would carry on, carry over into something like this.

[00:41:48] Jeffrey Rosen: Mark Graber, how do you think courts would and should analyze a case of a state election official who kept President Trump off the ballot in the general election? That it might look different than Griffin's case. That their claim was that a judge wasn't qualified to preside over a trial. Here this would be deferring to the constitutional judgment of the state official. How, how do you think courts would decide it?

[00:42:12] Mark Graber: Well, the interesting question is how courts decide the fact issue. What sort of hearing does this person, the Secretary of State have? On the one verse, the Secretary of State says, "No, you're on the ballot or no, you're off them. You're on the ballot, you're off the ballot." There are no facts. The interesting question is, do you defer at all to the fact-finding? Do you conduct independent fact-finding?

[00:42:51] Mark Graber: My guess is that this is something that courts will conduct independent fact by, will want to have hearings. But the, the question remains, did he do it? Is Donald Trump sufficiently different from the politicians we dislike? And we dislike a lot of politicians, but is Donald Trump sufficiently different that Section 3 says, "You don't get to run, you don't get to hold office?" And that's what they've got to decide. And they have to decide that the way they decide everything else.

[00:43:31] Jeffrey Rosen: Michael, analyze the case specifically if you would you've been judicious in describing the arguments on both sides, but imagine the Secretary of State of California decides that President Trump is disqualified under Section 3 and keeps him off the general ballot, it goes up to the Supreme Court, how would the justices analyze that case?

[00:43:56] Michael McConnell: I don't disagree with what Mark Graber has just been saying about this. I think it is very unlikely that the courts would defer to the Secretary of State of California. What they are much more likely to do is to is you know, conduct hearings hear evidence, hear argument and so forth. I think what's the answer is, based upon what we know about the facts now, my guess is that it's less going to be a fight over what Donald Trump did or

didn't do, as it is going to be a fight over whether what he did and didn't do amounted to engaging in insurrection.

[00:44:40] Michael McConnell: And that's going to be a pure legal question and the Supreme court will decide it through what, the way they always decide things, which is some combination of looking at the text, some combination of, of being informed by history when history is there to be brought to bear. No doubt that Professor Graber's research on the common law will be, you know, will be part of that mix but it's also going to be some parts pragmatism and looking at sort of general principles of the Constitution.

[00:45:15] Michael McConnell: And we can all predict what they will do but exactly how they get there, I don't know. I also think they will be tempted to get rid of the case on some sort of proceduralist grounds. I wonder, for example, if they wouldn't hold that Section 3 applies to holding office, it doesn't apply to running for office. And so, the whole case is premature until the election is over.

[00:45:47] Jeffrey Rosen: Very interesting. Mark Graber, analyze, if you will, some of those pragmatic and prudential considerations that the court might take into account. The discussion calls to mind the Burr treason trial, where Chief Justice Marshall strictly construed the constitutional requirements for treason and rejected the prosecution's argument that the common law of constructive treason would sweep in Burr's alleged conduct. First Amendment and general democratic considerations here lead the court to be suspicious of a broad definition of insurrection, and how do you think it might play out?

[00:46:26] Mark Graber: Well, there is pragmatism and pragmatism. We might want to distinguish them. One is, say, pragmatism within the law. That is, the Constitution is not a suicide pact. In interpreting the law, it is fair to consider consequences of different interpretations. Another pragmatism is no court wants to wind up on the wrong side of history. So, one notion is I agree with Professor McConnell, I think there'll be a temptation to be pragmatic, get rid of it on technicality. I think my prediction would be if they did that, why not go with Chase in Griffins.

[00:47:14] Mark Graber: There's no congressional statute, getting this Congress to pass a statute, governing walking across the street is difficult enough. They're not gonna pass one on Section 3. Another matter is, and the question I've sort of wanted to raise is, do they think Donald Trump and Section 3 really is simply what happened, is simply maybe a little more than what's happened before, difference in degree, but not different in kind.

[00:47:53] Mark Graber: One of the features of Section 3 is notice who's not excluded. The Confederate Army is not excluded. The normal Confederate soldier, the, the Democrats who Republicans hated. And what I think Section 3 says is in normal democratic politics, people we dislike have a right to rule, and we just have to accept it, but there are characters that are exceptional. To the extent the Supreme Court regards Donald Trump as different in kind, not merely in degree from politicians they dislike.

[00:48:40] Mark Graber: I think that will guide them to find a way to use Section 3 to the extent they decide, "No, he's really different in degree. Maybe, worse in degree than we'd like, but different in degree." That suggests finding a way to punt this.

[00:48:57] Jeffrey Rosen: Thoughtful suggestion of how the court views President Trump may help shape its pragmatic ruling which, which raises the question squarely. Michael McConnell, would disqualifying President Trump be prudent or not?

[00:49:16] Michael McConnell: Oh, I'd rather throw that over to the political scientist among us. It would not go down easily.

[00:49:24] Jeffrey Rosen: Judiciously stated. Mark Graber, would it be prudent or not?

[00:49:29] Mark Graber: Well, first to remind Michael, those who can do, those who can't teach, which explains a good deal of why many of us become political scientists. But my own sense, and here's something we don't know, is MAGA a cult of personality or is it a genuine political movement? To the extent you think it is a cult of personality, cutting off the head of the personality reduces the movement. To the extent you think it's a genuine political movement brought on by a lot of forces, all cutting off the head does is make those people even angrier.

[00:50:19] Mark Graber: My sense, and it's somewhat of an amateurish sense, it's somewhat in between. In the long run, if you are anti-MAGA as I am, MAGA must be defeated at the ballot box. What Donald Trump stands for must be defeated by election. But that's not to say if you think that Donald Trump is exceptional in his disregard for democratic politics, that the United States can't do what a lot of other countries and say, "Guess what? If you have such contempt for democratic politics that while in office or after holding office you participate in an insurrection, you are disqualified and we'll deal with your political movement and saner leaders at a different time and place."

[00:51:14] Jeffrey Rosen: Thanks so much for that. Well, in the interests of equal time in this wonderful conversation, we'll give the last word to Professor McConnell. And please answer as you think best the question of whether or not Section 3 of the 14th Amendment bars president Trump from running for reelection and serving as president once again?

[00:51:33] Michael McConnell: Ultimately, in a democratic republic, the will of the people at some level is going to rule. And I don't think that means every little thing, but I think if the vast majority of the people have to be persuaded that the processes were fair and democratic, and I think that taking somebody off the ballot who has support from so many millions of people, maybe not Mark and maybe not me, but millions of people on grounds that are debatable at best is not something that will be regarded as legitimate.

[00:52:18] Jeffrey Rosen: Thank you so much, Mark Graber and Michael McConnell, for taking the time to illuminate and educate We the People listeners about the crucially important question of whether or not Section 3 of the 14th Amendment disqualifies President Trump for running for reelection. Mark, Michael, it's always an honor to have you on We the People. Thank you.

[00:52:37] Mark Graber: Thank you.

[00:52:42] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollack, and Samson Mostashari. It was engineered by Bill Pollack. Research was provided by Lana Ulrich, Samson Mostashari, Cooper Smith, and Yara Daraiseh. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional deliberation, illumination, conversation, and debate. Sign up for the newsletter at constitutioncenter.org/connect and always remember whether you wake or sleep that the National Constitution Center is a private non-profit, we rely on the generosity, the passion, the engagement, the dedication to civil constitutional dialogue of people from around the country who are inspired by our non-partisan mission.

[00:53:23] Jeffrey Rosen: You can support that mission by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support our work including the podcast at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.