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The Sweep and Force of Section Three

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**THE UNIVERSITY OF CHICAGO LAW SCHOOL**

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THE SWEEP AND FORCE OF SECTION THREE

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WILLIAM BAUDE<sup>†</sup> & MICHAEL STOKES PAULSEN<sup>††</sup>

*Section Three of the Fourteenth Amendment forbids holding office by former office holders who then participate in insurrection or rebellion. Because of a range of*

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*misperceptions and mistaken assumptions, Section Three's full legal consequences have not been appreciated or enforced. This Article corrects those mistakes by setting forth the full sweep and force of Section Three.*

*First, Section Three remains an enforceable part of the Constitution, not limited to the Civil War, and not effectively repealed by nineteenth century amnesty legislation. Second, Section Three is self-executing, operating as an immediate disqualification from office, without the need for additional action by Congress. It can and should be enforced by every official, state or federal, who judges qualifications. Third, to the extent of any conflict with prior constitutional rules, Section Three repeals, supersedes, or simply satisfies them. This includes the rules against bills of attainder or ex post facto laws, the Due Process Clause, and even the free speech principles of the First Amendment. Fourth, 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." It covers a broad range of offices, including the Presidency. And in particular, it disqualifies former President Donald Trump, and potentially many others, because of their participation in the attempted overthrow of the 2020 presidential election.*

INTRODUCTION .....	608
I. SECTION THREE IS LEGALLY OPERATIVE TODAY .....	613
A. <i>The Generality and Presumptive Perpetuity of Constitutional Language</i> .....	613
B. <i>Has Congress Removed the Disability for Everyone for All Time? (And Could It Do So If It Wanted To?)</i> .....	617
II. SECTION THREE IS LEGALLY SELF-EXECUTING .....	622
A. <i>Section Three as Automatic Legal Disqualification</i> .....	623
B. <i>Who (All) Can (Must) Faithfully Apply and Enforce Section Three?</i> .....	628
1. Seeking Office .....	629
a. <i>By Election</i> .....	629
b. <i>By Appointment</i> .....	633
2. Holding Office .....	634
3. Special Situations .....	636
C. <i>The Problem of Griffin's Case</i> .....	644

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A note to readers: In the time between acceptance and final publication of this article, the issues we address here became the subject of much public commentary, academic discussion, and litigation. As this article goes to press, the U.S. Supreme Court is poised to address some or all of these issues in the case of *Trump v. Anderson*, No. 23-719 (argued February 8, 2024). We have chosen not to address these developments in the final text of this article. We are very grateful to the staff of the University of Pennsylvania Law Review for their patient, careful, and attentive editing of this very long article.

1.	Background .....	645
2.	Chase on Section Three .....	646
a.	<i>“The Argument from Inconveniences, Great As These”</i> .....	647
b.	<i>The Argument from “the Intention of the People”</i> .....	651
c.	<i>The Argument that Section Three Should Not be Read to Depart from the “Spirit” of Prior Constitutional Law</i> .....	652
d.	<i>The Argument from the Section Five Enforcement Power</i> ....	655
3.	<i>Griffin’s Self-Defeating and Highly Irregular Dictum</i> .....	656
III. SECTION THREE SUPERSEDES, QUALIFIES, OR SATISFIES		
PRIOR CONSTITUTIONAL PROVISIONS .....		
A.	<i>Bills of Attainder</i> .....	664
B.	<i>Ex Post Facto Laws</i> .....	666
C.	<i>Due Process of Law</i> .....	667
D.	<i>The Ominous Question: Section Three and the First Amendment</i> .....	669
IV. SECTION THREE’S SUBSTANTIVE DISQUALIFICATION IS SWEEPING .....		
A.	<i>Section Three’s Disqualifying Conduct: “Insurrection or Rebellion”; “Engaged In”; “Aid or Comfort” to “Enemies”</i> .....	676
1.	Working Definitions .....	676
2.	Contemporaneous Dictionary Definitions.....	683
3.	Intratextualism .....	685
4.	Contemporaneous Public, Political, Legal Usage.....	687
a.	<i>President Lincoln</i> .....	688
b.	<i>Congress</i> .....	693
i.	<i>The Ironclad Oath</i> .....	694
ii.	<i>The Second Confiscation Act</i> .....	695
c.	<i>The Supreme Court’s Decision in The Prize Cases</i> .....	699
5.	Other Extant Statutory Sources and Notorious Examples ...	702
a.	<i>The Insurrection Acts (and Insurrections Generally)</i> .....	702
b.	<i>The Congressional Exclusion Debates</i> .....	709
6.	Legislative History .....	716
7.	Early Applications of Section Three .....	717
B.	<i>What Prior Officeholders are Covered? What Future Offices are Barred?</i> .....	721
C.	<i>The Attempted Overthrow of the 2020 Presidential Election</i> .....	730
1.	<i>The Question of Coverage: Insurrection and Rebellion</i> .....	730
2.	<i>The Question of Participation: “Engaged in” and “Aid or Comfort”</i> .....	734
a.	<i>General Principles Concerning Culpable Participation</i> .....	735
b.	<i>Section Three Disqualifies Donald Trump from Future Office</i> .....	736

c. <i>Beyond Trump</i> .....	740
CONCLUSION.....	742

## INTRODUCTION

“Section 3 has long since faded into history.”

-Eric Foner<sup>1</sup>

Reports of Section Three’s demise are greatly exaggerated. It turns out that Section Three of the Fourteenth Amendment remains of direct and dramatic relevance today—a vital, fully operative rule of constitutional law with potentially far-reaching contemporary real-world consequences. Section Three remains in legal force and has a broad substantive sweep.

Here is what it says:

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.<sup>2</sup>

This section of the Fourteenth Amendment was designed to address a particular historical situation and acute problem arising in the aftermath of the Civil War. States in the South had purported (unconstitutionally)<sup>3</sup> to secede from the Union; they had purported to form the (so-called) “Confederate States of America” in rebellion against the authority of the U.S. Constitution; and they had waged a bloody four-year war of rebellion against the United States. Yet even after the rebellion had been defeated, Southern States had audaciously sent to Congress, to serve as U.S. Senators and Representatives, men who had notoriously violated previously sworn oaths to support the U.S. Constitution by subsequently engaging in or supporting secession, rebellion, and civil war against the authority of the United States (to say nothing of those now serving again in their state governments). The former Confederates who arrived in Washington included “four Confederate

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<sup>1</sup> ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 85 (2019).

<sup>2</sup> U.S. CONST. art. XIV, § 3.

<sup>3</sup> See *infra* note 279 and sources cited there.

generals, four colonels, several Confederate congressmen and members of Confederate state legislatures, and even the vice president of the Confederacy, Alexander H. Stephens.”<sup>4</sup>

The Congress that proposed the Fourteenth Amendment rightly regarded the situation as outrageous—not only morally, but practically. If former Confederates held the levers of federal and state government power, effective “reconstruction” of the political order and any hope of extending the full and equal protection of the laws to the newly freed former slaves would be at an end. Section Three of the Fourteenth Amendment responded to that outrage, enacting a sweeping disqualification from state and federal office of those who had, as legislators or officers in the federal or state government prior to the War, sworn required oaths of loyalty to the United States Constitution and subsequently engaged in “insurrection or rebellion” against the U.S. constitutional authority or given “aid or comfort” to its enemies. Only a two-thirds majority vote of both houses of Congress could remove that sweeping disqualification.

Fast-forward a century and a half. The events surrounding efforts to overturn the result of the presidential election of 2020 have sparked renewed scholarly, judicial, and political interest in Section Three of the Fourteenth Amendment.<sup>5</sup> The core events are familiar to all—the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for States’ selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several States; the efforts of Members of Congress to assert a similar power to reject votes lawfully cast by electors; the fomenting and immediate incitement of a mob to attempt to forcibly prevent Congress’s and the Vice President’s counting of such lawfully cast votes—all in an attempt to prevent the defeated incumbent President, Donald Trump, from losing power in accordance with the Constitution.

This was undoubtedly a serious assault on the American constitutional order. Not since the Civil War has there been so serious a threat to the

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4 AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 377 (2005) [hereinafter *AMERICA’S CONSTITUTION*]; see also ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 178-79 (1960); ALLEN C. GUELZO, *RECONSTRUCTION: A CONCISE HISTORY* 25 (2018).

5 The most important scholarly articles (to which we are deeply indebted) are Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 *CONST. COMMENT.* 87 (2021) [hereinafter *Amnesty*]; Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section Three of the Fourteenth Amendment*, 30 *WM. & MARY BILL RTS. J.* 153 (2021), both of which were written before the events of January 6, and Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-to Guide*, *LAWFARE* (Jan. 19, 2021), <https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide> [<https://perma.cc/LMT6-MBQR>] [hereinafter *How-to Guide*].

foundations of the American constitutional republic. It takes little imagination to describe the efforts to maintain Trump in office, notwithstanding his defeat, as an attempted political coup d'état. These actions culminated in the incitement and execution of a violent uprising at the Capitol on January 6, 2021—an “insurrection” aimed at preventing Congress and the incumbent Vice President from performing their constitutional responsibilities to count the votes for President and Vice President in the 2020 election. Several of the people involved in these events—most notably, the defeated President, Donald Trump—had previously taken oaths to support the Constitution. If they engaged in or gave aid and comfort to an insurrection against the constitutional government, Section Three would appear to bar them from holding office again.

As legal officials and citizens generally have begun to confront the application of Section Three, they have floundered on the most fundamental questions. How does Section Three's disqualification apply—*does* it apply—to those who planned, supported, encouraged, assisted, incited, or otherwise participated in the events surrounding the attempted overturning of the presidential election of 2020? Does Section Three's century-and-a-half-old disqualification, designed for the aftermath of the Civil War, even remain legally operative in the first place? If so, what must be done to enforce Section Three? Does it require implementing legislation or criminal trials (or impeachments) before its disqualification kicks in? How does Section Three interact with the rest of the constitutional order—are its subjects protected by constitutional principles of attainder, anti-retroactivity, due process, and free speech? And if Section Three *does* apply—to *what and to whom*? What actions count as having “engaged in insurrection or rebellion” against the Constitution of the United States or having “given aid or comfort to the enemies thereof”? Which officials are covered by Section Three's exclusions?

This Article attempts to answer these questions. It makes four key points (or clusters of points):

*First. Section Three remains legally operative.* It is no less part of the Constitution than the other provisions of the Fourteenth Amendment. It is not a dead letter. The Constitution is a binding, authoritative, written text, not a collection of specific historical purposes and intentions. Where the text applies, it applies. Its legal force is not limited to the immediate problem or purpose that prompted its enactment. Section Three is not limited to the circumstances of the Civil War and Reconstruction, even if the meaning of its terms may be illuminated by that experience and history.

Nor has Section Three somehow been “repealed” by Congress's two major nineteenth-century statutes granting amnesty to those covered by Section Three. This is not because it would be *impossible* for a constitutional provision

to expire by its terms after a period of time, or upon the occurrence of a particular event, or upon action taken by future actors. Article I, Section 9, for example, created a constitutional prohibition of most congressional regulation of the international slave trade for a period of twenty years—but its prohibition then vanished in 1808. Section Three, however, does not work that way. It imposes a general, prospective, rule of disqualification, which Congress may remove by two-thirds vote of both houses only once it has occurred. Section Three is prospective; congressional amnesty is retrospective.

*Second. Section Three is legally self-executing.* That is, Section Three's disqualification is constitutionally automatic whenever its terms are satisfied. Section Three requires no legislation or adjudication to be legally effective. It is enacted by the enactment of the Fourteenth Amendment. Its disqualification, where triggered, just *is*. It follows that Section Three's disqualification may and should be followed and carried out by all whose duties are affected by it. In many cases, Section Three will give rise to justiciable controversies in the courts. In others it will be enforceable by state and federal officials. But no prior judicial decision, and no implementing legislation, is required for Section Three to be carried out by officials sworn to uphold the Constitution whose duties present the occasion for applying Section Three's commands. Section Three is ready for use.

While Section Three's requirements *could* be made the subject of enforcement legislation by Congress, under its general power under Section Five of the Fourteenth Amendment "to enforce" the provisions of the amendment, no such legislation is constitutionally *required* as a prerequisite to Section Three doing what Section Three itself does. Chief Justice Salmon P. Chase's circuit court opinion to the contrary, *In re Griffin*,<sup>6</sup> is simply wrong on this point—full of sleight of hand, motivated reasoning, and self-defeating maneuvers—as we will explain at length. *In re Griffin* should be hooted down the pages of history, purged from our constitutional understanding of Section Three.

*Third. Section Three supersedes (or satisfies) earlier-enacted constitutional provisions to the extent of any supposed conflict between them.* Section Three, at the time it was adopted as part of the Constitution, imposed a disqualification from office based on an individual's past conduct. Even if imposition of such a disability might otherwise, if done by statute, have been a forbidden *ex post facto* law or bill of attainder, Section Three of the Fourteenth Amendment constitutionally supersedes any prior provision conflicting with its terms.

This principle extends to a more unsettling point. To the extent Section Three's disqualification for having "engaged in insurrection or rebellion" or

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<sup>6</sup> 11 F. Cas. 7, 22-27 (C.C.D. Va. 1869) (No. 5,815).

giving “aid or comfort” to “the enemies” might turn out to be in tension with the First Amendment’s protection of freedom of speech, Section Three supersedes the First Amendment to the extent of any true conflict. To be sure, the proper construction of Section Three’s terms (“insurrection,” “rebellion,” “aid or comfort,” “enemies”) will leave much speech and advocacy completely free. But in the cases where it does not, the terms of Section Three, not the constructions of the First Amendment, decide where the line is.

This leads to the article’s fourth and final group of points:

*Fourth. Section Three’s disqualification is sweeping in its terms.* It disqualifies from future office-holding persons who “engaged in”—an expansive and encompassing term connoting many forms of participation in or active support of—a broad swath of activity covered by the terms “*insurrection or rebellion*” or the giving of “*aid or comfort*” to “*enemies*” of the nation or its constitutional order. It applies to a broad swath of civilian, military, and legislative office holders who swore oaths of fidelity to the Constitution, and it disqualifies such persons from holding in the future any of an extraordinarily broad swath of public offices. Taking Section Three seriously, on its own terms, means taking seriously the enormous sweep of the disqualification it creates. And, we will argue, taking Section Three seriously means that its constitutional disqualifications from future state and federal officeholding extend to participants in the attempted overturning of the presidential election of 2020, including former President Donald Trump and others. The substantive terms of Section Three’s prohibition are not themselves difficult or inscrutable (even if there might be questions of application at the outer edges of the text’s meaning). But they are potentially breathtaking in their straightforward consequences.

In what follows, we develop each of these four core points at length.

Section Three remains a valid, prospective, enforceable, self-executing, broad, and relevant part of our Constitution. It falls to us to fulfill our duties to it. These include the duties of legislative bodies, state and federal election officials, executive officers, and perhaps others to take up the Constitution, including Section Three of the Fourteenth Amendment, and wield it faithfully and forcefully against its enemies. Taking Section Three seriously means excluding from present or future office those who sought to subvert lawful government authority under the Constitution in the aftermath of the 2020 election by engaging in insurrection or rebellion or giving aid or comfort to enemies of the lawful constitutional order.

## I. SECTION THREE IS LEGALLY OPERATIVE TODAY

### *A. The Generality and Presumptive Perpetuity of Constitutional Language*

The first step in our argument is an easy one, but perhaps not immediately obvious to everyone: Section Three's disqualification remains an operative rule of the Constitution. The reason this might not be obvious, at least to the uninitiated, is that Section Three plainly was designed for a specific historical situation—the circumstances of Reconstruction following the end of the Civil War. The implication, in the eyes of some, might be that that historical situation limits the scope of the provision's operation. We think any such inference badly mistaken. Section Three was prompted by historical circumstances, but that does not in any way detract from its enduring force.

To be sure, Section Three clearly bears the hallmarks of its historical context. It is, for one thing, a *radical* rule. The sheer sweep of the disqualification from offices that it imposed on former Southern officeholders-turned-rebels was dramatic. Its operation was hugely disruptive of antebellum patterns of elite political leadership, apparently indifferent to inconvenience, and seemingly rather *punitive* in its consequences. Section Three is harsh. It is categorical. It is insistent. It seems to have been deliberately designed to turn the prior Southern political order upside down. As Eric Foner puts it, "Section 3 aimed to promote a sweeping transformation of Southern public life."<sup>7</sup>

In these respects, the disqualification reflects and embodies the distinctive political impulses of the so-called Radical Republican Congress that proposed the Fourteenth Amendment in 1866. If its disqualification had radical policy consequences for the South, so be it.<sup>8</sup> It was more important to strip insurrectionists and rebels of governing power completely, to remake Southern political society thoroughly, and to prevent Southern backsliding from the full consequences of Union victory entirely, than to be concerned about such things as seeming harshness, impracticality, or disruptiveness. Section Three is very much a creation and creature of its day.

Yet it is (or should be) basic constitutional law that it is the *enduring text* of the Constitution that supplies the governing rule, not the ostensible "purpose" or specific historical situation for which the text was written. Constitutional provisions, written into our fundamental law, live beyond the circumstances that prompted their adoption. And many such constitutional provisions are written in broad, or general, terms that obviously extend

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<sup>7</sup> ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 260 (1988).

<sup>8</sup> See 1 MARK GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR 16-42 (2023).

beyond the specific situation or situations that led to their enactment. Sometimes this is by design: the text's drafters wrote a general rule, applicable to a broad class of circumstances, as a more general, "neutral" way of addressing a class of situations of which the specific problem motivating the writing of the text might be just one instance. The thinking might be that if the principle giving rise to the text is a correct one, it should be correct in like circumstances, not just the one situation that provoked the rule's adoption. And sometimes a text's breadth and generality might *not* reflect conscious design: the text's drafters wrote a general rule that unintentionally went further than the problem they had in mind. Put colloquially, the text sometimes "overshoots" its drafters' intended purposes. (A text might undershoot the problem its framers had in mind to address, too—or achieve only part of its intended purpose, perhaps because of political compromise.)

The reason does not really matter. It is the *rule* as drafted and enacted in the written text that counts, whether it goes further than the purposes supposed to have inspired its adoption, or even whether it falls short of fully achieving those purposes. While evidence of intention, usage, purpose, and political context can assist in *ascertaining* the meaning of the enactment, it is that objective meaning that constitutes the law, not the ostensible purposes or motivations that supposedly lay behind it. This is "originalism," our system's basic method for interpreting the Constitution and its amendments.<sup>9</sup>

Consider, for example, Section One of the same Fourteenth Amendment. As a matter of historical purpose, the specific mischief the framers of Section One had in mind was the enactment of "Black Codes" in Southern States that discriminated against the newly freed former slaves. But the words chosen by the drafters to enact the rule embodied in the text command, in general terms, that no state shall abridge the "privileges or immunities of citizens of the United States" nor deny to any "person" within its jurisdiction the "equal protection of the laws"<sup>10</sup>—rules not cast in racial terms at all, let alone limited to the immediate situation of former enslaved persons. The rules enacted apply to all persons irrespective of race. So it was entirely plausible for lawyers to argue that Section One also barred the same kind of discrimination against women citizens that it barred against black citizens. It doesn't matter

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<sup>9</sup> See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1124-48 (2003); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?* 103 NW. U. L. REV. 857, 872-82 (2009) [hereinafter *Rules for Its Own*]; William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 623-25 (2021); William Baude & Stephen Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1456-60 (2019) [hereinafter *Grounding*]. For purposes of this article, we can bracket any differences in emphasis between Paulsen's objective-original-meaning originalism and Baude's original-law originalism.

<sup>10</sup> U.S. CONST. amend. XIV, § 1.

that the draftsmen of the amendment might not have had women “in mind” if women are covered by the meaning of the words they actually wrote and ratified.<sup>11</sup> Similarly, it was entirely plausible to argue that Section One went so far as to ban racially segregated schools.<sup>12</sup> The answers to each of these questions turn on the objective, original meaning of “privileges or immunities of citizens of the United States” and “equal protection of the laws,”<sup>13</sup> not whether the 1866 Congress and subsequent ratifiers had thought through the possible radical implications of their own work. If the *meaning* of the Fourteenth Amendment’s terms forbade racially discriminatory classifications of any and all kinds, as a matter of the rules of late-1860s language and usage, it doesn’t matter one way or the other whether it was intended or expected that governments could enforce certain types of racial discrimination, like enforced racial segregation. The rule as adopted might overshoot the purposes, expectations, or desires of those who voted for it. But the rule is the rule; the text’s meaning is the text’s meaning.

Thus, if the framers and ratifiers of the Fourteenth Amendment enacted a *general rule* in Section Three—a disqualification from future officeholding keyed to having taken an oath to the Constitution and subsequently engaging in insurrection or rebellion against the United States—rather than a provision that by its terms applied only to the case of former Civil War secessionists and Confederate officials and officers,<sup>14</sup> it is the general rule that matters. That the rule had a particular political purpose behind it as a matter of history might be an aid to correct interpretation of the language supplying that rule. (We will make such an argument below, concerning the meaning, in context, of the phrase “insurrection or rebellion.”)<sup>15</sup> But in the end, the question is what rule was enacted. If Section Three’s rule fell short somehow, missing

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<sup>11</sup> We have used such examples before. See Paulsen, *Rules for Its Own*, *supra* note 9, at 901-02; Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar’s Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1421 n.68 (2014) [hereinafter *Nothing but the Text*]; William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 54-57); [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4604902](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4604902) [<https://perma.cc/DS4N-AKUG>].

<sup>12</sup> We have used this example before, too. See Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RESV. L. REV. 795, 839-40 (1993); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2380-81 (2015); see also Baude, Campbell & Sachs, *supra* note 11 (manuscript at 55).

<sup>13</sup> U.S. CONST. amend. XIV.

<sup>14</sup> Indeed, for what it is worth, the legislative history of Section Three confirms that this is what the authors of the Fourteenth Amendment did. Earlier drafts had limited the Section’s application to the “late insurrection.” Later versions dropped this limitation and generalized Section Three’s application to “insurrection” and “rebellion.” See CONG. GLOBE, 39th Cong., 1st Sess. 2767-68, 2770, 2869, 2921 (1866); see also Mark A. Graber, *Rewarding Loyalty and Punishing Treason Through Disenfranchisement and Bans on Officeholding: Section 3*, at 3-4 (unpublished draft chapter, forthcoming in *Constructing Constitutional Politics: The Forgotten Fourteenth Amendment*, Volume 2, University Press of Kansas) (documenting this development).

<sup>15</sup> *Infra* Section IV.A.

some folks its drafters might have meant to ensnare, those persons are not ensnared. The text might (or might not) be thought deficient in this regard—as having failed to fulfill its full purpose. But the text means what it says. Similarly, if the rule supplied by the objective meaning of the text runs right on past the specific historical purpose for which it was enacted and embraces as well *other* insurrectionists, rebels, and aiders and comforters of enemies, that rule must be given full legal effect as part of the Constitution. The rule's overbreadth in terms of its perceived purpose, and even its inconvenience as a consequence of such overbreadth, are beside the point.<sup>16</sup>

Finally, we take it as almost too obvious to require stating that constitutional provisions have indefinite life unless and until repealed or amended by subsequent constitutional enactments. The fact that an unrepealed, unamended provision of law is “old” does not in any way weaken its legal force. The First Amendment is old too, as is the entire original Constitution. But both remain in force. This is true even if the purpose for which a constitutional provision was originally written has ceased to be relevant, or even if the constitutional provision at issue might be thought in today's society to be something of an anachronism.<sup>17</sup> There are, of course, some self-identified living constitutionalists who deny this point—who think that old texts have a legal shelf life and lose their potency over time, as “the interest in sovereignty fades.”<sup>18</sup> But in our view, this just shows what is wrong with such living constitutionalism.<sup>19</sup> The Constitution is not a spice cabinet.

All of this might seem to belabor the obvious. Few interpreters of Section Three explicitly deny that it continues to govern new insurrections and rebellions.<sup>20</sup> But sometimes we wonder if this kind of denial is sneaking into

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16 See, e.g., Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 908-09 (1994) (making this point about the disqualification of some senators and representatives from eligibility for certain appointed offices posed by the Emoluments Clause of Article I, § 6, cl. 2); William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J. L. & PUB. POL'Y (forthcoming 2023) (“Sometimes rules go beyond their reasons; a rule can be overbroad compared to the reasons for enacting it. And sometimes rules are underbroad; a rule cannot quite do all the things that you might want to do given the reasons for enacting the rule. Textualism recognizes that when the judge enforces the law, the law's rule might sometimes be different from what the people who enacted the law would have wanted had they thought about the situation.”). For an extended discussion of the abuse of arguments from inconvenience, see *infra* Section II.C.2.a, which discusses Chief Justice Chase's appalling opinion in *Griffin's Case*.

17 See, e.g., Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1486-90 (1997) (discussing privilege against self-incrimination).

18 David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 58 (2015). See generally Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295 (2008).

19 See Baude & Sachs, *Grounding*, *supra* note 9, at 1487-88 (responding to Strauss).

20 For a rare example, see an argument made and rejected by the House during the exclusion of Victor Berger. 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 55 (1935) (“It was also seriously contended by counsel that section 3 of the

people’s intuitions—subtly infecting and distorting the actual interpretation of Section Three. So let us start from the right first principles: Section Three remains constitutionally fully in force, as alive today as the day it was enacted.

*B. Has Congress Removed the Disability for Everyone for All Time? (And Could It Do So If It Wanted To?)*

But what about this? The second sentence of Section Three provides that “Congress may by a vote of two-thirds of each House, remove such disability.”<sup>21</sup> Just as the first sentence’s disqualification is not limited specifically to the Civil War, neither is Congress’s power to grant amnesty. Thus, Congress can, by the requisite vote, remove any disqualification that exists by virtue of the operation of Section Three. But just exactly how far does that power reach? Could Congress, by two-thirds majorities, essentially extinguish the legally operative effect of Section Three *entirely*, by removing the disability imposed by Section Three generally, prospectively, and universally? Put more vividly: Can Congress, by two-thirds vote of each house, essentially “explode” Section Three—render it inoperative in the future, for all time?

These questions are not completely hypothetical. In two statutes enacted in the late nineteenth century, Congress might arguably have done this. One statute (from 1872) removed “from all persons whomsoever”—except designated categories of individuals—“all political disabilities imposed” by Section Three.<sup>22</sup> Another (from 1898) further removed “the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred.”<sup>23</sup> And indeed, in a recent case brought by then-Representative Madison Cawthorn, a district court judge relied on these statutes to conclude that Section Three is now legally dead.<sup>24</sup> Is that right? Do these statutes—*can* these statutes—grant amnesty to all insurrectionists, past, present *and future*?<sup>25</sup>

No. While the argument is not entirely bonkers, it does not withstand more serious scrutiny. It is wrong on both statutory and constitutional grounds. Consider the statutes first. Neither one purports to rescind Section

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fourteenth amendment was an outgrowth of the Civil War and that such a provision can not possibly apply to the present case. . . . [H]owever . . . its provisions are for all time . . .”).

21 U.S. CONST. amend. XIV, § 3.

22 Act of May 22, 1872, ch. 193, 17 Stat. 142.

23 Act of June 6, 1898, ch. 389, 30 Stat. 432.

24 See *Cawthorn v. Circosta*, 590 F. Supp. 3d 873, 889-92 (E.D.N.C. 2022), *rev’d sub nom.* *Cawthorn v. Amalfi*, 35 F.4th 245 (4th Cir. 2022). This argument was also made and rejected by the House during the exclusion of Representative Victor Berger. CANNON, *supra* note 20, at 55.

25 Congress’s power to remove Section Three’s disability and the history of its exercise are the central themes of Professor Gerard Magliocca’s excellent article, *Amnesty*, *supra* note 5.

Three's operative rule for all time. They do not pretend to explode the first sentence of the constitutional provision.

Begin with the 1872 Act.<sup>26</sup> In 1872, after a period of case-by-case consideration of amnesty requests, Congress enacted a general statute removing disqualification from a broad description of persons embraced by Section Three's prohibition. As Professor Magliocca recounts, the statute reflected a mixture of motives: genuine mercy and magnanimity; the practical consequences of Section Three in the South; the burdens and biases of case-by-case consideration of private bills; the politics of a presidential election year; and the general but regrettable retreat from aggressive Congressional Reconstruction.<sup>27</sup> But what is most important is what it says. The statute reads, in full:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.<sup>28</sup>

The key words are “imposed” and “hereby removed.” The words of the 1872 statute are used in the past tense: the statute “*removed*” disqualifications “*imposed*” by the Fourteenth Amendment—that is, disabilities that had already become legally effective.<sup>29</sup> That is simply the natural reading, and the natural implication, of the language employed.

Indeed, this is almost exactly what the Fourth Circuit recently said in reversing the District Court's decision in the *Cawthorn* case: Congress in 1872 “employed the past-tense version” of the verb “impose,” thus “indicating its intent to lift only those disabilities that had by then been ‘imposed.’”<sup>30</sup> Moreover, the Fourth Circuit continued: “[T]he operative clause's principal verb—‘removed’—reinforces this conclusion. In the mid-nineteenth century, as today, that word generally connoted taking away something that already exists rather than forestalling something yet to come.”<sup>31</sup>

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<sup>26</sup> Act of May 22, 1872, ch. 193, 17 Stat. 142.

<sup>27</sup> See Magliocca, *Amnesty*, *supra* note 5, at 112-20 (describing the lead-up to and legislative history of the act).

<sup>28</sup> Act of May 22, 1872, ch. 193, 17 Stat. 142.

<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> *Cawthorn v. Amalfi*, 35 F.4th 245, 258 (4th Cir. 2022).

<sup>31</sup> *Id.*

By contrast, the District Court had faulted Congress for not being more explicit: “Congress could have limited the Act to remove Section 3’s disabilities from ‘persons currently subject to the disabilities’ or ‘persons against whom the disabilities were lodged’ at the time (i.e., the ‘Confederates’) but did not do so.”<sup>32</sup> The District Court thus concluded that “[b]y the plain language of Section 3 and the 1872 Act, Congress removed *all* of Section 3’s disabilities from *all* persons whomsoever who were not explicitly excepted.”<sup>33</sup> With all due respect, the District Court appears to have been simply hoodwinked by the (for lack of a better word) *feel* of the “all persons whomsoever” language and completely missed the other language that made clear the statute’s past tense.

What about the 1898 statute? Does it yield a different result? On the cusp of the Spanish–American War, at a moment of seeming national unity and perhaps a desire to put aside old sectional grievances<sup>34</sup> (and, one might add more cynically, at a time of rising Jim Crow sentiment)<sup>35</sup>—Congress enacted another general disqualification-removal statute. This one removed the disqualification for *everybody*, without exception. Its language is even more laconic:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed.*<sup>36</sup>

In one sense, that’s about as categorical, across-the-board a disqualification-removal as one can imagine: “[T]he disability imposed by section three . . . is hereby removed.”<sup>37</sup> Period. No exceptions. But here it is also even clearer that the 1898 act is backward-looking. Like the 1872 act, the 1898 act uses retrospective language: a disability (already) “imposed” is now being “removed” from its prior legal existence. What’s more, the 1898 act says that the Section Three disqualification being removed was one “*heretofore incurred*.” That is unmistakably backward-looking, past-occurrence language.

What might otherwise give the 1898 act the *feel* of a now-and-ever-shalt-be removal, eliminating all future Section Three disqualification as well as

<sup>32</sup> Cawthorn v. Circoستا, 590 F. Supp. 3d 873, 891 (E.D.N.C. 2022), *rev’d sub nom.* Cawthorn v. Amalfi, 35 F.4th 245 (4th Cir. 2022).

<sup>33</sup> *Id.*

<sup>34</sup> Magliocca, *Amnesty*, *supra* note 5, at 126.

<sup>35</sup> See MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION 195–201 (2015) (discussing Plessy v. Ferguson, 163 U.S. 537 (1896), Cummings v. Richmond County Board of Education, 175 U.S. 528 (1899), and the rise of Jim Crow).

<sup>36</sup> Act of June 6, 1898, ch. 389, 30 Stat. 432.

<sup>37</sup> *Id.* (emphasis added).

any and all extant ones—that is, but for the clarity of the “heretofore incurred” language—is the Act’s reference to “*the* disability” imposed by Section Three. This singular reference might be taken to suggest that Section Three’s disqualification was thought a one-time-only, single-shot, Civil War-era occurrence.<sup>38</sup> If Section Three was good for one rebellion only, then repealing it in the past tense repeals all that there is. But of course, as we have argued, Section Three is not limited to one rebellion only, and so far as we can tell even the Fifty-fifth Congress did not think that it was<sup>39</sup> (nor would it matter if they did).

In any event, though these statutes do not even purport to sunset Section Three for the future, they do prompt us to consider the interesting question of Congress’s constitutional power: *What if they did* purport to sunset Section Three for the future? Is Congress’s constitutional power to remove Section Three’s disqualification general and prospective, letting it remove Section Three’s disqualification once and for all, including for future situations? We think not.

To be clear, we don’t think there’s anything inherently unthinkable or absurd about the idea of an “exploding” or otherwise defeasible constitutional provision. Legal drafters might sometimes want to provide for an expiration event or expiration date, even in an enduring Constitution. Article I’s Slave Importation Clause, protecting the international slave trade, exploded after twenty years.<sup>40</sup> So too the initial allocation of representatives to states is written into the text of the Constitution, even though it was then exploded by the subsequent census.<sup>41</sup> Other provisions of the Constitution set baseline rules that Congress has the power to modify. Article I, Section 4 does so with respect to state legislative power over congressional elections: “Congress may at any time by Law make or alter such Regulations.”<sup>42</sup> Article III, Section 2

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38 For instance, in a different context the D.C. Circuit’s recess-appointments opinion in *Noel Canning v. NLRB*, 705 F.3d 490, 500 (D.C. Cir. 2013), *aff’d only on alternate grounds*, 573 U.S. 513 (2014), leaned heavily on “this difference between the word choice ‘recess’ and ‘the Recess,’” arguing that “[a]s a matter of cold, unadorned logic, it makes no sense to . . . [say] that when the Framers said ‘the Recess,’ what they really meant was ‘a recess.’ This is not an insignificant distinction. In the end it makes all the difference.” *Id.* But a majority of the Supreme Court did not share this view of the text. *NLRB v. Noel Canning*, 573 U.S. 513, 527-28 (2014).

39 For the brief and generally inconclusive legislative history of the 1898 act, see 31 CONG. REC. 5404-19 (1898).

40 U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”). For a scathing critique of the substance and purpose of this proviso, see, for example, PAULSEN & PAULSEN, *supra* note 35, at 81-83.

41 U.S. CONST. art. I, § 2, cl.3; Act of Apr. 14, 1792, ch. 23, 2d Cong., Pub. L. No. 2-23, 1 Stat. 253.

42 U.S. CONST. art. I, § 4, cl. 1.

does so with respect to the Supreme Court's appellate jurisdiction, setting a default rule subject to "such Exceptions, and under such Regulations as the Congress shall make."<sup>43</sup> The Twentieth Amendment, in Section 2, sets a default date for Congress's annual meeting, which Congress can modify.<sup>44</sup>

There's no reason the framers of the Fourteenth Amendment could not have similarly drafted Section Three to provide for the *provision's own* extinction after a supermajority vote of Congress.<sup>45</sup> But that is simply not what Section Three says. The second sentence of Section Three is not a grant of power to explode, or amend, the *content of the rule* stated in the first sentence. It is a grant of power to remove the *consequences of* the rule's operation.

To see this, break down Section Three into its component parts: Section Three has two sentences. The first one describes at length the disqualification for those who have taken a covered oath and engaged in insurrection or related conduct. Of course, those two things must actually *have happened* for the rule of Section Three's first sentence to be triggered—for a disqualification to have come into legal effect.

The second sentence (the "But" sentence) then gives Congress the power to "remove such disability." ("*But Congress may by a vote of two-thirds of each House, remove such disability.*") The "But" sentence explicitly cross-references the first. Thus, the most natural reading of the two sentences in relation to each other is that the second sentence confers an exceptions power that only comes into existence when the conditions specified in the first sentence have occurred. And to belabor the point a moment further, the word "remove" means (and meant at the time, according to 1864 dictionaries) to displace or take away something that already exists.<sup>46</sup> This confirms that Congress's

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43 U.S. CONST. art. III, § 2, cl. 2.

44 U.S. CONST. amend. XX, § 2.

45 We thus part ways with Professor Magliocca here. Magliocca argues (in addition to versions of the points we make above) that Section Three's second sentence cannot be read as authorizing Congress to remove future disabilities because this "would mean that Congress basically repealed Section Three of the Fourteenth Amendment in 1872. But Congress cannot repeal a part of the Constitution by itself: only a constitutional amendment can do that." Gerard N. Magliocca, *The January 6th Insurrectionists Do Not Have Amnesty*, JURIST (Apr. 13, 2022), <https://www.jurist.org/commentary/2022/04/gerard-magliocca-january-6-insurrectionists/> [<https://perma.cc/29N5-K2N6>]; see also *Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1314 (N.D. Ga. 2022) ("Congress has no power whatever to repeal a provision of the Constitution by a mere statute." (quoting CANNON, *supra* note 20, at 55)).

This strikes us as not quite right: if Section Three *in fact* authorized prospective removal of disqualifications arising from future acts of insurrection, a statute doing so would not be *repealing* a constitutional provision but exercising a power *conferred by* that constitutional provision—a power to terminate the provision's ongoing legal effect.

46 DR. WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 1116 (Chauncy A. Goodrich & Noah Porter, eds., London, Bell & Daldy 1864) (defining "remove" as "[t]o cause to

removal power only comes into being when a legal disqualification has vested by operation of Section Three's first sentence.

Section Three's first sentence is written as a general and prospective rule, not limited to the specific instance of the Civil War. Section Three's second sentence is written as a continuing power to grant relief from disabilities *already imposed* by the operation of the first sentence. The power to remove an extant legal disability is not a power to rescind the legal rule that creates that disability. Thus, not only has Congress never purported to sunset Section Three, it lacks the power to do so by Section Three's own terms.

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All of this is, we submit, basic. But it is also foundational. Section Three remains legally operative as part of the U.S. Constitution. Its rule of disqualification is general, not limited to the Civil War era. It states a rule of law embodied in the written constitutional text as permanent fundamental law. It possesses prospective force and applies to new situations: wherever the rule applies, the rule applies. And while Congress comprehensively relieved insurrectionists of the disability of disqualifications incurred prior to 1898, it did not (and could not) erase Section Three from the Constitution. Section Three remains *in force*.

Is anything more required, then, before this provision of the Constitution can (and must) be given effect? Put somewhat differently: Is Section Three a self-executing rule of constitutional law, complete in itself? Or does Section Three require implementing legislation by Congress or some other further legal or administrative action before it has legal force? We take up that question next.

## II. SECTION THREE IS LEGALLY SELF-EXECUTING

Our second point is colossally important—and a major sticking point for some. But it is a point we think should be obvious: *Section Three is self-executing*. That is, its disqualifications from office are constitutionally automatic whenever its conditions for disqualification are met. Nothing more needs to be done in order for Section Three's prohibitions to be legally effective. Section Three requires no implementing legislation by Congress. Its commands are enacted into law by the enactment of the Fourteenth Amendment. Where Section Three's legal rule of constitutional

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change place; to move away from the position occupied; to displace") [hereinafter WEBSTER'S 1864]; see also *Cawthorn v. Amalfi*, 35 F.4th 245, 258 (4th Cir. 2022) (quoting Webster's definition).

disqualification is satisfied, an affected prospective officeholder *is* disqualified. Automatically. Legally.

In the years immediately after the Fourteenth Amendment was adopted this seemingly obvious reading of Section Three was deemed inconvenient. It was rejected in the highest quarters and has since faded from view. We thus give the point considerable attention here. Our analysis here is organized in three steps. First, we take Section Three itself and explain why it has direct legal effect. Second, we discuss how this legal effect can and must be recognized by all persons and institutions who have the occasion to apply it in the performance of their duties—election officials, state and federal administrators, legislatures, and courts. Third, we consider at some length the leading counterargument to our view: the 1869 opinion written by Chief Justice Salmon P. Chase as a circuit court judge in *Griffin's Case*. Even if the result in that case is defensible—which is far from clear, and raises grave separation-of-powers problems of its own—its argument against self-execution is so wrong as to prove our case. Section Three is legally self-executing as operative constitutional law.

#### A. *Section Three as Automatic Legal Disqualification*

Before we consider Section Three itself, consider the Constitution as a whole. Though too many constitutional law teachers and casebooks begin their study of the Constitution with questions of judicial review, and cases like *Marbury*,<sup>47</sup> in doing so they put the cart before the horse. The horse is the Constitution, which is itself the “supreme Law of the Land.”<sup>48</sup> Our system is one of constitutional supremacy, not judicial supremacy or legislative supremacy. As a general matter, this means that it is the Constitution which states the law, and it is the job of government officials to apply it, not the other way around.

This general truth is no less true of Section Three. 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. It lays down a rule by saying what shall be.<sup>49</sup> It does not *grant a power* to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule

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<sup>47</sup> But not ours! See MICHAEL STOKES PAULSEN, MICHAEL W. MCCONNELL, SAMUEL L. BRAY & WILLIAM BAUDE, *THE CONSTITUTION OF THE UNITED STATES* (5th ed. 2022).

<sup>48</sup> U.S. CONST. art. VI, cl. 2.

<sup>49</sup> We have borrowed this felicitous phrasing from John Harrison. Cf. John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 211 (1997) (“The Vesting Clause is a self-executing enactment; it lays down rules by saying what shall be.”).

itself. Section Three directly adopts a constitutional rule of disqualification from office.

This should be no surprise, as the same thing is true of the Constitution's other rules of disqualification from office. A person who has not attained to the age of thirty-five is not qualified to be President of the United States. This disqualification is automatic. The Constitution's rule is self-executing. "*No person . . . shall be eligible*" to be President who does not satisfy the age requirement.<sup>50</sup> The disqualification requires no further legislation or other action, by anybody, to be operative. The disqualification simply *is*. So too for Article II's citizenship and length-of-residency eligibility prerequisites for the office of President.<sup>51</sup> And so too for the constitutional qualifications—age, citizenship, state inhabitancy—for members of the House and Senate: "*No Person shall be*" a Representative who does not meet Article I, Section 2's requirements.<sup>52</sup> "*No Person shall be*" a Senator who does not meet Article I, Section 3's requirements.<sup>53</sup> These restrictions on eligibility are legally binding simply by virtue of their presence in the Constitution.

The language of Section Three parallels, even duplicates, the language used in these other provisions to express other constitutional disqualifications from officeholding.<sup>54</sup> None of these disqualifications requires any further legal action or legislation to be operative. Where a constitutional legal disqualification exists, it simply exists. It is a binding rule of constitutional law.

Again, this kind of binding rule should be no surprise. The Thirteenth Amendment's ban on slavery, enacted a few years earlier, works the same way. Immediately upon adoption of the amendment, slavery was legally extinguished as a matter of constitutional law. "*Neither slavery nor involuntary servitude . . . shall exist,*" the Thirteenth Amendment provides.<sup>55</sup> The institution of slavery was *immediately, legally, constitutionally gone*.<sup>56</sup> The Thirteenth Amendment contains a separate section granting Congress the power to enforce the prohibition of slavery.<sup>57</sup> But that enforcement power scarcely means that the ban on slavery contained in Section One was *inoperative unless and until* Congress passed legislation making it operative.

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<sup>50</sup> U.S. CONST. art. II, § 1, cl. 5 (emphasis added).

<sup>51</sup> *Id.*

<sup>52</sup> U.S. CONST. art. I, § 2, cl. 2 (emphasis added).

<sup>53</sup> U.S. CONST. art. I, § 3, cl. 3 (emphasis added).

<sup>54</sup> See JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW* 168 (2007).

<sup>55</sup> U.S. CONST. amend. XIII, § 1 (emphasis added).

<sup>56</sup> See ALEXANDER TSEHIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 48-49 (2004) (documenting reactions of persons learning of their freedom immediately after ratification).

<sup>57</sup> U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

Such a position would be ridiculous. The power to enforce adds to the substantive prohibition—it is not a subtraction from or suspension of it.

And of course, the same is true elsewhere in the Fourteenth Amendment. We take it as obvious that Section One is self-executing. Section One of the Fourteenth Amendment, like Section Three, states directly operative rules of constitutional law: “No State shall” in Section One, and “No person shall” in Section Three.<sup>58</sup> Both of these provisions are subject to additional enforcement legislation by Congress under Section Five. Yet it is common ground that Section One is self-executing. Nobody thinks, for example, that the prohibitions of Section One are *inoperative* unless and until Congress enacts legislation pursuant to its Section Five legislative power to bring them to life.

In each instance, Congress certainly *can* enact legislation “to enforce” the Thirteenth and Fourteenth Amendments’ commands.<sup>59</sup> Doing so can unlock additional procedural mechanisms, additional deference by courts to Congress’s view of the law, and so on. The Civil Rights Act of 1866,<sup>60</sup> the Ku Klux Klan Act of 1871,<sup>61</sup> and more were designed to enforce Section One of the Thirteenth and Section One of the Fourteenth Amendment. But even before those laws were enacted, the amendments immediately bound private and state actors (including state courts), and could be recognized in existing causes of action as well as the Supreme Court’s existing appellate jurisdiction.<sup>62</sup> To repeat, the existence of an enforcement power does not mean that the Amendment’s specific legal commands lack independent, self-executing force.<sup>63</sup>

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58 U.S. CONST. amend. XIV, §§ 1, 3. Nothing here turns on it, but Section Four of the Fourteenth Amendment, which repudiates rebel and slave debts while guaranteeing the legal obligation of the national debt, also seems to be self-executing. U.S. CONST. amend. XIV, § 4. Section Two, which alters Article I and imposes a rule for how Representatives “shall be apportioned,” presents a more complicated case. U.S. CONST. amend. XIV, § 2. Its rule is immediately operative, like the rest of the Fourteenth Amendment, but its rule operates by changing an apportionment process undertaken by Congress. *Id.* In practice, Congress has ignored it. See Michael Rosin, *The Five-Fifths Rule and the Unconstitutional Presidential Election of 1916*, 46 HIST. METHODS 57, 58-59 (2013) (noting that Congress “did nothing to enforce the Penalty Clause of section 2 when it reapportioned the House in 1871-2,” and failed altogether to reapportion the House after the 1920 census); AMAR, AMERICA’S CONSTITUTION, *supra* note 4, at 395; see also E-mail from John Harrison to Akhil Reed Amar (Feb. 25, 2004), *quoted in id.* at 611 n.96 (discussing practical obstacles to enforcing Section Two). It is hard to see how anybody else can realistically enforce it.

59 U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5.

60 Act of April 9, 1866, 14 Stat. 27 (codified at 42 U.S.C. § 1981).

61 Enforcement Act of 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1985(2)).

62 See Baude et al., *supra* note 11, at 22, 57.

63 Indeed, Section One was added to an early draft of the Fourteenth Amendment precisely to ensure that state Black Codes would be unenforceable even if there were no federal legislation saying so. *Id.* at 30-31, 63-64.

So too, Congress in fact enacted implementing legislation in 1870 to enforce Section Three, authorizing quo warranto civil suits brought by the United States to remove state and federal officials unconstitutionally holding office in violation of Section Three and imposing criminal penalties for knowing violations of Section Three.<sup>64</sup> But Congress's choice to trigger additional procedural mechanisms and federal jurisdiction for Section Three cases does not mean that there was no constitutional prohibition before Congress acted.<sup>65</sup> Congress *enforced* Section Three's prohibition. Congress was not the one to give it *legal effect*. Section Three was effective law all along.

Section Three is also noticeably *different* from other constitutional provisions that deal with misbehavior—provisions that are not self-executing in the same way. Article III, for instance, describes the offense of treason:

Treason against the United States, shall consist only in levying war against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of blood, or Forfeiture except during the Life of the Person attained.<sup>66</sup>

Note the contrast. The Treason Clause defines an *offense* (“Treason . . . shall consist”) but it does not itself convict anybody of treason. Section Three, by contrast, enacts its own disqualification (“No Person shall be”). It acts on persons, not offenses. This is driven home by the Treason Clause's specific procedures and powers: “[C]onvict[ions] of treason” require two witnesses or a public confession; and “Congress shall have Power to declare the Punishment of Treason.” Section Three of the Fourteenth Amendment, by contrast, enacts its standard and imposes its consequences all at once.

<sup>64</sup> Act of May 31, 1870 (First Ku Klux Klan Act), ch. 114 §§ 14, 15, 16 Stat. 140, 143, 144. The criminal prohibition in Section 15 of the Act was repealed in the 1909 codification of the penal code, 35 Stat. 1088, 1153, § 341 (1909), and the quo warranto provision in Section 14 was repealed during the 1948 positive law codifications of Title 28 of the U.S. Code, *see* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 992-93; *see also* Lynch, *supra* note 5, at 206 n.365. Neither of these codifications was thought to make a substantive change by repealing these provisions. *See generally* William W. Barron, *The Judicial Code 1948 Revision*, 8 F.R.D. 439 (1949). *See also* 19 U.S.C.A. § 3264 (West 1916). These provisions were probably thought obsolete. The repeals therefore certainly did not reflect a decision to preempt or preclude any *other* existing remedies for Section Three.

<sup>65</sup> Professor Magliocca concurs. *See* Magliocca, *Amnesty*, *supra* note 5, at 106 n.101 (noting that “enacting enforcement legislation does not imply that legislation is required” and that the existence of Section Five of the Fourteenth Amendment does not imply that the other sections are not self-executing). Indeed, this is especially so because Congress may have been responding to the decision in *Griffin's Case* (wrongly) holding that such legislation was required for Section Three to have operative legal effect. *See infra* Section II.C.

<sup>66</sup> U.S. CONST. art. III, § 3.

Similarly, the Constitution's impeachment provisions say that those who are impeached "shall be removed from Office."<sup>67</sup> But the Constitution does not itself impeach anybody. Instead, it specifies that somebody else—the House and Senate—must do the impeaching.<sup>68</sup> Again, Section Three's contrast is glaring. The framers of Section Three had the treason clause and impeachment clauses at hand and chose a noticeably different path.<sup>69</sup> Section Three does not call for treason *trials* or the *impeachment* of insurrectionists and rebels. It directly imposes an across-the-board disqualification and involves Congress only if Congress wishes to *end it*.

Section Three's constitutional disqualification, where applicable, just *is*. It stands on its own as a constitutional rule of law, having come into legal force "as Part of this Constitution," along with the rest of the Fourteenth Amendment, "when ratified" as a constitutional amendment.<sup>70</sup> It immediately became "supreme Law of the Land."<sup>71</sup> Its rule took immediate effect. Section Three is, in that sense, legally self-executing.

Is there any serious textual argument to the contrary? We will address Chief Justice Chase's conclusion in *Griffin's Case* in a moment. But we suspect that resistance to this point often comes instead from some misdirected intuitions. One is *the problem of supposed difficulty*. It seems easy, perhaps, to apply the constitutional qualifications of age and citizenship.<sup>72</sup> It is pretty

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67 U.S. CONST. art. II, § 4.

68 U.S. CONST. art. I, §§ 3–4.

69 Indeed, for what it is worth, the legislative history supports this understanding. Section Three's opponents criticized the proposal for its immediate consequences on former Confederates, and its proponents seemed to share the same understanding. Opponents decried the provision's direct and immediate consequences. See CONG. GLOBE, 39th Cong., 1st Sess. 2900 (1866) (statement of Senator Doolittle) (arguing that the amendment "will have the effect of putting a new punishment, not prescribed by the laws, upon all those persons who are embraced within its provisions."); *id.* at 2916 (statement of Senator Doolittle) (lamenting that the amendment would "annul that amnesty and take away that pardon" issued to Confederates by President Lincoln); *id.* at 2940 (statement of Senator Hendricks) (complaining about immediate consequences). Proponents recognized and defended the amendment's immediacy. See *id.* at 2919 (statement of Senator Willey) (defending the amendment's immediate effect because those affected had already "forfeited" their claim to participate in government "by their past conduct"); CONG. GLOBE, 39th Cong., 1st Sess. App. at 228 (1866) (statement of Senator Defrees) (noting that the proposing provision "would . . . prevent the direful influence these men would have upon the interests of the country"); CONG. GLOBE, 39th Cong., 1st Sess. 3036 (1866) (statement of Senator Henderson) (defending the immediate effect of Section Three against the charge that it is a bill of attainder or ex post facto law). See generally *infra* Sections III.A–B (discussing bills of attainder and ex post facto laws). See also Graber, *supra* note 14, at 26–27, 35–37 (documenting all of these discussions).

70 U.S. CONST. art. V.

71 U.S. CONST. art. VI, cl. 2.

72 See Gerard N. Magliocca, *Background as Foreground: Section Three of the Fourteenth Amendment and January 6th*, 25 U. PA. J. CONST. L. 1059, 1066 n.42 (2023) [hereinafter *Foreground*] ("Section Three was unprecedented in the sense that prior restrictions on serving in office were bright-line rules (age and citizenship, for example) instead of standards."). On the other hand, the Constitution's

obvious what these are and obvious what they demand that we do. But who exactly is disqualified by Section Three is, at least to initial appearances, a more difficult, complicated, and fact-specific question. It is a more difficult question of law because we must plumb the meanings of “insurrection” and “rebellion” and so on—and these meanings are not quite as self-evident as “thirty-five years of age” (at least until this article is widely read and accepted). And it is more difficult in practice, because even once we know what the terms of Section Three *mean*, we must know what exactly every prior-oath-sworn official *did*. Not all participation in insurrection or rebellion is open and notorious. But the problem of supposed difficulty is a non sequitur. The fact that it might be hard for us to know today what a legal rule means (or how it applies) does not mean that it is not the legal rule.<sup>73</sup> The Constitution says what it says and we must try to apply it as best we can. To start by asking what is easy for us, and then to assume that the Constitution must mean something that makes our lives easy, is as fallacious as drawing the curve before gathering the data points.<sup>74</sup>

Resistance might also come from *the problem of enforcement*. The Constitution is generally self-executing law, but still, somebody has to enforce it. Somebody has to read it, understand it, and ensure that our practices conform to its commands. (Many somebodies, actually, as we discuss shortly.) This is true, but again it is a non sequitur. It is true that government officials must enforce the Constitution, and who does this and how they do it are important questions—maybe the central questions of constitutional law. But the meaning of the Constitution *comes first*. Officials must enforce the Constitution because it is law; it is wrong to think that it only becomes law if they decide to enforce it. Section Three has legal force already.

#### B. *Who (All) Can (Must) Faithfully Apply and Enforce Section Three?*

As we just said, even though Section Three is a self-executing, immediately applicable constitutional legal rule, someone needs to do the

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*inhabitancy* requirement has proved far from simple in practice. See JACK MASKELL, CONG. RSCH. SERV., R414946, QUALIFICATIONS OF MEMBERS OF CONGRESS 13-18 (2015), <https://sgp.fas.org/crs/misc/R41946.pdf> [<https://perma.cc/AQ8Z-337B>]. And there has been recent litigation about the requirement that the President be a “natural born citizen” as well. See Derek T. Muller, “Natural Born” Disputes in the 2016 Election, 85 FORDHAM L. REV. 1097, 1097-98 (2016) [hereinafter *Natural Born*].

<sup>73</sup> See Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y 497, 511-12 (2018).

<sup>74</sup> Cf. Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RESV. L. REV. 795, 839 (1993) (mocking constitutional interpretation that engages in “the legal equivalent of the method my lab partner and I used in high school chemistry: first draw the desired curve; then plot the data; if time permits, do the experiment”); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 779 (2022).

actual applying of that rule to particular situations where its application is called for. Section Three's constitutional disqualification exists of its own force as an abstract matter. But someone needs to bring that legal rule to bear in a concrete situation as a practical matter.

Who has the power and duty to do this? We think the answer is: anybody who possesses legal authority (under relevant state or federal law) to decide whether somebody is eligible for office. This might mean different political or judicial actors, depending on the office involved, and depending on the relevant state or federal law. But 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, just as with any of the Constitution's other qualifications.

These actors might include (for example): state election officials; other state executive or administrative officials; state legislatures and governors; the two houses of Congress; the President and subordinate executive branch officers; state and federal judges deciding cases where such legal rules apply; even electors for the offices of president and vice president. We will discuss in detail some of these examples presently. But two points are important to keep clear at the outset: First, all of these bodies or entities may possess, within their sphere, the power and duty to apply Section Three as governing law. Second, their authority to do so exists as a function of the powers they otherwise possess. No action is necessary to “activate” Section Three as a prerequisite to its application as law by bodies or persons whose responsibilities call for its application. The Constitution's qualification and disqualification rules exist and possess legal force in their own right, which is what *makes* them applicable and enforceable by a variety of officials in a variety of contexts.

Consider some illustrations:

### 1. Seeking Office

#### a. *By Election*

Anybody who seeks office will at some point need to show that they are entitled to hold that office. At every point that this occurs, Section Three governs. So, for instance, *state or local election boards, and state Secretaries of State*, may possess state law authority to make at least initial determinations as to eligibility of candidates for elected office in that state or representing that state in Congress (as authorized by Article I, Section 4 of the Constitution)—and, thus, whether or not such candidates shall be placed on

a primary or general election ballot.<sup>75</sup> Those state bodies or officers are obliged, often by oath—sometimes by oath mandated by the U.S. Constitution—to act consistently with the requirements of the Constitution in the discharge of their duties.<sup>76</sup> Accordingly, such state actors can and must apply Section Three’s disqualification in carrying out their state law responsibilities, just as they possess the authority and duty to comply with and enforce the Constitution’s other qualification-for-office requirements.<sup>77</sup>

For an example of how this process is supposed to work, consider how the state of Georgia entertained a Section Three challenge to the qualifications of Representative Marjorie Taylor Greene under Georgia law. A state administrative law judge took evidence about Representative Greene’s involvement in the events of January 6, 2021.<sup>78</sup> The judge proceeded under the theory that if January 6 was a constitutional “insurrection,” and if Representative Greene had been part of it, she would be barred from office.<sup>79</sup> But the judge concluded that the challengers had failed to meet their burden of proof under state law:

In short, even assuming, *arguendo*, that the Invasion was an insurrection, Challengers presented no persuasive evidence Rep. Greene took *any* action—direct physical efforts, contribution of personal services or capital, issuance of directives or marching orders,

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<sup>75</sup> To be sure, the centralized, government-administered ballot did not come to America until the late nineteenth century, ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 115 (2000), and so of course states are not constitutionally required to run elections in this way. But if they do, Section Three governs how they carry out their duties.

<sup>76</sup> U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land . . . .”); *see also* U.S. CONST. art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .”). The nature of the Constitution as supreme, binding law is of course fundamental to the argument for “judicial review,” as it is likewise fundamental to the argument for the obligation of all government officials to adhere to the law supplied by the Constitution and give its commands priority over any other source of law or legal duty. *See generally* Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003); *see also* William Baude, *Severability First Principles*, 109 VA. L. REV. 1, 5-9 (2023) [hereinafter *Severability*].

<sup>77</sup> We note that the determination by state officials that a candidate for election to the U.S. Congress is *not* disqualified—and therefore may be elected—does not bind the respective houses of Congress, in the exercise of their independent Article I, Section 5, powers to act as “Judge of the Elections, Returns, and Qualifications of its own Members.” U.S. CONST. art I, § 5, cl. 1. Congress still may refuse to seat prospective members it judges to be constitutionally disqualified by Section Three or other constitutional limitations. *See also infra* notes 111–12 and accompanying text.

<sup>78</sup> *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of State Administrative Hearings, May 6, 2022) (initial decision).

<sup>79</sup> *See id.* at 12.

transmissions of intelligence, or even statements of encouragement—in furtherance thereof on or after January 3, 2021.<sup>80</sup>

Secretary of State Brad Raffensberger issued a final decision ratifying the hearing officer’s proposed findings that day.<sup>81</sup>

Such determinations about ballot eligibility may also be subject to *further judicial review*. In *state courts*, these procedures will of course depend on what review is available under state law. Similarly, *federal courts* might well possess jurisdiction, subject to the usual federal jurisdiction doctrines (such as standing, ripeness, mootness, and abstention), to decide cases of candidate eligibility. Continuing the example, Representative Greene did file a federal lawsuit attempting to enjoin the then-pending state proceedings (mentioned above), and the district court concluded that the case was justiciable and that *Younger* abstention did not apply, but that Greene’s claims failed on the merits.<sup>82</sup> While Greene’s appeal to the Eleventh Circuit was pending, she prevailed in the state proceedings, so the case was dismissed as moot.<sup>83</sup> The details, of course, will vary from case to case. But where any of these tribunals has jurisdiction they too obviously have the power and duty to apply Section Three as the supreme law of the land.

This is not to say that states *must* provide any *particular* procedure for bringing a challenge to ballot eligibility qualification or grant a cause of action to particular private individuals to bring such challenges. For instance, in a recent suit seeking to disqualify Arizona Representative Mark Finchem and U.S. Representatives Paul Gosar and Andy Biggs from the 2022 primary ballot, the Arizona Supreme Court concluded that state law did not provide a private cause of action for a disqualification challenge.<sup>84</sup> In principle, that could well be right. Whether to provide a cause of action in such cases is largely a question of state law. Section Three slots into existing powers and procedures without mandating or micromanaging them.

That said, the Arizona Supreme Court’s muddled reasoning in the Finchem–Gosar–Biggs case necessitates a few clarifying points. First, state law *can* enforce Section Three, and the Fourteenth Amendment does not

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<sup>80</sup> *Id.* at 15. The January 3, 2021, cut-off is because that is the date that Representative Greene first took a constitutional oath. *Id.* at 5. The Court also specifically rejected the argument that a Newsmax appearance on January 5, 2021, should be interpreted as a “coded message from Rep. Greene to her co-conspirators to go forward with a previously planned incursion into the Capitol.” *Id.* at 16.

<sup>81</sup> Rowan v. Greene, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of the Secretary of State, May 6, 2022) (final decision).

<sup>82</sup> Greene v. Raffensperger, 599 F. Supp. 3d 1283, 1295, 1304, 1320 (N.D. Ga. 2022).

<sup>83</sup> Greene v. Sec’y of State for Georgia, 52 F.4th 907, 909-10 (11th Cir. 2022).

<sup>84</sup> Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157, at \*1 (Ariz. May 9, 2022) (nonprecedential disposition).

place any particular presumption against doing so. Unfortunately, the Arizona Supreme Court suggested otherwise, writing that “Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause . . . which suggests that A.R.S. § 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates.”<sup>85</sup> This inference is mistaken—Congress’s power to enforce federal law, including constitutional law, is not exclusive of the states, and states regularly enforce federal law including constitutional law in their own courts.<sup>86</sup>

Second, in some circumstances, state courts not only *can* but *must* enforce Section Three. Under the rule of *Testa v. Katt*,<sup>87</sup> where a state does open its courts to a cause of action, it must apply federal law evenhandedly to that cause of action. As the unanimous Court put it: “[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’”<sup>88</sup> And thus “the policy of the federal Act is the prevailing policy in every state.”<sup>89</sup> A state cannot refuse to enforce federal obligations the way it can sometimes refuse to enforce foreign ones.

The Arizona Supreme Court’s decision unfortunately can be read to suggest otherwise. The court cryptically wrote that the state “statute’s scope is limited to challenges based upon ‘qualifications . . . as prescribed by law,’ and does not include the Disqualification Clause, a legal proscription from

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<sup>85</sup> *Id.* at \*1. The court did not cite any authority for this interpretation, but its argument does echo a fallacious argument made by Chief Justice Chase in *Griffin’s Case*, which we discuss at greater length presently. See *infra* Section II.C.2.d. The Arizona Supreme Court made the additional suggestion that Article I, Section 5 gave Congress “exclusive authority to determine whether to enforce the Disqualification Clause against its prospective members.” *Hansen*, 2022 WL 1468157, at \*1. We are skeptical of this point as well, see *infra* note 111 and accompanying text, but in any event it would have only applied to *federal* representatives Gosar and Biggs, not the lead defendant, *state* representative Finchem. The individual houses of Congress of course have no Article I, Section 5 power, exclusive or otherwise, to determine the membership of state legislatures.

<sup>86</sup> See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 458-60 (1990) (holding that state courts have concurrent jurisdiction over civil RICO claims); *id.* at 469-70 (Scalia, J., concurring) (discussing concurrent jurisdiction); see also Thomas Koenig & Christopher D. Moore, *Of State Remedies and Federal Rights* 6 (May 29, 2023) (unpublished comment), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4462807](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4462807) [<https://perma.cc/8EQS-Z454>].

<sup>87</sup> 330 U.S. 386 (1947).

<sup>88</sup> *Id.* at 391 (quoting U.S. CONST. art VI, § 2).

<sup>89</sup> *Id.* at 393. To be sure, *Testa*, and especially subsequent cases expanding it, have been subject to powerful criticisms as a matter of original meaning. See, e.g., Ann Woolhandler & Michael G. Collins, *State Jurisdictional Independence and Federal Supremacy*, 72 FLA. L. REV. 73, 78-83, 97-105 (2020); *Haywood v. Drown*, 556 U.S. 729, 742-67 (2009) (Thomas, J., dissenting). We bracket those criticisms here.

holding office.”<sup>90</sup> If the court meant to distinguish federal constitutional qualifications from state statutes, it seems to have violated *Testa*. If the court meant that Section Three’s dis-qualification is not a “qualification,” that seems nonsensical. And if it meant something else, it is hard to figure out what.

In any event, the real question is what procedure is available for determining whether a candidate is qualified for office. That is basically a question of state law, and the correct procedures will likely vary from state to state. But the courts owe state law a full and fair reading, not one slanted by reticence to acknowledge the life in Section Three.

b. *By Appointment*

Now let us turn to appointments. Just as with elected office, anybody who must decide whether an appointee is qualified must comply with Section Three. Traditionally, this includes at a minimum whoever nominated the officer.<sup>91</sup> Thus governors, presidents, and other nominating authorities can and should—indeed, constitutionally must—*decline to nominate and appoint to state or federal offices persons who are constitutionally disqualified by Section Three*. And likewise, where nominating authority is subject to additional confirmation—by a state senate, the U.S. Senate, or any other body—that body presumably can and should, constitutionally must, decline to consent to the appointment of such constitutionally disqualified nominees.<sup>92</sup>

In other words, the election and appointment systems, from top to bottom, frequently make decisions about a candidate’s eligibility for office. All of those decisions are legally bound by Section Three of the Fourteenth Amendment; and all persons *making* such decisions are correspondingly bound to faithfully interpret, enforce, and apply Section Three.

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<sup>90</sup> Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157, at \*1 (Ariz. May 9, 2022) (nonprecedential disposition).

<sup>91</sup> For instance, both President George Washington and President Franklin Roosevelt felt obligated to consider whether their Supreme Court nominees (Patterson and Black, respectively) were constitutionally disqualified by Article I, Section 6. See William Baude, *The Unconstitutionality of Justice Black*, 98 TEX. L. REV. 327, 330, 333-34, 355-56 (2019).

<sup>92</sup> See Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 914-18 (1994) (discussing constitutional responsibility of political branches to enforce constitutional disqualifications from office irrespective of whether they give rise to a judicial case or controversy, and bemoaning the failure of all to enforce the Emoluments Clause); see also Baude, *supra* note 91, at 355-56 (similar); Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 YALE L.J. 549, 562-70 (1995) (noting parallel constitutional structural argument for obligation of both the President and the Senate to exercise independent faithful constitutional interpretive judgment in the course of carrying out their respective powers with respect to appointment); Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 658-60 (1970) (similar).

## 2. Holding Office

What about those who *already hold* office—either because Section Three was not attended to before they gained office, or because their disqualifying conduct happened later?<sup>93</sup>

Once again, the answer turns in part on what procedures are available under other law. State officials can be subject to a variety of remedies for unlawfully holding office. They might (or might not) be subject to removal, as a matter of state law, by a private suit *quo warranto*, by the authority of another executive or judicial officer or administrative board, or perhaps even by the state legislature exercising powers of impeachment or recall. In addition, it is possible that the salaries of such rightfully disqualified officials—and the legal eligibility of such persons for those salaries—might be subject to the authority and determination of some other state official.

We submit that all such officials—administrators, executives, legislatures—possessing legal authority concerning such matters likewise possess the authority (and duty) to interpret, apply, and enforce Section Three's disqualification in the course of exercising that legal authority. And once again: if such determinations are judicially reviewable under state law, the courts likewise possess the authority and duty to interpret, apply, and enforce Section Three.<sup>94</sup>

For an example of how this process is supposed to work, consider how the state of New Mexico removed commissioner Couy Griffin from state office.<sup>95</sup> Griffin was an elected commissioner for Otero County, New Mexico, who promoted, assisted, and ultimately joined in the January 6 insurrection against the Capitol.<sup>96</sup> A group of New Mexico citizens filed a *quo warranto* action against Griffin under New Mexico law, seeking his removal from office.<sup>97</sup> The New Mexico district court took evidence, received legal arguments, and then concluded that Griffin was disqualified under Section Three.<sup>98</sup> More precisely, and quite correctly, it held that Griffin had been disqualified since the day of the January 6 insurrection, and ordered his

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<sup>93</sup> Or because Section Three was not yet *adopted as law* when they were appointed to office but became operative and disqualified them subsequently. This was the situation presented in *Griffin's Case*, discussed presently. See *infra* Section II.C.

<sup>94</sup> Of course, federal courts, too, might possess jurisdiction, subject to the usual rules and conditions, to decide such lawsuits just as they will for state determinations of election candidate eligibility. See *supra* notes 82-83 and accompanying text. And when doing so, they have the authority and duty to interpret, apply, and enforce Section Three.

<sup>95</sup> New Mexico *ex rel.* White v. Griffin, No. D-101-CV-2022-00473, 2022 WL 4295619 (N.M. Dist. Ct. Sept. 6, 2022).

<sup>96</sup> *Id.* at \*2, \*5-9, \*14-18.

<sup>97</sup> *Id.* at \*1.

<sup>98</sup> *Id.* at \*45-46.

immediate ejection from office, and permanently enjoined him from seeking or holding any other covered position.<sup>99</sup>

As a matter of state procedure, the court concluded that the New Mexico quo warranto statute was a remedy for ejecting unlawful office holders.<sup>100</sup> It also concluded that quo warranto could be sought by any citizen of New Mexico, without any further showing of injury, because the New Mexico courts are not bound by the same “standing” limitations as the federal courts are.<sup>101</sup> As a matter of federal law, the court had no trouble concluding that the events of January 6, 2021, were a constitutional “insurrection.”<sup>102</sup> And it had no trouble concluding that Griffin had engaged in that insurrection, both by “voluntarily aid[ing] the insurrectionists’ cause by helping to mobilize and incite” the crowd, and by joining in the invasion of the Capitol itself, even though Griffin himself did not commit a violent act.<sup>103</sup> The New Mexico county court correctly recognized both its power and its duty to interpret and apply Section Three of the Fourteenth Amendment.

The same general principle applies to the situations of those who hold federal office. Again, anyone who possesses legal power to decide whether such a person can and should hold (or continue to hold) the office in question must apply Section Three’s disqualification in doing so.<sup>104</sup> Here, the specific federal constitutional rules for tenure and removal present some interesting complications, which we address shortly.

But in general: Wherever anyone possesses the constitutional authority or duty to remove others from office for legal reasons, they can and should

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<sup>99</sup> *Id.* The New Mexico Supreme Court dismissed Griffin’s appeal on procedural grounds. Order Dismissing Appeal, *Griffin v. New Mexico ex rel. White*, No. S-1-SC-39571 (N.M. Nov. 15, 2022). Meanwhile, the federal courts concluded that they lacked federal jurisdiction over two related claims by Griffin: An attempt to remove the state action to federal court. *New Mexico ex rel. White v. Griffin*, 604 F. Supp. 3d 1143, 1150 (D.N.M. 2022) (denying removal because of plaintiffs’ lack of Article III standing). And a separate parallel suit attempting to enjoin the state proceedings. *Griffin v. White*, No. 22-0362, 2022 WL 2315980, at \*3 (D.N.M. June 28, 2022) (finding lack of standing, lack of ripeness, and invoking *Pullman* abstention).

<sup>100</sup> *New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at \*24-25 (N.M. Dist. Ct. Sept. 6, 2022).

<sup>101</sup> *Id.* at \*25.

<sup>102</sup> *Id.* at \*27.

<sup>103</sup> *Id.* at \*35-38.

<sup>104</sup> The availability of a federal quo warranto action is curiously codified in the D.C. Code §§ 16-3501, 16-3502. Courts have generally construed this statute quite narrowly, holding that only the Attorney General may bring a quo warranto against a public official, and that he has broad discretion not to do so. *See Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984); *Drake v. Obama*, 664 F.3d 774, 784-85 (9th Cir. 2011); *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff’d*, 580 U.S. 288 (2017). The Third Circuit recently dismissed a Section Three quo warranto against former state senator Doug Mastriano on this ground. *Hill v. Mastriano*, No. 22-2464, 2022 WL 16707073, at \*2 (3d Cir. Nov. 4, 2022); *see also Hill v. Perry*, No. 22-2465, 2023 WL 3336648, at \*1 (3d Cir. May 10, 2023) (dismissing similar suits by same plaintiff against Rick Saccone and Scott Perry).

remove those barred by Section Three. Presidents—and subordinate executive officers acting at the president's direction—should remove from office executive officers, civil and military, who are constitutionally disqualified by Section Three. Likewise, the House of Representatives should impeach, and the Senate convict and thereby remove from office, civil executive officers who become constitutionally disqualified by Section Three.<sup>105</sup>

Finally, and additionally, what happens if all of the above fails? Somebody disqualified by Section Three is given office and nobody removes that person from office. What then? Here too there will often still be additional procedures to enforce Section Three. These procedures mirror those available to enforce the Appointments Clause and other constitutional law of appointments. A litigant can move to disqualify a judge whose appointment is improper.<sup>106</sup> A regulated entity can challenge the actions of an executive official who holds office improperly.<sup>107</sup> Those who cannot constitutionally hold office cannot constitutionally exercise government power, so the subjects of that power can challenge their acts as *ultra vires*. While there may be some limits to the available relief in some kinds of suits under the “de facto officer doctrine,” (more on which shortly), in many cases the courts will be called on to decide if an action is *ultra vires*. Section Three governs those cases.

### 3. Special Situations

A few federal constitutional offices raise special cases, where the Constitution itself speaks to official tenure or qualifications.

First consider Congress. Each house of Congress has two specific powers with respect to its own membership in which Section Three might come into play. First, each house is the “Judge of the Elections, Returns, and Qualifications of its own Members.”<sup>108</sup> Since one of those qualifications is non-disqualification under Section Three, each house can and must judge

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<sup>105</sup> An officeholder who has engaged in insurrection or rebellion or given aid or comfort to enemies of the United States has surely committed a “high Crime[]” or “Misdemeanor” within the meaning of Article II, Section 4’s description of the scope of the impeachment and removal power. U.S. CONST. art. II, § 4; see Michael Stokes Paulsen, *To End a (Republican) Presidency*, 132 HARV. L. REV. 689, 698–702 (2018). Note that military officers are not subject to impeachment; they are subject instead to the President’s removal authority as Commander in Chief. See Zachary S. Price, *Congress’s Power over Military Offices*, 99 TEX. L. REV. 491, 549 (2021). Whether Congress could supplement that authority through appropriate legislation is an interesting question. *Id.* at 550.

<sup>106</sup> See *Nguyen v. United States*, 539 U.S. 69, 77–79, 81–82 (2003); Baude, *supra* note 91, at 346–47.

<sup>107</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 8–10 (1976) (per curiam); *Morrison v. Olson*, 487 U.S. 654, 668 (1988); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 487–88 (2010); *NLRB v. Noel Canning*, 573 U.S. 513, 520 (2014); see also Baude, *Severability*, *supra* note 76, at 36–37.

<sup>108</sup> U.S. CONST. art. I, § 5, cl. 1.

whether Section Three forbids the seating of a member. This judgment is conclusive, and it operates as a crucial constitutional backstop for each house. No state or group of voters can force upon the House or Senate a Member it judges to be constitutionally disqualified. Indeed, even federal courts could not properly do so. While the Supreme Court has held, in *Powell v. McCormack*,<sup>109</sup> that Congress cannot *create new* “Qualifications” and that the federal courts have the power to stop it from doing so, neither *Powell* nor first principles allow a federal court to second-guess each house’s judgment about whether the *existing, constitutional*, qualifications have been satisfied.<sup>110</sup>

Some have argued that each house’s judging power also preempts other early stages of the election process. The argument is that states and state election law have no power to *exclude a candidate* for Congress because they are constitutionally ineligible to office—that instead the state must allow the voters to send up the ineligible candidate, so as not to prejudge the possibility that the House or Senate will find them eligible.<sup>111</sup> With respect, we do not agree with this argument. As a logical matter, each house’s right to judge whether an elected candidate can hold office does not give it the power to force states to elect that candidate (or allow them to be elected) in the first place. And as a textual matter, state legislatures have the power to regulate the “Manner” of elections, which includes ballot eligibility.<sup>112</sup> In our view, the

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<sup>109</sup> 395 U.S. 486 (1969).

<sup>110</sup> *See id.* at 520 n.41 (reserving the possibility that Section Three disqualification is a qualification); *see also* P. Allan Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. PUB. L. 103, 114-15 (1968), *cited in id.* at 520 n.41 (arguing that each House can apply Section Three); *Powell*, 395 U.S. at 521 n.42 (“[F]ederal courts might still be barred by the political question doctrine from reviewing the House’s factual determination that a member did not meet one of the standing qualifications.”). We emphasize that questions of interpretation and application of Section Three are not *in general* “political question[s]” that cannot be decided by federal courts simply because they have political consequences. Where the Constitution supplies a rule, and the rule’s application is *not* committed by the text of the Constitution to the judgment of one of the political branches, the courts are not disabled from deciding a case based on that rule. We simply think that the provision committing to each house the power to be the “Judge” of the “Elections, Returns, and Qualifications” of its own members does not permit judicial review of determinations of each house that properly fall within these constitutional categories.

<sup>111</sup> *See* Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 594-98 (2015) [hereinafter *Scrutinizing*]; *see also* *Cawthorn v. Amalfi*, 35 F.4th 245, 267-73, 282-84 (4th Cir. 2022) (Richardson, J., concurring); *Greene v. Sec’y of State for Ga.*, 52 F.4th 907, 912-16 (11th Cir. 2022) (Branch, J., concurring).

<sup>112</sup> U.S. CONST. art. I, § 4. The same Clause also gives Congress the power to “make or alter” such regulations by legislation if it wishes. Two relatively recent Supreme Court cases have invalidated state ballot eligibility rules for members of Congress that attempted to impose congressional term limits, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) and *Cook v. Gralike*, 531 U.S. 510 (2001), and Judge Richardson relies on these cases to argue that states cannot judge the qualifications of congressional candidates, *Cawthorn*, 35 F.4th at 273-74 (Richardson, J., concurring). Putting aside whether these cases are correct as an original matter, we think they further support our view. The Court rejected term-limit-ballot-access restrictions because they were an

better interpretation is that Section Three can be relevant to *both* the state's power to regulate the manner of elections and each house's power to judge the results of those elections.

The second relevant power each house possesses with respect to its own Members concerns Members already sitting in Congress. Each house also has power to "determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."<sup>113</sup> So in addition to the initial power to exclude under Section Three, each house could potentially proceed through the expulsion power instead, by two-thirds vote.<sup>114</sup> As with the power to exclude, the power to expel, where exercised within the scope of the power conferred exclusively on each house, is committed to that house's discretion.

Additionally, Article I's Speech and Debate Clause provides that "for any Speech or Debate in either House," members of Congress "shall not be questioned in any other Place."<sup>115</sup> This means that to the extent that the conduct that violates Section Three was a member of Congress's official statements or legislative actions,<sup>116</sup> each house's powers of exclusion and expulsion are necessarily the sole mechanism for enforcing Section Three.

Federal judges hold their offices during "good Behaviour."<sup>117</sup> What if a sitting federal judge or even a Supreme Court justice has engaged in insurrection or rebellion or given aid or comfort to the nation's enemies?<sup>118</sup> As a matter of *substance* this is easy. Whether regarded as simply a violation of the Article III tenure condition of "good Behaviour" or as satisfying the impeachment standard of "high Crimes and Misdemeanors,"<sup>119</sup> conduct meeting Section Three's standard disqualifies a federal judge from office.

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attempt to impose a qualification *not contained in the Constitution*. See, e.g., *U.S. Term Limits*, 514 U.S. at 787-88, 806-15. It follows that ballot access rules that follow the qualifications contained in the Constitution could be treated differently.

<sup>113</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>114</sup> There is some debate whether Congress can expel a member for conduct that occurred before being elected. See CHAFETZ, *supra* note 54, at 210-12 (recounting arguments on both sides but arguing that it can); JACK MASKELL, CONG. RSCH. SERV., RL31382, EXPULSION, CENSURE, REPRIMAND, AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES 5-7 (2016), <https://sgp.fas.org/crs/misc/RL31382.pdf> [<https://perma.cc/FT4M-U5AB>] (same). At all events, however, continuing to hold office when forbidden to do so by Section Three is ongoing conduct that would seem independently to justify expulsion in the here-and-now.

<sup>115</sup> U.S. CONST. art. I, § 6, cl. 1.

<sup>116</sup> As we elaborate later, we think it is quite rare that such conduct could violate Section Three, even on its own terms.

<sup>117</sup> U.S. CONST. art. III, § 1.

<sup>118</sup> Cf. *Ex parte Milligan*, 71 U.S. 2, 141 (1866) (Chase, C.J., concurring in the judgment) ("In Indiana, the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.")

<sup>119</sup> See *supra* note 105.

As a matter of procedure the question is trickier. The conventional wisdom is that Article III allows good behavior to be judged only through the procedure of impeachment by Congress. An alternative view, with some support in the history, is that Congress could provide other procedures for adjudicating misbehavior (as for instance in the 1790 Crimes Act, which purported to require the immediate removal of any federal official convicted of bribery or other crimes).<sup>120</sup> Whichever is the answer, the procedures and criteria for judging judges can and must apply Section Three.

Finally, what about the top of the ticket? What if the President or a presidential candidate (or likewise for Vice President) is constitutionally disqualified?<sup>121</sup> Who has the power and duty to enforce Section Three's legal prohibition? Again, the answer depends on whether the supposedly disqualified individual is seeking election to office or already holds it. In the case of a *candidate*, state election officials and state election law will frequently judge that candidate's ballot eligibility, applying Section Three as described above, and subject to the usual avenues of judicial review. This is true even in the case of a presidential candidate, even though it is technically the electors who are elected by the people.<sup>122</sup> Put simply: a state secretary of state (for example) might well possess state law authority to determine candidate eligibility for federal elective offices—President and Vice President, U.S. Representatives, U.S. Senators—selected directly or indirectly via state elections; and among those relevant eligibility criteria is whether a candidate is disqualified from the office he or she seeks by Section Three of the Fourteenth Amendment.

Additionally, presidential electors have the power (and therefore perhaps the responsibility) to enforce Section Three.<sup>123</sup> In perhaps half the states, the

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<sup>120</sup> See Saikrishna Prakash & Steven D. Smith, *How to Remove A Federal Judge*, 116 YALE L.J. 72, 122, 127-35 (2006). In the interests of full disclosure, one of us was the student lead editor when this piece was published, and continues to think it is probably right, notwithstanding the counterarguments in James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227 (2007). The other of us adheres to the traditional view. Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J. L. & LIBERTY 18, 76, 77 n.88 (2016).

<sup>121</sup> We are assuming for now that the Presidency and Vice Presidency are covered by Section Three's language as an "office, civil or military, under the United States." U.S. CONST. amend. XIV, § 3. We think that assumption is correct, and we will return to it in Section IV.B.

<sup>122</sup> See Hemel, *How-to Guide*, *supra* note 5; *Lindsay v. Bowen*, 750 F.3d 1061, 1063, 1065 (9th Cir. 2014) (upholding state exclusion from presidential primary ballot of twenty-seven-year-old candidate constitutionally disqualified on grounds of age); *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding state exclusion from presidential election ballot of naturalized citizen constitutionally disqualified from office by Natural Born Citizen Clause of Article II); see also Muller, *Scrutinizing*, *supra* note 111, at 599-608; Muller, *Natural Born*, *supra* note 72, at 1100-06. This is standard practice and law even though the President and Vice President are only indirect candidates, with their electors as direct candidates.

<sup>123</sup> See Muller, *Scrutinizing*, *supra* note 111, at 579-80.

question is more complicated, because state laws purport to *bind* the electors in various ways to vote for their party's candidate rather than making their own determination, and the Supreme Court has recently upheld such laws.<sup>124</sup> But even working within that paradigm, states and their legislatures have their own duties to uphold the Constitution. That means they have a responsibility to ensure that their electors do not ultimately contribute to a constitutionally disqualified candidate assuming office.

If the voters and presidential electors do select a constitutionally disqualified candidate for the Presidency, does Congress have the power—perhaps even the duty—to reject such a candidate when the votes of electors are counted in joint session called for by the Twelfth Amendment? This is an unsettled question and we are, candidly, not sure of the answer.

On the one hand, the text of the Twelfth Amendment does not in terms confer a *power* on the joint session of Congress to judge the propriety, legal or otherwise, of the votes cast by electors.<sup>125</sup> The responsibility to *count* the votes cast is not cast in terms of a power to judge the validity of such votes. Indeed, even the role of counting is formulated in a (very) passive voice: “The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes *shall then be counted*.”<sup>126</sup> This is hardly the language of affirmative power to judge, evaluate, or decide. It contrasts rather sharply with the Article I power of each house of Congress to “Judge of the Elections, Returns, and Qualifications” of “its own Members.”<sup>127</sup> Further, the Twelfth Amendment specifically limits Congress's role in *selection* of the President to the power of the House of Representatives to “choose immediately, by ballot, the President,” from the three persons receiving the highest number of votes, only “if no person have such majority [of the votes of the whole number of Electors appointed].”<sup>128</sup> To the extent a power to judge the constitutional validity of votes submitted by electors might verge on a practical power of the joint session to select the President

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<sup>124</sup> See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2319–22 (2020); see also Muller, *Scrutinizing*, *supra* note 111, at 580. We bracket the serious possibility that *Chiafalo* was wrongly decided. See, e.g., Mike Rappaport, *The Originalist Disaster in Chiafalo*, LAW & LIBERTY (Aug. 7, 2020), <https://www.lawliberty.org/the-originalist-disaster-in-chiafalo/> [<https://perma.cc/2PED-4EMB>]; Michael Stokes Paulsen, *The Constitutional Power of the Electoral College*, PUB. DISCOURSE (Nov. 21, 2016), <https://www.thepublicdiscourse.com/2016/11/18283/> [<https://perma.cc/J7ZG-LH2U>].

<sup>125</sup> See, e.g., Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1805 (2002); John Harrison, *Nobody for President*, 16 J.L. & POL. 699 (2000).

<sup>126</sup> U.S. CONST. amend. XII (emphasis added).

<sup>127</sup> U.S. CONST. art. I, § 5, cl. 1.

<sup>128</sup> U.S. CONST. amend. XII.

by selective counting of votes, it subtly infringes on the Twelfth Amendment's constitutional design.<sup>129</sup>

On the other hand, perhaps such a power to enforce Section Three's disqualification can be inferred from constitutional structure and history. The argument would go like this. Because Section Three is binding on all officials exercising powers or duties that involve questions of election to, appointment to, or continuance in office of persons who are constitutionally disqualified by Section Three from holding such positions, a case can be made that the logic of this principle implies that Congress, sitting in joint session pursuant to the Twelfth Amendment, and oath-bound to abide by the Constitution in the exercise of all its functions, has a constitutional responsibility to refuse to accede to the election of a person for president who is constitutionally disqualified from holding that office.

Moreover, another provision of the Constitution, the Twentieth Amendment, is explicit that a disqualified candidate *does not become president*, even if he has the most votes. It states that at "the time fixed for the beginning of [the President's] term," "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified."<sup>130</sup> The language thus specifically confirms the possibility of a failure to qualify and specifies the consequences of that failure. If the President-elect is covered by Section Three, he cannot become President—unless Congress chooses (by supermajority votes) to remove Section Three's disability. If this prohibition is not enforced during the counting of the electoral votes in joint session, then when would it be enforced, and by whom?

Moreover, imagine the situation where a presidential candidate receiving a clear majority of votes cast of electors engaged in plainly constitutionally disqualifying acts of insurrection or rebellion *between the time when electors cast their votes and the time for beginning his or her term*. Again, and even more emphatically, if Congress cannot determine that such a person cannot constitutionally become President, who can? Must Congress pliantly accede to the election of such person as President? (Or, as actually happened in 1872, what if a presidential candidate has *died* between election day and the day prescribed by law for votes of electors to be counted? Must votes for a dead man to be president be counted? In 1872, Congress said no, refusing to count votes cast for Democratic presidential candidate Horace Greeley because he had died between election day and the meeting of the electors.)<sup>131</sup>

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<sup>129</sup> That a substantive power to judge the validity of electors' votes might be susceptible to such misuse is illustrated by examples from both the 2020 and 2016 elections.

<sup>130</sup> U.S. CONST. amend. XX, § 3.

<sup>131</sup> In the 1872 presidential election, Horace Greeley had won six states with a total of sixty-six electors. However, Greeley died on November 28, 1872, five days before electors were to cast their votes. Sixty-three of the Greeley electors thereupon cast their votes for other (living) persons. The

Finally, Congress has enacted two statutes, the Electoral Count Act and the Electoral Count Reform Act.<sup>132</sup> These statutes have been on the books for 137 years and assume that Congress has some role, albeit limited, in judging the validity of electoral votes. They would potentially implicate Congress's powers under the "necessary and proper" clause as well.<sup>133</sup> Even if these statutes are constitutional—that is, even if Congress does have a substantive power to reject votes for a disqualified candidate—there is an additional question whether the current statutes allow it to do so. (This turns on the meaning of the phrase "regularly given," and we take no position on it here.<sup>134</sup>)

On balance, we are inclined to think the stronger textual and structural argument is that neither Congress nor the Vice President (acting as President of the Senate) has the authority to evaluate the decisions or actions of the electors themselves (as opposed to perhaps determining the authenticity of submitted votes).

But we confess to some uncertainty here. If the Constitution does not supply a clear, determinate answer, the various branches of government are constitutionally entitled each to exercise their own independent constitutional judgments on the question. Thus, even if state election officials, voters, electors, and the judiciary all support (or acquiesce to) the election of a president barred from holding office by Section Three, there is a serious argument that Congress might act as a last constitutional backstop against the installation of such a constitutionally disqualified person in the presidency.<sup>135</sup>

Once the President has taken office, the Constitution provides two paths for involuntary removal from office: impeachment for "high Crimes and Misdemeanors"<sup>136</sup> and removal for being "unable to discharge the powers and duties of his office" under the procedure of the Twenty-fifth Amendment.<sup>137</sup>

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three remaining electors cast their votes for Greeley, notwithstanding his having died. After debate, a divided Congress decided that votes for a dead person could not be counted. See Michael L. Rosin, *A History of Elector Discretion*, 41 N. ILL. U. L. REV. 125, 181-83 (2020) (detailing the course of events and describing the vote in the two houses of Congress).

<sup>132</sup> Electoral Count Act, Pub. L. No. 49-90, 24 Stat. 373-75 (1887); Electoral Count Reform Act, Pub. L. No. 117-328, 136 Stat. 5237-40 (2022) (codified in relevant part at 3 U.S.C. § 15(b) & (d)(2)(B)(ii)).

<sup>133</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>134</sup> See Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1538 (2021).

<sup>135</sup> Even if Congress is thought to possess implied power not to count votes for a constitutionally disqualified candidate, this falls far short of a "textually demonstrable constitutional commitment" of the issue to Congress's exclusive determination (and thus a nonjusticiable "political question" that federal courts may not decide). See *Baker v. Carr*, 369 U.S. 186, 217 (1962). It would merely mean that *multiple* constitutional actors—legislatures, elected officials, courts—possess the power and obligation to engage in faithful constitutional interpretation, each within the sphere of its constitutional powers and responsibilities.

<sup>136</sup> U.S. CONST. art. II, § 4.

<sup>137</sup> U.S. CONST. amend. XXV, § 4.

The impeachment route is straightforward. As we have discussed, an insurrection against the United States is a paradigm example of a high crime or misdemeanor. On the other hand, it is less clear whether being *legally disqualified* from holding office makes the would-be President “unable to discharge the powers and duties of his office” within the meaning of the Twenty-fifth Amendment. (Structurally, the Twenty-fifth Amendment appears to relate to Article II, Section 1, paragraph 6, which deals with Presidential succession, rather than Article II, Section 1, paragraph 5, which deals with eligibility.) But in any event the Twenty-fifth Amendment question will usually be unimportant in practice, because it requires a two-thirds vote of both houses, the Vice President, and a majority of the cabinet. It will therefore usually be significantly easier to use the impeachment process instead.<sup>138</sup>

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Tying together all of these different procedures and possibilities: consider briefly (and not-so-hypothetically) a violent insurrection on the seat of government, by a mob joined or given aid or comfort by various government officials, from a state representative or commissioner to a U.S. Senator to the President himself.<sup>139</sup> From the moment of their participation in the insurrection, those officials would be *legally* ineligible to hold their offices, thanks to Section Three of the Fourteenth Amendment. How this would play out *practically* might vary across them. As the state official returned home, he would immediately be subject to state law procedures such as a quo warranto suit.<sup>140</sup> He might be removed by such a suit,<sup>141</sup> or he might well choose to resign instead.<sup>142</sup> The Senator might choose to brazen it out, counting on the difficulty in getting together a two-thirds vote to expel him. But if he sought re-election the Senate could and should exclude him by a mere majority vote. As for the hypothetical President, by right he ought to be immediately subject

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138 BRIAN KALT, UNABLE: THE LAW, POLITICS, AND LIMITS OF SECTION 4 OF THE TWENTY-FIFTH AMENDMENT 13 (2019).

139 See *infra* Section IV.C. for further discussion.

140 For two relevant examples, see N.M. STAT. ANN. § 44-3-4 (2023); W. VA. CODE ANN. § 53-2-1 (2023). In West Virginia, such a claim may be brought “[w]hensoever the Attorney General or prosecuting attorney of any county is satisfied that a cause exists therefor, [at] his own instance, or at the relation of any person interested.” W. VA. CODE ANN. § 53-2-2. For illustrative applications, see *State ex rel. Zickefoose v. West*, 116 S.E.2d 398, 423 (W. Va. 1960); *Wells v. Miller*, 791 S.E.2d 361, 364-65 (W. Va. 2016).

141 See *supra* notes 95-104 and accompanying text.

142 See, e.g., Press Release, West Virginia House of Delegates, Delegate Derrick Evans Announces Resignation from House of Delegates (Jan. 9, 2021), [https://www.wvlegislature.gov/News\\_release/pressrelease.cfm?release=2820](https://www.wvlegislature.gov/News_release/pressrelease.cfm?release=2820) [<https://perma.cc/H59D-6E89>].

to impeachment and conviction by Congress, and perhaps also a Twenty-fifth Amendment declaration by the Vice President and supported by the cabinet. Even if those things did not happen, if he sought re-election, state election officials around the country would be bound by Section Three in deciding whether to put him on the ballot, even in the primary.

And of course, some of these matters would no doubt promptly find their way into the courts as well. Continuing the example of the presidential candidate, if state officials excluded him from ballot eligibility, he would likely be able to sue in state or federal court to challenge state officials' determination of ineligibility. And if he was *not* excluded by state officials, voters (at least in some states) might possess the legal right to challenge his eligibility. Either way, such a challenge would present a classic legal case or controversy. It is not difficult to imagine such suit being resolved by courts. Indeed, given the magnitude of the question and its consequences, it is not difficult to imagine such an important case making its way quickly to the U.S. Supreme Court. It would then become the province and duty of the Court to determine and apply the meaning of Section Three.

Section Three thus functions as a sort of constitutional immune system, mobilizing *every* official charged with constitutional application to keep those who have fundamentally betrayed the constitutional order from keeping or reassuming power.

### C. *The Problem of Griffin's Case*

A small problem with our view that Section Three is self-executing and immediately operative is that the Chief Justice of the United States said the opposite, almost immediately after the Fourteenth Amendment was adopted. This was the opinion in *Griffin's Case* by Chief Justice Salmon P. Chase, sitting as Circuit Justice in 1869, in one of the first cases to interpret any part of the Amendment. In *Griffin's Case*, Chief Justice Chase concluded that Section Three is inoperative unless and until Congress passes implementing legislation to carry it into effect.<sup>143</sup> This precedent continues to cast a shadow over Section Three today.<sup>144</sup>

But there is a simple response to this small problem: *Griffin's Case* is just wrong. It is possible—possible—that its *result* is correct on an alternate

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<sup>143</sup> *In re Griffin* (“*Griffin's Case*”), 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815) (Chase 364).

<sup>144</sup> See, e.g., Josh Blackman & S. B. Tillman, *Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene*, N.Y. TIMES (Apr. 20, 2022), <https://www.nytimes.com/2022/04/20/opinion/madison-cawthorn-marjorie-taylor-green-section-3.html> [<https://perma.cc/AV9F-5HHD>]; Tom Ginsburg, Aziz Z. Huq & David Landau, *Democracy's Other Boundary Problem: The Law of Disqualification*, 111 CALIF. L. REV. 1633, 1653, 1698 (2023).

ground, under the so-called de facto officer doctrine, which we will discuss.<sup>145</sup> But Chase's legal reasoning that the Fourteenth Amendment is not self-executing is unsustainable. Indeed, the more one pulls at his opinion, the more it unravels. We examine it in some detail.<sup>146</sup>

### 1. Background

Caesar Griffin, a black man, was charged in Virginia state court with the crime of shooting with the intent to kill.<sup>147</sup> Griffin was tried, convicted, and sentenced to prison.<sup>148</sup> He made no claim that the statute under which he was tried was unconstitutional; nor that he had been subjected to discrimination because of his race; nor that the composition of the jury was improper. As Chase put it: Griffin made "no allegation that the trial was not fairly conducted, or that any discrimination was made against him, either in indictment, trial, or sentence, on account of color."<sup>149</sup> Nor did Griffin allege that the presiding judge—Judge Hugh W. Sheffey—"did not conduct the trial with fairness and uprightness."<sup>150</sup> Griffin raised just one challenge to the validity of his conviction: that Judge Sheffey (or, one might say, *so-called* Judge Sheffey)<sup>151</sup> was legally disqualified by Section Three of the Fourteenth Amendment from serving on the bench.<sup>152</sup>

The facts relevant to Judge Sheffey were not disputed either. He had taken the oath: Before the Civil War, Hugh Sheffey had been a member of the Virginia state legislature, as far back as 1849.<sup>153</sup> And he had "engaged in" rebellion: After Virginia purported to secede from the Union, Sheffey continued to serve as a member of Virginia's secessionist legislature. In that role, in 1862, he "voted for measures to sustain the so-called Confederate States in their war against the United States."<sup>154</sup> Thus "it is admitted," wrote

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<sup>145</sup> *Infra* Section II.C.3.

<sup>146</sup> For other criticism of *Griffin's Case*, insightful as always, see Magliocca, *Amnesty*, *supra* note 5, at 102-108; Magliocca, *Foreground*, *supra* note 72, at 1067-72.

<sup>147</sup> *Griffin's Case*, 11 F. Cas. at 22.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 22.

<sup>150</sup> *Id.*

<sup>151</sup> Cf. Will Baude, *The Deadly Serious Accusation of Being a "So-Called Judge,"* WASH. POST: VOLOKH CONSPIRACY (Feb. 4, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/04/the-deadly-serious-accusation-of-being-a-so-called-judge/> [<https://perma.cc/Q55Z-R7M7>] ("[T]o call him a 'so-called' judge is to hint that he is not *really* a judge, that he lacks judicial power. It is just a hint, but it flirts with a deadly serious issue.").

<sup>152</sup> *Griffin's Case*, 11 F. Cas. at 22-23.

<sup>153</sup> *Id.* at 22.

<sup>154</sup> *Id.*

Chase, that Judge Sheffey “was one of the persons to whom the prohibition to hold office pronounced by the amendment applied.”<sup>155</sup>

Griffin had petitioned the U.S. district judge, Judge John Underwood, for a writ of habeas corpus challenging the lawfulness of his custody, which Judge Underwood granted.<sup>156</sup> The sheriff appealed to the circuit court, which was held by Chase as circuit justice.<sup>157</sup>

## 2. Chase on Section Three

Chase reversed. Here is how he framed the problem: Everybody agreed that Sheffey had been lawfully appointed as a state judge in February 1866, while Virginia was controlled by military reconstruction and the Fourteenth

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<sup>155</sup> *Id.* at 23.

<sup>156</sup> Opinion of Judge Underwood in the Matter of Cæsar Griffin—Petition for Habeas Corpus, reprinted in EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION (FROM APRIL 15, 1865, TO JULY 15, 1870)*, at 462-66 (3d ed., Washington, James J. Chapman 1875). We are indebted to Myles Lynch for locating this source.

<sup>157</sup> The procedural posture of this and several related cases is extremely confusing and reflects background machinations by both Judge Underwood and Chief Justice Chase. At the time, habeas was apparently available from the district court, at chambers, or from the circuit court. If Judge Underwood issued the writ from the district court or at chambers, he could be reviewed by the circuit court, which would include Chief Justice Chase. But if Chief Justice Chase was not present, Judge Underwood could also sit alone as the circuit court. And thanks to a recent statute designed to strip the Supreme Court of jurisdiction over the anti-Reconstruction suit of *Ex parte McCardle*, there would be no appeal if Judge Underwood sat as the circuit court. Underwood took this unreviewable route in another habeas case like Griffin's, brought by Sally Anderson. In that case, Underwood held that Section Three, alone, removed disqualified persons from office, and therefore Anderson's trial, conducted by a Section Three-covered judge, was invalid. Chief Justice Chase then wrote to Underwood with a veiled threat, floating the possibility that a recent statute could be interpreted to deprive Underwood of his ability to hold the circuit court at that time, and encouraging Underwood to hear the case in the district court or at chambers so that Chase could review him. Underwood obliged. Meanwhile, Virginia also sought an original writ in the Supreme Court to put a stop to Underwood's Section Three docket. The Supreme Court ordered all of the proceedings stayed, and then let Chase go down to the circuit to clean things up, taking no action on the writ. For a more detailed description of these events, see CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-88*, in 6 *THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 601-07 (Paul A. Freund, ed., 2d prtg. 1974). See also Letter from Chief Justice Chase to Judge Underwood (Nov. 19, 1868), in 5 *THE SALMON P. CHASE PAPERS* 285-86 (John Niven ed., 1998); Letter from Chief Justice Chase to Judge Underwood (Jan. 14, 1869), in 5 *id.* at 292-93.

This background is briefly alluded to in the synopsis in *Griffin's Case*, which explains that “[a] motion was then made by James Lyons, Esq. in the supreme court of the United States for a writ of prohibition against the district judge, to restrain him from further exercise of such power. The supreme court advised on the motion, and never announced any conclusion, but shortly afterward the chief justice opened the circuit court at Richmond, and immediately called up the appeal in Griffin's Case. This statement is necessary for a full understanding of the pregnancy of the chief justice's statement that the supreme court agreed with him as to the decision he rendered in this case.” *Griffin's Case*, 11 F. Cas. at 8-9. But really, these circumstances are extraordinary. We take them up again below, see *infra* notes 200-201 and accompanying text.

Amendment did not exist.<sup>158</sup> The question was whether ratification of Section Three kicked him out. As Chase put it: “[W]hether upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power.”<sup>159</sup>

Chase said no, rejecting this as a “literal construction” of Section Three.<sup>160</sup> There is a lot going on in this opinion. Chase included a number of makeweight arguments and asides on topics such as the legal history of West Virginia.<sup>161</sup> But his core argument was that surely Section Three cannot mean what it says: It would have bad consequences, couldn’t possibly have been intended by the ratifiers, and would violate the spirit of the Constitution. As we will explain, these arguments are bad ones. Chase then supplemented them with a shocking claim of a secret Supreme Court ruling in favor of an alternative approach—which was both generally improper, and further impeached his interpretation of Section Three.<sup>162</sup> All in all, *Griffin’s Case* is a case study in how *not* to go about the enterprise of faithful constitutional interpretation.

a. “*The Argument from Inconveniences, Great as These*”

The core of Chase’s argument was that if Section Three was recognized as an immediately operative, self-executing constitutional rule of disqualification, it would have inconvenient consequences in the Reconstruction South. “In the examination of questions of this sort,” Chase

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<sup>158</sup> *Griffin’s Case*, 11 F. Cas. at 23.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 24.

<sup>161</sup> Chase summarized the intriguing legal history of this Virginia government: When Virginia, by act of its legislature in 1861, purported to secede from the Union, loyal Unionists assembled in convention in Wheeling to organize a new state government. Congress and the Lincoln administration recognized the Wheeling government as the lawful government of Virginia. The Wheeling Virginia government then gave its consent to the creation of a new Wheeling-based state of West Virginia, after which the (Wheeling) Virginia government-in-exile relocated to Alexandria, just across the river from Washington, to serve as the loyal, Union-recognized government of all of what remained as “Virginia.” After Lee’s surrender at Appomattox, Chase’s opinion notes, the “government recognized by the United States was transferred from Alexandria to Richmond” and “became in fact what it was before in law, the government of the whole state.” *Id.* at 23. Judge Sheffey was appointed under the authority of this government. *Id.* For the full story—and full formalist legal defense—of the validity of the legal fiction of “Virginia” giving its consent to the creation of a breakaway state of West Virginia, see Vasani Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291 (2002) [hereinafter *West Virginia*]. For an argument that this aside was actually relevant to Chase’s argument, see Magliocca, *Foreground*, *supra* note 72, at 1064 n.30, discussed *infra* note 194.

<sup>162</sup> See *infra* Section II.C.3.

wrote, “great attention is properly paid to the argument from inconvenience.”<sup>163</sup> And here “the argument from inconveniences” was “great” in Chase’s estimation—it was “of no light weight.”<sup>164</sup>

In several incompletely reconstructed Southern governments, many offices were in fact held by former oath-breaking rebels.<sup>165</sup> If Section Three were automatically operative, it would have immediately barred all such men from office. (Indeed.) Yet, Chase argued, many such disqualified persons in fact had *not* vacated their offices but instead continued to exercise authority under those offices notwithstanding the ratification of the Fourteenth Amendment. To give Section Three immediate effect would thus upset the apple cart in a fairly major way. “No sentence, no judgment, no decree, no acknowledgement of a deed, no record of a deed, no sheriff’s or commissioner’s sale—in short no official act—is of the least validity.”<sup>166</sup> Chase found this unthinkable: “It is impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these [Southern] states.”<sup>167</sup>

Chase went on: not only did Section Three impose great “inconveniences” and “calamities,” it was unfairly punitive—ungraciously ousting once-lawfully-appointed officers—and ostensibly inconsistent with the “spirit” of prior constitutional principles concerning due process, bills of attainder, and *ex post facto* laws.<sup>168</sup> And besides, the specific remedy sought—vacating Griffin’s conviction—*only* worked mischief, because it did not even seek the literal removal of Judge Sheffey from office. Put these things together and you have Chase’s interpretive driver: “Surely,” Chase continued,

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.<sup>169</sup>

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<sup>163</sup> *Griffin’s Case*, 11 F. Cas. at 24.

<sup>164</sup> *Id.* at 25.

<sup>165</sup> *Id.* Chase also suggested that the problem was not completely limited to the Southern governments. *Id.* (observing that “[i]t is well known that many persons, engaged in the late Rebellion, have emigrated to states which adhered to the national government,” and that “it is not to be doubted that not a few among them” had previously taken a covered oath, and that “[p]robably some of these persons” had subsequently been elected to office).

<sup>166</sup> *Id.* Of course, Chase would undercut this conclusion later in the opinion. See *infra* Section II.C.3.

<sup>167</sup> *Griffin’s Case*, 11 F. Cas. at 25.

<sup>168</sup> *Id.* at 25-26. More on this point presently, in Section II.C.2.c, and again in Part III.

<sup>169</sup> *Id.* at 26.

Chase tried to funnel these policy arguments into a rule of constitutional construction: “the argument from inconvenience.”<sup>170</sup> This argument “it is true, can not prevail over plain words or clear reason,” Chase acknowledged.<sup>171</sup> “But, on the other hand,” he wrote, “a construction, which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great a degree, unless the terms of the instrument absolutely require such preference.”<sup>172</sup>

This is not an unreasonable principle, as interpretive canons go. When confronted with two plausible interpretations of genuinely *ambiguous*, *unclear* text, one of which would produce manifestly jarring results, the less jarring interpretation is more likely the correct one. As James Madison said in his famous speech against the national bank: “Where a meaning is clear, the consequences, whatever they may be, are to be admitted; where doubtful, it is fairly triable by its consequences.”<sup>173</sup> Or as Chief Justice Marshall said in *United States v. Fisher*: “[W]here great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.”<sup>174</sup> But Chase’s canon was noticeably more aggressive: The supposedly more disruptive reading must “*never be preferred*” unless the text’s terms “*absolutely require*” such preference.<sup>175</sup> That is putting not just a thumb on the scale, but a whole hand.

But that is not the real problem with Chase’s analysis. The real problem was how Chase applied these principles to Section Three.

First, Chase was too quick—far too quick—to dismiss the “literal” reading of the “terms of the instrument” as meaning exactly what they seem to say. As discussed above, the language of Section Three’s prohibition on office holding is clear and direct; it is hardly doubtful at all. It takes considerable effort to impute any ambiguity to the text and Chase’s opinion does not even undertake that effort. Instead, the opinion assumes its own conclusion—that the text’s language is somehow insufficiently clear to justify applying the “literal” meaning of its words. Indeed, even on Chase’s own hyper-strict standard, the words of Section Three *do* “absolutely require” the conclusion that it, on its own, disqualifies covered rebels from office.

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<sup>170</sup> *Id.* at 24.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 39, 40 (M. St. Clair Clarke & D.A. Hall, eds., Washington, Gales & Seaton 1832) (describing a speech by James Madison on Feb. 2, 1791).

<sup>174</sup> *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805).

<sup>175</sup> *Griffin’s Case*, 11 F. Cas. at 24 (emphasis added).

Second, Chase was too ready—far too ready—to find that following the (“literal”) language of the document would produce (what *Chase* considered to be) great “inconveniences” or “mischief”—indeed, increase “calamities” already visited upon the South. Chase emphasized the breadth of Section Three’s language: it applied in all the states, not just the former Confederacy (so?); it applied beyond the context of Civil War but included aiding enemies in a foreign war (so?); it would apply in terms to immediately disqualify men for acts done long ago, for example in the Mexican War (so?); it would apply “to all persons in the category” and “for all time present and future” (so?).<sup>176</sup> And, taken seriously, this broad rule would, as noted, “annul all official acts” performed by disqualified officers, including judges. (Would it?)<sup>177</sup>

For Chase, all this seemed to border on the shocking—a parade of horribles demanding the search for an alternative construction of Section Three. But why? Because it might have a broad effect? Because it adopted a new rule of constitutional law superseding prior law? Because it would have removed immediately a substantial number of former-oath-swearing-officeholders-turned-rebels from positions of power? Because it could have the effect of invalidating their unauthorized, lawless actions? Chase’s parade of horribles assumes, without argument, the correctness of his own apparent policy prejudices.<sup>178</sup>

Now Chase did attempt to groom these prejudices into more plausible legal arguments, which we will get to in a moment.<sup>179</sup> But because these arguments from inconvenience are the heart of Chase’s opinion, and because we still see these kinds of arguments repeated today, we pause to emphasize that this is not how judging is supposed to work, even if it too often does.

Chase’s consequentialist approach to constitutional interpretation is simply wrong. Judges do not get to rewrite constitutional provisions they find objectionable on policy grounds. Relatedly, judges do not get to make up new provisions of law in order to devise policy “solutions” to texts they don’t like. Chase’s opinion imposed, as a solution to textual literalism and its real and imagined policy inconveniences, a different kind of constitutional provision, one more like the Impeachment Clause and the Treason Clause. Put bluntly, Chase made up law that was not there in order to change law that was there but that he did not like.

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<sup>176</sup> *Id.* at 24-25.

<sup>177</sup> *Id.* at 25.

<sup>178</sup> As Judge Underwood put it: “Whatever inconvenience may result from the maintenance of the Constitution and the laws, I think the experience of the last few years shows that much greater inconvenience results from attempting their overthrow.” Opinion of Judge Underwood in the Matter of Cæsar Griffin—Petition for Habeas Corpus, *supra* note 156, at 465.

<sup>179</sup> See *infra* Sections II.C.2.c-d.

b. *The Argument from “the Intention of the People”*

In places, Chase raises the inconvenience argument as an inquiry into the “intent” of the Framers: “What was the intention of the people of the United States in adopting the fourteenth amendment? What is the true scope and purpose of the prohibition to hold office contained in the third section?”<sup>180</sup> This at least sounds kind of like the question a judge should be asking—the original meaning of the constitutional provision adopted by We The People and binding on those who interpret it. But in fact it conceals still more sleight of hand.

First and foremost, Chase’s framing of the interpretive question commits a classic blunder: swapping in original intent for original meaning. In our constitutional system, law is made by *enacting* texts, not by searching for the *unenacted* wishes of lawmakers.<sup>181</sup> And whatever evidence Chase might have had that the consequences of Section Three were *unintended* by some of those who voted for it, he had no evidence that these consequences were *not entailed* by what they voted for.

Second, however dubious it is to look to original intent over original meaning generally, it is especially dicey to do so in the case of the Fourteenth Amendment. The Fourteenth Amendment was ratified in unusual, exigent circumstances. In Congress, the Amendment represented a compromise between different Republican factions, some much more radical than the others. And in the states, where ratification made it law, the Amendment depended on the ratification votes of the southern states, who were pressured—some might say “coerced”—to ratify the Amendment as the price of regaining their representation in Congress.<sup>182</sup> Even if one accepts this process as lawful (which we do) it is obvious that it means one must cast a skeptical eye on stories about the supposed “intent” of those who ratified it, especially in the South. It may well be that some of the ratifiers had their fingers crossed behind their backs and *intended* to give the Amendment as

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<sup>180</sup> *Griffin’s Case*, 11 F. Cas. at 24.

<sup>181</sup> See *supra* notes 9–16, sources cited there, and accompanying text.

<sup>182</sup> See generally John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 461 (2001). For arguments that Congress’s requiring states’ ratification as condition of restored representation was entirely lawful and appropriate, see *id.*; Kesavan & Paulsen, *West Virginia*, *supra* note 161, at 329; AMAR, AMERICA’S CONSTITUTION, *supra* note 4, at 364–80; see especially *id.* at 376–378. There is a different argument for ratification, the “loyal denominator” theory, in which the southern states were unnecessary for ratification. See Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 DUKE J. CONST. L. & PUB. POL’Y 167, 168 (2017); Christopher R. Green, *The History of the Loyal Denominator*, 79 LA. L. REV. 47, 48 (2018). One of us has rejected this theory in prior writing. Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 709 (1993); see also AMAR, AMERICA’S CONSTITUTION *supra* note 4, at 378–80. The other of us is inclined in the same direction.

little effect and as little quarter as they could get away with. But so what? What matters is what they *did*, in one of the highest-stakes moments of constitutional law making in American history. By diminishing the plain scope of the Amendment's text, Chase succumbed to this kind of anti-constitutional subversion.

Third and finally, all of Chase's evidence of this supposed intent just boils down to the inconvenience argument we have just discussed. And as discussed above, this is why one must be especially careful with judges who invoke the supposed intent of a written text.<sup>183</sup> When meaning is uncertain, it is permissible to give a slight edge to the interpretation that is more likely to match what its authors were trying to do. But it is easy for a judge to use this principle as an excuse for reading into the text his own views of what the law should be. *After all, the authors of the provision were reasonable people, trying to do reasonable things, and, I, the judge, am also reasonable, so surely if I don't like this result, they wouldn't have liked this result, and therefore it must not be the result.* To write it down this way would give up the game, but it is too easy to think it. Chase's use of original intent is makeweight at best, and a trick at worst.

c. *The Argument that Section Three Should Not be Read to Depart from the "Spirit" of Prior Constitutional Law*

The "inconveniences" and "calamities" that, surely, were not intended by the authors of the Fourteenth Amendment were Chase's main arguments. But he had a bit more to say. There was "another principle which, in determining the construction of this amendment, is entitled to equal consideration"<sup>184</sup>:

Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution.<sup>185</sup>

What was the supposed conflict between Section Three and the rest of the Constitution? Chase fretted that Section Three was a penal enactment, imposing punishment without trial on secessionists, and thus in tension with the spirit of earlier provisions on bills of attainder, ex post facto laws, and due process:

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183 *Supra* Section II.C.2.a.

184 *Griffin's Case*, 11 F. Cas. at 25.

185 *Id.*

Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an ex post facto, are inconsistent in their spirit and general purpose with a provision which, at once without trial, deprives a whole class of persons of offices held by them, for cause, however grave. It is true that no limit can be imposed on the people when exercising their sovereign power in amending their own constitution of government. But it is a necessary presumption that the people in the exercise of that power, seek to confirm and improve, rather than to weaken and impair the general spirit of the constitution.<sup>186</sup>

Thus, Chase concluded, Section Three should not be read as accomplishing disqualification of its own force.

Now once again, the interpretive rule Chase is formulating here is not totally crazy. But it is a warped version of the real thing. As we discuss at length in the next part: It is true that repeals by implication are disfavored, and this principle applies to constitutional law. But at the same time, constitutional amendments change things, and when an amendment is inconsistent with prior constitutional rules, ultimately it is the amendment that controls. If a new provision fairly can be harmonized with prior law—where there is no true conflict—the provisions should be read harmoniously.<sup>187</sup> But where new language in fact changes old law, by clear terms or necessary logical effect, the greater error is to deny such change out of undue attachment to the former legal regime.

This greater error is exactly what Chase did. Chase leaned very heavily—too heavily—on the rule against implied repeals, ratcheting it up to “*forbid[]*” readings of a text “not *clearly* required” by its terms, that would “*bring it into conflict or disaccord*” with other provisions of the Constitution.<sup>188</sup> Each leaning is wrong. Repeals by implication may be *disfavored*; but repeals, made in terms or by necessary logical implication, are not presumptively *forbidden*. Nor does new language changing old provisions require such extraordinary clarity as Chase would have it. The true question is whether the language and logic of a new provision really does present a conflict with prior law. And the idea that constitutional amendments should presumptively be read so as not to change the Constitution (!)—that they should be construed to avoid *conflict* or even mere *disaccord* with prior constitutional law—is indefensible. *Of course* constitutional amendments change prior constitutional law. That is their purpose and function. Now, that doesn’t warrant reading them to change

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<sup>186</sup> *Id.* at 26.

<sup>187</sup> See *infra* Part III.

<sup>188</sup> *Griffin’s Case*, 11 F. Cas. at 25 (emphasis added).

more than they really do. But a presumption that constitutional amendments should be read to change as little as possible makes no sense.

Finally, this part of Chase's argument took a puzzling turn that is worth noting. In another of his many strange asides, Chase noted the possibility that Section Three had *implicitly repealed the Treason Clause*: "in [the] judgment of some enlightened jurists, the legal effect" of Section Three's imposition of a new prohibition on officeholding for rebels and insurrectionists "was to remit all other punishments" for treason.<sup>189</sup> If anything this seemed to *hurt* Chase's argument against self-execution, because it emphasized that Section Three *could* change the pre-existing constitutional rules. And at the same time this supposedly enlightened argument was also bonkers. The enactment of a constitutional rule of disqualification from office does not remotely suggest a supersession or repeal of criminal-law punishment for treason. And if it did, it would have the perverse effect of leaving Confederates who had *not* previously taken a constitutional oath subject to the death penalty, while previous office holders avoided all criminal punishment except the officeholding ban.<sup>190</sup>

So why did Chase bring it up? Who were these "enlightened jurists" who imagined such a thing? The answer is . . . Chase himself! He had asserted precisely this wacky construction of Section Three's effect on the criminal penalty for treason—and quietly suggested the argument to defense counsel—in the federal criminal treason prosecution of Jefferson Davis just two years earlier.<sup>191</sup> Even Davis's lawyers had been puzzled by the argument, and wondered if it was some sort of trick, and it seems likely that Chase had complex political motivations in proposing it at the time.<sup>192</sup> This argument was tendentious then, and weirdly irrelevant in *Griffin's Case*. But it is a helpful reminder that Chief Justice Chase was not shooting straight in his applications of Section Three.

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<sup>189</sup> *Id.* at 26.

<sup>190</sup> See *Case of Davis*, 7 F. Cas. 63, 95 (C.C.D. Va. 1867) (argument of Richard H. Dana, counsel for the United States) ("[The effect of Defendant's construction] would be to relieve persons holding high office, and therefore the more guilty, from the penalties of death or imprisonment, and leave those penalties in full force against all persons engaged in a rebellion who did not at the time hold public office.").

<sup>191</sup> *Case of Davis*, 7 F. Cas. at 91, 102 (reporting Chase's statements embracing the view that Section Three impliedly repealed the Treason Punishment Clause and that the indictment of Davis therefore should be quashed); see Magliocca, *Amnesty*, *supra* note 5, at 100-02 ("The argument was suggested to Davis's defense team by none other than Chief Justice Chase."); CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS 293-300 (2017) (describing Chase's communications with Davis's defense counsel).

<sup>192</sup> Nicoletti suggests—and she is not making this up—that either Chase was gunning for the Democratic nomination for President, or that this was a bank shot to get southern whites to accept the ratification of the Fourteenth Amendment, by arranging for the Amendment to benefit them. NICOLETTI, *supra* note 191, at 293-96.

d. *The Argument from the Section Five Enforcement Power*

Having failed to avoid the natural reading of Section Three, Chase finally offered his alternative, “reasonable construction”:

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 enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by congress. Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that “congress shall have power to enforce, by appropriate legislation, the provision[s] of this article.” [sic] . . . The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections.<sup>193</sup>

Section Five “qualifies” Section Three. Of course, this proves too much. Taken seriously, it would suggest that Section Five likewise “qualifies” Section One and renders its commands—birthright citizenship, privileges or immunities, due process, and equal protection—inoperative until enforced by congressional legislation. It would imply that Section One had no self-executing legal effect, which has never been the law. It also proves too little. It is true, perhaps, that carrying a legal prohibition into practical effect in actual situations frequently will involve, necessarily, actions by persons and institutions charged with applying that prohibition as law in the course of performing their assigned duties. But as noted above, there is no reason why “proceedings,” “decisions,” and “enforcement” with respect to Section Three’s commands may not be conducted and carried out by various state and federal actors, exercising their usual authority with respect to such matters.<sup>194</sup> It is simply not true that “these can only be provided for by congress.” Congress *can* provide them. But so can many others. Indeed, that is just what Judge Underwood was trying to accomplish in *Griffin’s Case*, until Chase stopped him.

Chase’s tendentious construction of Section Three has gone on to a surprisingly serious career as a precedent. But it simply does not hold up as an original matter. But that is not even the weirdest thing about *Griffin’s Case*.

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<sup>193</sup> *Griffin’s Case*, 11 F. Cas. at 26.

<sup>194</sup> See Section II.B. Magliocca also suggests that in the specific situation in *Griffin’s Case*, state law may have been “unavailable for enforcement” of Section Three because “Virginia was an unreconstructed state and thus lacked the ordinary powers of a state” and “because Virginia did not yet recognize the Fourteenth Amendment’s legitimacy”—in contrast with states such as North Carolina. Magliocca, *Foreground*, *supra* note 72, at 1064 n.30. We are not sure whether this is giving Chase too much credit or not, but regardless, these points would obviously not hold today, where state law is fully available in every state of the Union.

### 3. *Griffin's* Self-Defeating and Highly Irregular Dictum

Chase concluded his discussion of Section Three this way: "After the most careful consideration, therefore, I find myself constrained to the conclusion that Hugh W. Sheffey had not been removed from the office of judge at the time of the trial and sentence of the petitioner; and that the sentence of the circuit court of Rockbridge county was lawful."<sup>195</sup>

By Chase's logic, such as it was, that should have been the final line of his opinion. But strangely, Chase was not actually done. He then launched into the weirdest part of his opinion, a sort of half-dictum, half-advisory opinion that cast further doubt on all that had come before:

In this view of the case, it becomes unnecessary to determine the question relating to the effect of the sentence of a judge *de facto*, exercising the office with the color, but without the substance of right. It is proper to say, however, that I should have no difficulty in sustaining the custody of the sheriff under sentence of a court held by such a judge . . . .

This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in the opinion that a person convicted by a judge *de facto* acting under color of office, though not *de jure*, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus.<sup>196</sup>

What is going on here? Chase describes an alternate ground for the case—"a judge *de facto* acting under color of office," which we would now call the "de facto officer doctrine"—, explains that it is unnecessary to decide it, but then also explains that he would "have no difficulty" resolving the case on that alternate ground, and also that the rest of the Supreme Court agrees with him. It is hard to make sense of this part of Chase's opinion, but the more one digs into it, the more dubious the whole opinion becomes.

First, notice that what Chase says here fatally undercuts his earlier arguments about Section Three. The heart of Chase's argument was that a self-executing Section Three would have calamitous consequences that could not possibly have been intended.<sup>197</sup> But here Chase says that even an illegally appointed officer can be a "de facto" officer whose acts are treated as valid for purposes of a habeas claim. If Chase believed this claim about the de facto officer doctrine, then his earlier claim about the consequences was overblown; the de facto officer doctrine would limit or eliminate the supposedly calamitous consequences and allow Section Three to be given its more natural

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<sup>195</sup> *Griffin's Case*, 11 F. Cas. at 27.

<sup>196</sup> *Id.*

<sup>197</sup> See Section II.C.2.a.

interpretation in other situations. On its own terms, then, this dictum is colossally self-defeating.<sup>198</sup>

Indeed, if Chase's extensive dictum about Section Three made it "unnecessary" to resolve the de facto officer doctrine, the same was equally true in reverse. Accepting Chase's conclusion about the de facto officer doctrine would have made his erroneous disquisition on Section Three completely unnecessary. The criticisms sometimes levelled against the chief justices who wrote the famous (or infamous) opinions in *Marbury v. Madison*, and *Dred Scott v. Sandford*, for having reached out to decide, gratuitously, unnecessarily, and improperly, grand questions of constitutional law,<sup>199</sup> fall far more heavily upon the head of Chief Justice Chase for his opinion in *Griffin's Case*.

Even stranger, Chase represented that the full Supreme Court unanimously agreed with him on the de facto officer question. "This subject received the consideration of the judges of the supreme court at the last term," Chase asserted, "with reference to this and kindred cases in this district."<sup>200</sup> The full Court had apparently decided the de facto officer question, in secret, without having announced the fact in any case decision or written opinion,<sup>201</sup> in some form of advisory preemptive appellate jurisdiction!?

To be sure, judicial norms were looser back then, but the whole thing was highly irregular even by the standards of the day. Charles Fairman, whose account *defends* the whole affair as an urgent workaround to stop Judge Underwood, nonetheless acknowledges that "[i]t was most unusual to hear a Justice on circuit declare that he was authorized to announce the opinion of the Justices of the Supreme Bench on a matter pending in the Circuit Court."<sup>202</sup> Fairman further acknowledges technical problems with this maneuver because the only issue in front of the full Court was an original

<sup>198</sup> *Accord* Magliocca, *Foreground*, *supra* note 72, at 1065 n.34.

<sup>199</sup> See, e.g., Letter from Thomas Jefferson to William Johnson (June 12, 1823), in 19 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 660, 664 (J. Jefferson Looney et al. eds., 2022) ("This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable."); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1011-12, 1012 n.39 (2003); William Baude, *Judgment Power*, 96 GEO. L.J. 1807, 1823-24 (2008).

<sup>200</sup> *Griffin's Case*, 11 F. Cas. at 27.

<sup>201</sup> The Court's one recorded public statement on the matter was a statement from Justice Nelson in the original writ of prohibition case, *Ex parte State of Virginia*, that Chief Justice Chase had "informed the court that before the pending motion for prohibition was made, he signified to the district judge his dissent" and that Chase was going to "direct that this division of opinion . . . be certified to this court." *Ex parte State of Virginia*, 19 L. Ed. 153 (1868); FAIRMAN, *supra* note 157, at 606. That statement did not state the Court's view on the division, and seemed to anticipate that the Justices would deliberate on the issue *later* in the more ordinary course—not deputize the Chief Justice to go deliver some secret verdict in their stead.

<sup>202</sup> FAIRMAN, *supra* note 157, at 607.

writ of prohibition in *Ex Parte State of Virginia*, where the Court had granted a stay despite manifest procedural flaws.<sup>203</sup> Somehow the Court's non-ruling in a dubious vehicle became a second-hand advisory opinion on a legal question of great importance. The criticisms levelled today at the shenanigans allegedly perpetrated on the Supreme Court's "shadow docket,"<sup>204</sup> fall much more heavily and justifiably on the heads of the Reconstruction justices.

And to return to this point once more, even if we accept this whole problematic advisory opinion, it simultaneously undermines the other part of Chase's decision—his interpretation of Section Three. As Chase described it, there were two alternative ways to resolve the case—one massive constitutional question, and the other a more modest procedural question. Chase claimed that the whole Supreme Court had authorized him to issue a secondhand advisory opinion on the procedural question, an opinion adequate to resolve the Judge Underwood situation. But Chase ignored his colleagues' apparent preference and resolved the case on massive constitutional grounds instead—grounds that he did *not* claim were endorsed by the rest of the Court. Is there any justification for his doing so other than a personal power grab?

All of this is without taking a view on the merits of the de facto officer question. This, we think, is not as obvious as Chase (and apparently his colleagues) made it out to be. True, American and English history was full of many statements about the valid acts of "de facto" officers and even specifically judges.<sup>205</sup> But many of these statements could not be taken to their logical extreme in our constitutional system, and indeed, at the founding the Supreme Court had refused to accept the actions of several de facto officers in the saga surrounding *Hayburn's Case*.<sup>206</sup>

How to reconcile these principles is a difficult question. One possibility, stated in some of the cases, is that an unlawful, but de facto, officer's acts can be questioned directly, and on direct review, but not "collaterally."<sup>207</sup> On this possibility, maybe the de facto officer doctrine was a defense to claims like

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<sup>203</sup> *Id.*

<sup>204</sup> See generally STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015).

<sup>205</sup> For many citations, see *Griffin's Case*, 11 F. Cas. 7, 18-21 (C.C.D. Va. 1869) (No. 5,815) (argument of counsel). For more, see also Reply and Response Brief for the United States at 27-47, *Financial Oversight and Management Board for Puerto Rico v. Aurelius* (Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-15121); and *Calcutt v. Fed. Deposit Ins. Corp.*, 37 F.4th 293, 342-45 (6th Cir. 2022) (Murphy, J., dissenting).

<sup>206</sup> Baude, *Severability*, *supra* note 76, at 12-13 (discussing *Yale Todd*).

<sup>207</sup> See, e.g., *Ball v. United States*, 140 U.S. 118, 128-29 (1891) ("Judge Boardman . . . was judge de facto if not de jure, and his acts as such are not open to collateral attack."); Note, *The De Facto Officer Doctrine*, 63 COLUM. L. REV. 909, 910, 919 (1963). *But see id.* at 910, 910 n.9 (suggesting a suit is collateral whenever the officer "is not a party," including on "writ of error").

habeas—the procedural vehicle in *Griffin’s Case*—because habeas was a collateral attack.<sup>208</sup> Habeas could not be used as a substitute for a writ of error, where the challenge would have been properly raised.

But another possibility is that the de facto officer doctrine protects only technical and ordinary legal defects in an officer’s appointment, not *fundamental inability to exercise power*, as when that power is forbidden by the Constitution.<sup>209</sup> On this possibility, Judge Sheffey’s acts were inherently void, and thus everything he did fell outside of his court’s jurisdiction.<sup>210</sup> The de facto officer arguments in *Griffin’s Case*—and thus the correct legal fate of Caesar Griffin—turn on these technicalities.<sup>211</sup> Indeed, these technicalities were argued by the parties and they were the main subject of Judge Underwood’s opinion below.<sup>212</sup> Chief Justice Chase could have turned his considerable powers to them, had he not been busy knee-capping the Fourteenth Amendment instead.

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There is little to be said in defense of *Griffin’s Case*, but much to be learned from it. The very weakness of its arguments; the obviously result-oriented nature of its legal analysis; and the inconsistency of its conclusion with Section Three’s language, end up confirming the core conclusion in this section: Section Three’s disqualification of designated persons from office is a self-executing constitutional command that requires nothing more to have immediate legal force.

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<sup>208</sup> All three cases cited by Chase in *Griffin’s Case*, 11 F. Cas. at 27, can be characterized this way. *Taylor v. Skrine*, 5 S.C.L. (3 Brev.) 516 (S.C. Const. Ct. App. 1815) deals with a writ of execution and observes that “no objections were made to [the judge’s] authority at the time the decree was given.” *State v. Bloom*, 17 Wis. 521 (1863), relies entirely on *In re Boyle*, 9 Wis. 264 (1859), which is a habeas case holding that the “right to hold the offices cannot be inquired into in a collateral proceeding of this kind,” *id.* at 267. And *People v. Bangs*, 24 Ill. 184, 187 (1860) distinguishes a “direct proceeding” from one where the doctrine applied.

<sup>209</sup> See, e.g., *McDowell v. United States*, 159 U.S. 596, 598 (1895) (“This . . . presents a mere matter of statutory construction . . . It involves no trespass upon the executive power of appointment.”); Note, *supra* note 207, at 918 (discussing *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962)).

<sup>210</sup> But see *In re Boyle*, 9 Wis. at 267 (distinguishing “the jurisdiction of the court, which may always be inquired into; it is an inquiry into the right of the judge to hold his office, which is a question entirely distinct from that of the jurisdiction of the court over the offense”).

<sup>211</sup> In the Supreme Court’s most recent de facto officer case, *Ryder v. United States*, it split the difference, holding the doctrine inapplicable because the case was on direct review and the challenge was constitutional, see 515 U.S. 177, 182-83 (1995). In *Financial Oversight and Management Board for Puerto Rico v. Aurelius*, it avoided the issue because it found the appointments lawful, see 140 S. Ct. 1649, 1665 (2020).

<sup>212</sup> Opinion of Judge Underwood in the Matter of Caesar Griffin—Petition for Habeas Corpus, *supra* note 156, at 463-66.

### III. SECTION THREE SUPERSEDES, QUALIFIES, OR SATISFIES PRIOR CONSTITUTIONAL PROVISIONS

Our third proposition is logically and methodologically straightforward, but perhaps unsettling in some of its implications: *Section Three trumps the earlier parts of the Constitution—to the extent there is a true conflict between them.*

As noted above, one of Chief Justice Chase's arguments against enforcing Section Three was that it conflicted (he thought) with prior constitutional norms—of due process, prospectivity, fairness, and so on.<sup>213</sup> Even for those who do not put the claim in so many words, we suspect that they might share a similar intuition: there is something about Section Three, taken seriously, that seems harsh, unforgiving, undemocratic, un-American (?), even . . . unconstitutional(!?). If so, it might seem to follow that somebody (judges?) should tame Section Three.

This is an understandable instinct. But it is wrong—dead wrong. We think the conflict with prior constitutional rules is overstated—more *feel* than real. But to the extent the conflict is real, Section Three wins the face-off.

Constitutional amendments, by their very nature, change the Constitution. It thus should be unsurprising that such new provisions, when added to the Constitution, supersede, displace, qualify, adjust, correct, or simply must be considered to satisfy earlier constitutional rules, to the extent of any actual conflict between them. Simply put: *a constitutional amendment supersedes prior law precisely to the extent that it departs from the prior rules.* This general maxim of interpretation applies to Section Three of the Fourteenth Amendment the same as it applies to any other constitutional amendment provision. If the original textual meaning of Section Three's terms—understood in their natural sense and accounting for any terms of art or specialized usages of words—departs from or alters prior constitutional understandings, that new constitutional language must be given full effect and priority over earlier provisions.

These basic principles of conflicting legal provisions were astutely captured by Alexander Hamilton, writing as *Publius* in *The Federalist* Number 78. "It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression," Hamilton wrote.<sup>214</sup> When this

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<sup>213</sup> See *supra* Section II.C.2.c; see also Ginsburg, Huq & Landau, *supra* note 144, at 1656 (suggesting that a self-executing interpretation, "while . . . in harmony with the original operation of Section 3, . . . may raise due process and perhaps bill of attainder concerns" and for that reason an "alternative construction gives Congress authority to determine how Section 3 is enforced").

<sup>214</sup> THE FEDERALIST NO. 78, at 439 (Alexander Hamilton) (I. Kramnick ed., 1987).

occurs, the courts must determine the “meaning and operation” of the two provisions.<sup>215</sup>

Hamilton articulated two principles for doing so, which work as a complementary pair. “So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done”—there’s the first of the pair, but Hamilton’s sentence does not end there, but instead pauses only ever-so-briefly, with a semi-colon, before proceeding to the second rule of the pair—“where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first.”<sup>216</sup> This was, Hamilton continued, “a mere rule of construction,” but it was an appropriate one, “consonant to truth and propriety,” consistently recognized by courts “as interpreters of the law”: that, as “between the interfering acts of an *equal* authority that which was the last indication of its will should have the preference.”<sup>217</sup>

Hamilton went on, more famously, to explain that a different interpretive principle governed the interfering acts of a superior and a subordinate authority. He proceeded to derive the proposition customarily called “judicial review.”<sup>218</sup> But that is not the interpretive question here. Here, the key point is precisely Hamilton’s lead-in proposition: that, as between “interfering” acts of equal legal stature—the paradigm being two statutes, adopted by the same legislature, at different times—the last in time prevails to the extent of any true, irreconcilable conflict. As with statutes adopted by the same legislative authority at different times, so with constitutional provisions adopted by the same authority at different times and possessing the same legal status: By the terms of Article V, constitutional amendments are “valid to all Intents and Purposes, as Part of this Constitution,” when ratified.<sup>219</sup> Thus, where We the People have adopted a new constitutional text “interfering” with or departing from prior constitutional provisions, the last-in-time enacted prevails to the

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* These rules were well-established in American and English law. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 235-44 (2000) (describing the development of statutory construction rules in English law and their adoption in American courts).

<sup>218</sup> See THE FEDERALIST NO. 78, *supra* note 214, at 439-40 (Alexander Hamilton) (“But in regard to the interfering acts of a superior and subordinate authority of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.”).

<sup>219</sup> U.S. CONST. art. V.

extent of any conflict. That is the interpretive principle that governs the relationship between new constitutional language and old language from which it departs.

Actual constitutional examples of these principles abound. The entire Bill of Rights qualifies, or limits, the original Constitution's grant of enumerated powers—to the extent that a conflict exists between those powers and the subsequently enumerated rights.<sup>220</sup> Likewise, the Eleventh Amendment qualifies Article III's extension of the federal judicial power to various cases and controversies. To the extent the Eleventh Amendment changes what Article III may originally have provided, the amendment supersedes that prior law.<sup>221</sup>

Much of the time, new amendments can be harmonized with what came before them. Section Five of the Fourteenth Amendment's grant of "power to enforce, by appropriate legislation, the provisions of this article"<sup>222</sup> does not preempt, for example, the Due Process Clause or the Cruel or Unusual Punishments Clause. It does not allow Congress to punish civil rights violations through summary tortures without trial. Similarly, Section Five does not preempt the Veto Clause; it can and should be read together with Article I, to require "appropriate legislation" to go through the pre-existing lawmaking process.<sup>223</sup> A new amendment does not ignore the legal system that it amends.

On the other hand, other parts of the Reconstruction Amendments did conflict sharply with prior constitutional norms, and they displaced them precisely to that extent. Consider the Thirteenth Amendment's ban on slavery—a dramatic and particularly obvious illustration of the point that new constitutional language supersedes and repudiates old constitutional language, to the extent of any conflict. The Thirteenth Amendment's abolition of slavery implicitly but necessarily overrides and extinguishes the Fugitive Slave Clause and any other provision of the original Constitution that protected the institution of slavery to the full logical extent of inconsistency with the amendment's flat ban. Similarly, Section *Two* of the Fourteenth Amendment supersedes and displaces the Constitution's original

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220 On the relationship between rights and powers, see William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1821-22 (2013); Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 561-67 (2019).

221 Baude & Sachs, *The Misunderstood Eleventh Amendment*, *supra* note 9, at 624-25; cf. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (Harlan, J., concurring) (arguing that the Court in *Chisholm v. Georgia* had correctly interpreted the Constitution as it existed prior to the Eleventh Amendment).

222 U.S. CONST. amend. XIV, § 5.

223 See William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 19 (2017) (offering the examples in this paragraph).

apportionment rules, including the notorious Three-fifths Clause.<sup>224</sup> Because the two rules conflict in substance, the amendment prevails over the Constitution's original language.

Section Three of the Fourteenth Amendment is in the same family. In most respects, Section Three can be easily harmonized with other parts of the Constitution, such as Article I's Speech or Debate Clause, Article I and II's impeachment provisions, Article II's process of presidential selection, Article III's requirement of a case or controversy, and so on. As we have discussed, Section Three's new constitutional qualification for office is enforced in the same way as other constitutional qualifications for office, and is easily reconciled with existing constitutional rules.<sup>225</sup>

But there are a few constitutional provisions that have been alleged to conflict with Section Three. If and when this is the case, just as *any* later-enacted constitutional provision supersedes or modifies earlier-enacted constitutional provisions with which the new provision conflicts, so Section Three of the Fourteenth Amendment logically qualifies and, where the language so compels the conclusion, overrides prior constitutional rules.<sup>226</sup>

Thus, we think all this follows: *To the extent of any inconsistency between them*, Section Three overrides any limitations otherwise imposed by the Bill of Attainder Clause. *To the extent of any inconsistency between them*, Section Three also overrides limitations imposed by the Ex Post Facto Clause. *To the*

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<sup>224</sup> By itself, the Thirteenth Amendment also already rendered the Three-fifths Clause a null set. Section Two then dealt with the injustice of letting the South claim a massive increase in political power for its disenfranchised black population.

<sup>225</sup> See *supra* Section II.B.

<sup>226</sup> The legislative history supports this conclusion as well. Opponents of Section Three characterized it as directly imposing retroactive punishment, thus contradicting principles of due process and principles against bills of attainder and ex post facto laws. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2915-16 (1866) (statement of Sen. Doolittle) (complaining Section Three was an "*ex post facto* provision, a bill of attainder" and acknowledging an amendment could "work an *ex post facto* attainder"); *id.* at app. 241 (statement of Sen. Davis) (same); *id.* at 2940 (statement of Sen. Hendricks) ("As a penalty for crime this measure is *ex post facto*; and if it were a measure of ordinary legislation would therefore be unconstitutional."); see also *id.* at 2467 (statement of Rep. Boyer) (criticizing an earlier version of Section Three as a "bill of attainder or *ex post facto* law"). These charges were generally premised on the view that Section Three would preempt these earlier rules to the extent of a direct conflict, a premise with which proponents of the amendment evidently agreed. See *id.* at 3036 (statement of Sen. Henderson) ("They tell us that it is a bill of attainder. Suppose it were; are the people in their sovereign capacity prohibited from passing a bill of attainder? . . . It is said the law is *ex post facto* in its character; what if it is? Have not the people the right, by a constitutional amendment, to enact such a law?"). Though Senator Davis did make the wild suggestion that Section Three might itself exceed Congress's power to propose amendments to the Constitution. *Id.* at app. 241 ("The framers of the Constitution did not intend to invest, and have not in fact conferred on Congress the power to initiate alterations of it which would revolutionize the Government formed by it."). For further discussion of this legislative history, see generally Graber, *supra* note 14, at 26-31, 36-37.

*extent of any inconsistency between them*, Section Three likewise overrides—or simply satisfies—prior constitutional requirements of due process of law.

Finally—and this example might present more difficult questions—to the *extent of any inconsistency between them*, Section Three overrides, supersedes, or satisfies the free speech principles reflected in the First Amendment. That is: Whatever the correct meaning of Section Three as applied to conspiracies, attempts, incitements, and advocacy that meet the description of “engag[ing] in insurrection or rebellion” or of giving of “aid or comfort” to enemies of the constitutional government of the United States, the constitutional meaning of Section Three of the Fourteenth Amendment modifies or qualifies what otherwise might have been thought the dictates of the First Amendment.

In the end, we think these prior provisions can mostly be read harmoniously with Section Three. Reason and common sense suggest they should be read consistently with one another to the extent fairly possible. And it is, for the most part, fairly possible to do so. But to the extent of any legitimate conflict or tension, Section Three controls over the Bill of Attainder Clause, the Ex Post Facto Clause, the Due Process Clause, and the First Amendment.

The first three are easy.

#### A. *Bills of Attainder*

A bill of attainder is the legislative infliction of punishment on specific people without a trial.<sup>227</sup> It is a violation of both the separation of powers and individual rights because it short-circuits the normal adjudication of guilt or innocence. But Section Three is neither a bill nor an attainder. It is not a “bill”—that is, an enactment of the *legislature*. Rather, it is an enactment of The People as supreme constitutional law. And it is not an “attainder” either—in that it is not at all clear that Section Three inflicts *punishment*, because disqualification from office is not necessarily or exclusively a form of punishment. For instance, the Twenty-Second Amendment is surely not inflicting a “punishment” when it precludes the President from running for a third term.<sup>228</sup> Moreover, Section Three does not inflict it on specified persons or groups, but rather on anybody who has committed a described course of conduct.

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<sup>227</sup> See generally Anthony Dick, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 STAN. L. REV. 1177 (2011).

<sup>228</sup> U.S. CONST. amend. XXII. *But see* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866) (“Disqualification from office may be punishment, as in cases of conviction upon impeachment.”).

To be sure, Supreme Court precedent has read the Bill of Attainder Clauses more broadly, both in a pair of twentieth-century “red scare” cases<sup>229</sup> and perhaps more relevantly in a pair of immediate post–Civil War loyalty cases, *Cummings v. Missouri* and *Ex parte Garland*. In each case, the Supreme Court invalidated state and federal requirements of an “Ironclad Oath” for anybody holding a range of positions, both public and private.<sup>230</sup> That oath was really a *past*-loyalty requirement, requiring people to swear that they had not supported the Confederacy or the like.<sup>231</sup> The Court concluded these requirements were effectively bills of attainder—and also *ex post facto* laws—and held them unconstitutional.<sup>232</sup>

Even if one takes these precedents at face value, it does not follow that Section Three would similarly be a bill of attainder. First, the “Ironclad Oath” laws had a broader scope than Section Three: *Garland* dealt with bar membership, and concluded that “exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct.”<sup>233</sup> Similarly, the plaintiff in *Cummings* was a Catholic priest forbidden from preaching.<sup>234</sup> Neither case dealt with a more focused exclusion from *constitutional office*. Indeed, the *Garland* majority emphasized this fact, explicitly noting that it did not involve qualifications for public office.<sup>235</sup> Second, because both cases focused on the retroactive effect of the laws,<sup>236</sup> neither case’s reasoning seems applicable to Section Three in post–Civil War insurrections and rebellions—which of course are the only insurrections and rebellions to which Section Three still applies.<sup>237</sup>

And in any event we doubt that one should take these precedents at face value. First of all, if we had to take sides, we might well be inclined to say that *Garland* at least may have been wrong, for reasons stated in dissent by

<sup>229</sup> *United States v. Brown*, 381 U.S. 437, 447-48 (1965) (striking down as a bill of attainder a statute prohibiting Communist Party members from serving as executives of labor union); *United States v. Lovett*, 328 U.S. 303, 315 (1946) (invalidating a statute denying future compensation to three named government employees unless reappointed by the President).

<sup>230</sup> *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 317 (1866); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

<sup>231</sup> *Cummings*, 71 U.S. at 316-17; *Garland*, 71 U.S. (4 Wall.) at 376. For a more detailed discussion of the federal “Ironclad Oath,” see *infra* Section IV.A.4.b.i.

<sup>232</sup> *Cummings*, 71 U.S. (4 Wall.) at 322-32; *Garland*, 71 U.S. (4 Wall.) at 377-80.

<sup>233</sup> *Garland*, 71 U.S. (4 Wall.) at 377.

<sup>234</sup> *Cummings*, 71 U.S. (4 Wall.) at 319.

<sup>235</sup> *Garland*, 71 U.S. (4 Wall.) at 378.

<sup>236</sup> *Cummings*, 71 U.S. (4 Wall.) at 327 (“They are aimed at past acts, and not future acts.”); *Garland*, 71 U.S. (4 Wall.) at 377 (“In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed . . .”).

<sup>237</sup> See *supra* Section I.B.

Justice Miller (joined by three other justices, including, perhaps somewhat ironically given his later position in *Griffin*, Chief Justice Chase).<sup>238</sup> Second, and more fundamentally, if constitutional amendments can change the Constitution, *a fortiori* they can change judicial *interpretations* (and misinterpretations) of the Constitution. That is of course what Section One of the Fourteenth Amendment famously did with respect to *Dred Scott*, what the Eleventh Amendment did with respect to *Chisholm*, and so on.<sup>239</sup> In short, the Court's interpretation of the Bill of Attainder Clause was a stretch, and regardless, it does not stretch far enough to change or limit the meaning of Section Three.

### B. *Ex Post Facto* Laws

Article I also forbids both the state and federal governments from enacting an “ex post facto” law.<sup>240</sup> An *ex post facto* law is generally thought to mean a legislative enactment that makes a past act *criminal* even though it was lawful at the time it was done. Once again, Section Three does not meet this description, being neither a legislative enactment (but rather a new constitutional provision) nor a legislative enactment defining a criminal offense.<sup>241</sup> True, as applied to actions taken before 1868, Section Three has retroactive (non-criminal) constitutional legal effect. But as applied to actions done after 1868, the idea that Section Three might depart even from the “spirit” of the ban on ex post facto laws makes precious little sense.

So Section Three no longer produces any conflict—if it ever did—with the Ex Post Facto Clauses or with any Ex Post Facto Spirit that might be supposed to lurk behind them. And even if it did, Section Three would supersede both prior law and lurking spirit.

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<sup>238</sup> See *Garland*, 71 U.S. (4 Wall.) at 382 (Miller, J., dissenting). *Cummings* presents a trickier case, as it might involve complicating questions of state power to interfere with religious liberty and church autonomy (albeit before ratification of the Fourteenth Amendment), and an especially weak case for the relevance of past loyalty to engaging in religious occupation.

<sup>239</sup> For a somewhat lighthearted explication of this principle—and a serious treatment of certain of its implications, see Michael Stokes Paulsen, *Can a Constitutional Amendment Overrule a Supreme Court Decision?* 24 CONST. COMMENT. 285 (2007).

<sup>240</sup> U.S. CONST. art. I, §§ 9–10.

<sup>241</sup> To be sure, there are revisionist arguments that the Ex Post Facto Clause itself extends to retroactive civil laws too. See, e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 538–39 (1998) (Thomas, J., concurring) (“I would be willing . . . to determine whether a retroactive civil law that passes muster under our Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto* Clause.”). And as with bills of attainder, in the wake of the Civil War the Supreme Court held that Ironclad Oath requirements were ex post facto laws as well. *Cummings*, 71 U.S. (4 Wall.) at 325–32; *Garland*, 71 U.S. (4 Wall.) at 377–78. But as discussed in the text, even these principles do not ensnare Section Three going forward, on a non-ex-post-facto basis.

Indeed, we have this on especially good authority, as this very question about *ex post facto* amendments has been asked and answered in the past. The Eleventh Amendment, as noted above, cut off jurisdiction previously recognized by *Chisholm v. Georgia*'s interpretation of Article III.<sup>242</sup> In *Hollingsworth v. Virginia*, the Court then confronted the question of whether the Amendment was retroactive, cutting off suits pending when the Amendment became law.<sup>243</sup> The plaintiffs argued in the U.S. Supreme Court against retroactivity because "[t]he spirit of the constitution" forbade "the mischief of an *ex post facto* Constitution."<sup>244</sup> Indeed, their argument mirrored precisely the arguments for narrow construction we saw above:

It is true, that an amendment to the Constitution cannot be controuled by those provisions; and if the words were explicit and positive, to produce the retrospective effect contended for, they must prevail. But the words are doubtful; and, therefore, they ought to be so construed, as to conform to the general principle of the Constitution.<sup>245</sup>

But the Supreme Court disagreed *emphatically*—unanimously ruling the very next day that the Amendment applied retroactively, by necessary implication.<sup>246</sup> As with the Eleventh, so too for the Fourteenth: Had the Supreme Court ever been called upon to consider the question, the right answer surely is that the Fourteenth Amendment's rules immediately governed upon ratification and applied "retroactively" to prior actions now covered by the revised constitutional rules.

### C. Due Process of Law

The Constitution also forbids the deprivation of "life, liberty, or property, without due process of law,"<sup>247</sup> which, in many circumstances, requires judicial process. Does Section Three's self-executing legal disqualification from office present any incompatibility with this requirement? Again, we think the two sets of provisions readily reconciled by giving the Due Process Clause no more than its due.

First, it is far from clear that the right to hold public office is a form of life, liberty, or property. It is a public privilege—a public trust—to be vested with the power of the people. And though it is a closer case, the same thing

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<sup>242</sup> See *supra* notes 221, 239 and accompanying text.

<sup>243</sup> 3 U.S. 378 (3 Dall.) (1798).

<sup>244</sup> *Id.* at 379-80 (arguments of counsel).

<sup>245</sup> *Id.* at 379; see *supra* notes 183-184 and accompanying text (detailing the parallel argument in *Griffin's Case*).

<sup>246</sup> 3 U.S. (3 Dall.) at 382; see also Baude & Sachs, *The Misunderstood Eleventh Amendment*, *supra* note 9, at 626-27.

<sup>247</sup> U.S. CONST. amend. V.

may be true even for those who already hold office at the moment that Section Three disqualifies them. Due process protects *private* vested rights from public deprivation; it does not protect *public* rights.<sup>248</sup> It has been argued that in England, offices *were* understood as vested rights of property,<sup>249</sup> and occasionally early American courts said so as well.<sup>250</sup> But that was not the better rule in America. Treating offices as property did not fit well with republican principles,<sup>251</sup> and by 1900 the Supreme Court could rightly state: “The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such.”<sup>252</sup>

In any event, even if it were otherwise, and those who held offices were deprived of property by Section Three, what would follow? Nothing. Section Three would prevail. Consider once again the Thirteenth Amendment, which *did* directly interfere with private property rights—the right recognized in southern states to hold other humans in bondage. The Thirteenth Amendment instantly, self-executingly, eliminated those property rights, due process notwithstanding.<sup>253</sup> So too would Section Three.

Principles of due process might also animate a different objection—that imposing such harsh consequences on individual wrongdoing simply ought to involve fair notice and an opportunity to be heard. Perhaps this instinct motivates the argument against self-execution, as in *Griffin’s Case*.<sup>254</sup> But in our view this objection is sufficiently answered by the terms of Section Three itself. Section Three only applies to holding office and not voting, and only applies to prior officeholders who swore a constitutional oath; surely we can expect once and future officials and oath-takers to be on particularly strong notice about the basic rules of the constitutional order. Section Three does not ensnare garden-variety crime or miscreance. It ensnares offenses against the authority of the system by those who have been and seek to be part of that system.

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<sup>248</sup> See generally Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565-93 (2007); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1540-47 (2020).

<sup>249</sup> See, e.g., Jed Handelsman Shugerman, *Freehold Offices vs. “Despotic Displacement”: Why Article II “Executive Power” Did Not Include Removal* 32-40 (Oct. 12, 2023) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4521119](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521119) [<https://perma.cc/8VPG-9JXM>].

<sup>250</sup> See, e.g., *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 18-19 (1833).

<sup>251</sup> See Jane Manners & Lev Menand, *The Three Permissions*, 121 COLUM. L. REV. 1, 20 (2021) (“In Revolutionary America, the idea of offices as property was roundly rejected.”); Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1824 n.157 (2006) (“A more republican conception of government meant a more republican conception of offices.”).

<sup>252</sup> *Taylor v. Beckham*, 178 U.S. 548, 577 (1900).

<sup>253</sup> See *supra* notes 55-57 and accompanying text.

<sup>254</sup> See *In re Griffin (Griffin’s Case)*, 11 F. Cas. 7, 26 (C.C.D.Va. 1869) (No. 5,815) (Chase 364).

Similarly, so long as Section Three is applied through the established and customary procedures for determining qualifications for office, many due process objections would disappear. As discussed above, in many scenarios, Section Three's disqualification would be enforced through administrative hearings, quo warrant suits, state and federal judicial review, congressional adjudications, and so on.<sup>255</sup> Anybody who wishes to argue that his conduct is not covered by the substantive sweep of Section Three is free to litigate that point through all relevant channels. Section Three is therefore not in conflict with any requirements of fair notice or an opportunity to be heard.

#### D. *The Ominous Question: Section Three and the First Amendment*

With respect to the Constitution's provisions on bills of attainder, ex post facto laws, and due process, the harmonization of Section Three with prior constitutional law is easy and relatively unproblematic. There is little conflict between the two provisions, and to the extent there is, Section Three is plain enough that it must prevail. The interaction of Section Three with the First Amendment presents a more interesting, even troubling, question. Does Section Three partially revoke the right to political dissent?

This question begets more questions: What exactly *is* the relationship between Section Three's language imposing disqualification for having "*engaged in insurrection or rebellion*" and the First Amendment's protections of the freedoms of speech, press, assembly, and petition? Likewise, what is the relationship between the disqualification for having given "*aid or comfort*" to enemies of the United States and the First Amendment? As we have argued, Section Three in principle *can* supersede, qualify, or modify (or be deemed to "satisfy") prior constitutional requirements, rendering the provisions of the First Amendment essentially without independent constitutional force as limitations on the scope of Section Three. But how might the prior and important constitutional principles of the First Amendment affect the proper understanding of *Section Three's meaning and scope*? What exactly *does* Section Three effectuate, in relation to the First Amendment? Where do the usual protections of the First Amendment leave off and the legal disabilities imposed by Section Three take over?

There are, crudely, three possible ways of describing the relationship. The first is to find Section Three (implicitly) *limited by* the First Amendment. The second is, in contrast, to view Section Three as carving out a zone of *exception to, supersession of, or satisfaction of* First Amendment principles. The third, which we believe correct, lies somewhere in the middle: Section Three should be construed, to the extent fairly possible, *consistently with* the free speech

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<sup>255</sup> See generally *supra* Section II.B.

principles memorialized in the First Amendment. But to the extent of a true conflict between them, Section Three must control.

To consider a not-so-hypothetical example, suppose that an officeholder covered by Section Three gives a speech to an assembled crowd encouraging them to engage in rebellious or insurrectionary conduct. (And suppose further that the crowd accepts the encouragement, rebelling against members of Congress carrying out a constitutional duty at the seat of government.) We will return to this example,<sup>256</sup> but for now we consider: *how do we judge such an example?* Is this *only* a question of the constitutional definition of “engage in insurrection” and “aid or comfort”—of whether an encouraging speech to an insurrectionary crowd is covered by those terms? Or is it *also* a question of whether that speech is protected by freedom of speech, which under modern doctrine would mean the very stringent test of *Brandenburg v. Ohio*?<sup>257</sup> Or is it somehow both?

To a large extent, we think the conflicts between Section Three and free speech can be minimized—as Hamilton would counsel.<sup>258</sup> First, even under modern doctrine, free speech does not protect several categories of speech that overlap with Section Three. Second, Section Three’s terms will not often reach pure speech.

To elaborate on the first point: Modern First Amendment doctrine leaves the government free to punish actual *conspiracy* and *solicitation*, direct *incitement*, and *material support* of unlawful activities such as insurrection, rebellion, and treason. (There are serious questions about how much modern First Amendment doctrine has exceeded the original protections of freedom of speech and freedom of the press, which we will largely put aside, but the point is that these exceptions are recognized even on today’s liberal understandings.<sup>259</sup>)

The First Amendment has long been held not to protect conspiracy to commit a crime or direct solicitation of unlawful activity, because this is

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<sup>256</sup> See *infra* Section IV.C.2.

<sup>257</sup> 395 U.S. 444 (1969).

<sup>258</sup> See THE FEDERALIST NO. 78, *supra* note 214, at 439 (Alexander Hamilton) (“So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done.”).

<sup>259</sup> For what it is worth, we do not in general dispute many aspects of modern First Amendment doctrine, which we believe often captures the original meaning of freedom of speech and freedom of the press, as applied to modern circumstances. See generally Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1919-22 (2001). To get a sense of how one might construct a truly marvelous proof of this, which this margin is too narrow to contain, see generally Adam Griffin, *First Amendment Originalism: The Original Law and a Theory of Legal Change as Applied to The Freedom of Speech and of The Press*, 17 FIRST AMEND. L. REV. 91 (2019); Jud Campbell, *Natural Rights and the First Amendment*, 117 YALE L.J. 246 (2017); Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861 (2022). We will cease further digression on this point.

“speech integral to unlawful conduct.”<sup>260</sup> And while one must use some caution about unduly expanding this category, conspiracy and solicitation are at its core.<sup>261</sup> Thus, efforts to steal elections, to pressure state officials to manufacture votes, to pressure other officials (like the Vice President) to violate their constitutional duties in service of a constitutional coup—would all be unprotected by the First Amendment. To the extent those efforts are swept up by Section Three, there would be no conflict.

More familiar may be the modern line of cases concerning “incitement.” Over the course of the twentieth century, judicial doctrine increasingly gave greater protection to speech that could be seen as generally inciting unlawful activity, recognizing that earlier doctrine (such as the famous “clear and present danger” test) had too readily permitted suppression of disfavored political views. The modern rule, stated in *Brandenburg v. Ohio* in 1969, excludes from First Amendment protection only advocacy or expressive conduct (i) “directed to” (ii) triggering or inciting (iii) “imminent lawless action” (presumably including acts of insurrection or rebellion) and (iv) “likely to incite or produce such action.”<sup>262</sup> That is a fairly strict standard, but not one that is impossible to satisfy. Importantly, it does leave open—even under the generous terms of modern First Amendment law—the prospect that some acts of advocacy and expression supporting insurrection or rebellion are simply unprotected by the First Amendment in any event, so that Section Three does not even need to have amended or superseded the First Amendment in order for its terms to be given their full legal effect.

The Supreme Court’s relatively recent decision in *Holder v. Humanitarian Law Project* recognized a further and more controversial limitation on subversive speech: it can be forbidden where it provides “material support” to a foreign organization engaged in or committed to terrorist violence against the nation.<sup>263</sup> The Court concluded that because the “interest in combating terrorism is an urgent objective of the highest order,” the Congress

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<sup>260</sup> *United States v. Hansen*, 599 U.S. 762, 783 (2023); *see also* *United States v. Williams*, 553 U.S. 285, 297 (2008) (“Offers to engage in illegal transactions are categorically excluded from First Amendment protection.”); *Giboney v. New Ice Storage*, 336 U.S. 490, 498 (1949) (holding that constitutional protection does not grant immunity to speech that is an integral part of criminal conduct). *See generally* Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981, 989-93, 1007-08 (2016) (discussing illegal solicitation that induces criminal acts).

<sup>261</sup> *See* Volokh, *supra* note 260, at 1011-15.

<sup>262</sup> 395 U.S. 444, 447 (1969) (emphasis added). This standard is elaborated in *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973), and *NAACP v. Claiborne Hardware*, 458 U.S. 886, 927-28 (1982). Additionally, *Bond v. Floyd*, 385 U.S. 116, 132-35 (1966), rejected the idea that there is a lower First Amendment standard of incitement when a state legislature is excluding an elected member under state law. *See also* *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 448-49 (1974) (finding the same principle applies to ballot access).

<sup>263</sup> 561 U.S. 1, 28 (2010).

could forbid even *speech*—such as teaching and training—assisting such organizations, and even though the speech did not *directly* further terrorist conduct.<sup>264</sup> While this decision is hedged by multiple limiting principles,<sup>265</sup> it illustrates another set of circumstances where the First Amendment would create no conflict with potential applications of Section Three.

In sum, while modern First Amendment doctrine is quite generous in its protection of speech, in many cases it would produce no conflict with the coverage of Section Three. We will elaborate on the second point—the scope of Section Three itself—more fully in Part IV, but for now suffice it to say that the occasions will be rare where *speech alone* is what qualifies one as having “engaged in insurrection” or provided “aid or comfort” to enemies.

That said, we will concede that the conflict between free speech and Section Three cannot be denied entirely. Consider the Civil War example of Clement Vallandigham, who was arrested and imprisoned by the military on the theory that “he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the Rebellion without an adequate military force to suppress it”—that he was “warring upon the Military.”<sup>266</sup> It is conceivable (though we do not prejudge the point) that Vallandigham’s anti-military efforts could be covered by Section Three. And yet it is also quite plausible that his efforts would be protected by free speech.

Or for a sharper example, even more on point, consider the case of Representative-elect John Y. Brown, who was excluded from the Fortieth Congress on the grounds that he had given aid and comfort to the Confederacy by writing to the Louisville Courier promising to resist the Union army “unto the death” and stating that anybody who volunteered for the Union army “ought and I believe will be shot down before he leaves the State.”<sup>267</sup> This exclusion was part of the backdrop of Section Three’s enactment and likely the kind of thing Section Three was intended to cover. But, argues one scholar of the incident, this pre-Section Three exclusion “was entirely unconstitutional” and “plainly violative of the First Amendment.”<sup>268</sup>

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<sup>264</sup> *Id.* at 28–32.

<sup>265</sup> The Court emphasized that “only material support coordinated with or under the direction of a designated foreign terrorist organization” was banned; “[i]ndependent advocacy” was “not covered.” *Id.* at 31–32. Additionally, the law only applied to *foreign* organizations. *Id.* at 39.

<sup>266</sup> Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in 6 ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1965, at 454, 459 (Don E. Fehrenbacher, ed. 1989); see *infra* notes 322–328 and accompanying text.

<sup>267</sup> ASHER C. HINDS, 1 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, ch. 14, § 449, at 445 (1907). For further discussion of post–Civil War examples, see *infra* notes 325–339, 425–49 and accompanying text.

<sup>268</sup> Lynch, *supra* note 5, at 198.

If that was so before Section Three's enactment, does Section Three make it otherwise?<sup>269</sup>

Finally and perhaps most explosively, consider the 1919 exclusion of socialist newspaper editor Victor Berger from the House. Berger was denounced by members of the House for having given "aid and comfort to the enemies of this country during this Great War," and excluded in part on that basis.<sup>270</sup> (Indeed, Berger had also been convicted and sentenced under the Espionage Act, though the charges were overturned by the Supreme Court on a claim of judicial bias.<sup>271</sup>) Another scholar of the incident writes that "[u]nder a good reading of the First Amendment, Berger's speeches and writings could not have been seditious; however, under the interpretation prevailing at the time, they probably were."<sup>272</sup> What should we make of such an incident?

In the end, in a case where free speech principles conflict with the best original understanding of "engaged in insurrection" or "aid or comfort," we think that free speech principles must give way. We stress that we do not think that all or even most disloyal speech will rise to the level of triggering Section Three's disqualifications.<sup>273</sup> But where it does, where "it becomes a matter of necessity to give effect to one in exclusion of the other," it is the more recent Fourteenth Amendment that "shall be preferred" to the earlier rule.<sup>274</sup>

For those (like us) who value First Amendment liberties of speech, press, assembly, religion, and the right to dissent generally, might Section Three therefore be thought a little dangerous? Might Section Three, in the wrong hands or applied improperly, be used to suppress dissent in the name of excluding insurrectionists from office? Perhaps. We do not shy away from the point. But the supposed danger of a constitutional provision is not really an argument against its meaning. And the potential abuse of a constitutional power, privilege, or disqualification is not really a good legal argument against its existence. Section Three's exclusion could be thought to pose a danger, but

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269 *See id.* ("Had Section 3 been ratified by this point, these concerns would be assuaged.").

270 CHAFETZ, *supra* note 54, at 190-91. For further discussion of the House committee reports regarding Berger, see Lynch, *supra* note 5, at 211-13, and CANNON, *supra* note 20, at 52-63.

271 *Berger v. United States*, 255 U.S. 22, 36 (1921). During the initial exclusion, when Berger's conviction was on appeal, the House Committee announced "that it would not be governed by the action of the judge and jury at the Chicago trial," but would review the evidence and legal questions "for itself." CANNON, *supra* note 20, at 54. But curiously, after the convictions were reversed, the House allowed Berger to sit in the sixty-eighth through seventieth Congresses. Lynch, *supra* note 5, at 213.

272 CHAFETZ, *supra* note 54, at 191.

273 In our view, for instance, the exclusion of Victor Berger went too far—not because the First Amendment makes an exception to Section Three, but because Berger's advocacy did not satisfy the original meaning of Section Three. *See infra* note 449.

274 THE FEDERALIST NO. 78, *supra* note 214, at 439 (Alexander Hamilton).

insurrection and rebellion are dangers, too—all too real dangers, as recent events have shown. Where exactly the Constitution draws that line, and the extent to which that line changes the prior rules of the First Amendment, are ultimately questions of the meaning of Section Three’s general terms triggering disqualification from future office—“insurrection,” “rebellion,” “engaged in,” “given aid or comfort to”—and of who all is included under Section Three’s ban. To that set of important questions we turn next.

#### IV. SECTION THREE’S SUBSTANTIVE DISQUALIFICATION IS SWEEPING

We come at last to the heart of the beast: the substance of Section Three’s prohibition. We begin (in Section IV.A) with the most interesting and important set of issues—the types of misconduct that trigger Section Three. What deeds (and words?) amount to having “engaged in” “insurrection” or “rebellion” against the lawful authority of the Constitution and the system of government it establishes? What acts (or words?) amount to having given “aid or comfort” to “enemies” of lawful government under the Constitution?

These terms to some extent bear a *range* of meaning and fair construction. The events they describe are often exceptional and to some extent unique. Still, some applications will be clear and virtually indisputable, falling within the terms’ core meaning—the center of the interpretive bullseye, so to speak. Such scenarios so clearly fall within Section Three that they may be said to be contained within the opposite of a safe harbor—a “sure shipwreck,”<sup>275</sup> to borrow Susan Morse’s phrase—of unquestionably disqualifying conduct falling within the core of Section Three’s meaning; for example, declaring unilateral secession from lawful constitutional government; or the taking up of arms against the government (as in the waging of the Civil War). At the other end of the continuum, there will be situations that clearly lie in a safe harbor outside the legitimate range of meaning of Section Three’s terms—ordinary expression of political dissent, as well as ordinary law violations. In between these markers, there is a zone of reasonable, fair construction of *allowable* interpretation and application in which government officials may make judgments that must be conceded to be within the range of what the Constitution permits—and where the decisions and actions of government officials exercising their constitutional powers consequently cannot be considered *unlawful* and thereby subject to judicial invalidation. Within that fair range of meaning, different interpreters legitimately can reach differing conclusions, all in accordance with the Constitution. We address all of these questions in Section IV.A.

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<sup>275</sup> Susan Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385 (2016).

We then turn more briefly (in Section IV.B) to the questions of *what prior-office-holding, oath-taking categories of persons*—persons who then subsequently engaged in insurrection or rebellion—are covered by Section Three’s ban and (a similar but distinct question) *what future offices are constitutionally barred to such persons*. We conclude that Section Three’s disqualification is sweeping, both in the substantive conduct that triggers such disqualification and in the office-holders and offices to which it applies. In particular, contrary to one recent revisionist view, we believe it applies to the Presidency.<sup>276</sup>

Finally (in Section IV.C) we will consider the attempted overthrow of the 2020 Presidential election. Did the incumbent president’s willful, deliberate refusal to accept the outcome of the lawful constitutional election resulting in his defeat and, instead, his (and others’) attempt to overthrow constitutional election results and install or maintain himself in office, by force, by fraud or by attempted de facto political coup d’état against the regime of lawful constitutional government, constitute engaging in “insurrection or rebellion against the Constitution of the United States”? We think the answer is *yes*.

Whether called a “rebellion” or an “insurrection,” instigating, inciting, and encouraging a mob to engage in acts of forcible violence directed against the ability of Congress and the Vice President to carry out their constitutional duties—and then refusing to intervene—is covered by Section Three and is disqualifying. If those are indeed the facts concerning Donald Trump’s (and others’) efforts to overthrow the election—and we think they are—such conduct triggers the disqualification rule of Section Three.

Whether other federal and state officeholders—members of Congress, state legislators, past or present state and federal executive and judicial officers—engaged in conduct constituting “insurrection” or “rebellion” (including meaningful action in deliberate furtherance of an attempted coup against lawful constitutional government), or gave “aid or comfort” (approval, encouragement, support) to enemies might sometimes involve more difficult questions of fact and judgment. But they are the questions Section Three compels us to ask, and to answer. Where such evaluations and judgments have been made by actors exercising legitimate authority to make them (as discussed in Part II) and fall within the fair range of Section Three’s meaning, those judgments are entitled to full legal effect.

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<sup>276</sup> See *infra* notes 483–495 and accompanying text.

A. *Section Three's Disqualifying Conduct: "Insurrection or Rebellion"; "Engaged In"; "Aid or Comfort" to "Enemies"*

What is the proper, original public meaning of "insurrection" and "rebellion" as used in Section Three? Of having "engaged in" such conduct? Of having given "aid or comfort" to "enemies"?

Because the terms are capacious and the evidence is sprawling, we will start by proposing our working definitions for these terms. We then show how they are largely consistent with standard sources for discerning the meaning of constitutional text: contemporaneous definitions of these terms; usage elsewhere in the Constitution; and contemporaneous public, political, and legal usage of the terms. This last category, which is especially instructive, includes usages from President Lincoln, legislation adopted by the Civil War Congress (both the 1862 "Ironclad Oath" and the Second Confiscation Act), and the significant mid-Civil War decision of the Supreme Court in *The Prize Cases*. We also consider, albeit in somewhat more abbreviated fashion, statutes and usages leading up to the Civil War, as well as the relevant legislative history of Section Three and a few scattered post-enactment applications of Section Three itself.

1. Working Definitions

We begin by offering our working definitions of the terms *insurrection* and *rebellion* and of what might constitute "engaging in" such conduct or giving "aid or comfort" to enemies under Section Three.

*Insurrection* is best understood as *concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect*. The term "insurrection" connotes something more than mere ordinary lawbreaking. It suggests an affirmative contest with, and active resistance to, the *authority* of the government. It is in that sense more than just organized resistance *to the laws*—more than just a protest, even one involving civil disobedience. Rather, it is organized resistance *to the government*. Insurrection is also more than mere "protest" in that it implies some element of *forcible* resistance. It is something more than a mere spontaneous, disorganized "riot."<sup>277</sup> Insurrection suggests at least some degree of coordinated, concerted action. The term also implies something more than acts of solitary individuals: to qualify as an insurrection the acts in question must involve some form of collective action, even if not an advance plan.

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<sup>277</sup> Debates, Saturday 14 June (June 14, 1788) (Statement of James Madison at the Virginia Convention) ("[A] riot did not come within the legal definition of an insurrection."), reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1296 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

At the same time, *insurrection* may fall short of outright *rebellion*—even as the terms overlap and might bleed into each other—in that an insurrection might not seek to overturn, overthrow, or displace the government itself, in whole or in part (as a rebellion does). As the Supreme Court put it in *The Prize Cases* in 1863: “Insurrection against a government may or may not culminate in an organized rebellion . . . .”<sup>278</sup>

*Rebellion* is thus closely related to insurrection, but perhaps not quite identical in meaning. A rebellion is arguably broader than an insurrection: *rebellion* implies an effort to *overturn or displace lawful government authority by unlawful means*. In the case of secession, or a declaration of independence, the rebellion is an effort to free those engaged in rebellion from the authority of the existing lawful government. Rebellion is something beyond mere resistance to government authority in a particular instance or set of instances. A rebellion seeks to *replace* the existing regime, not just resist its law-executing authority. Rebellion involves repudiation, to some degree or another, of the regime’s authority, legitimacy, or validity. It is a challenge, direct or indirect, *to the regime itself*. The South’s attempted *secession* was a species of rebellion—an attempt to overturn the authority of the Constitution and government of the United States. Likewise, an attempted coup d’état is arguably also a species of rebellion—an effort to displace, replace, upend, or overthrow the existing lawful regime and substitute different authority in its stead.

The term *rebellion* can also imply a competing claim to legitimacy. Crucially, however, the fact that an insurrection or rebellion claims political or moral legitimacy—as the American Revolution did; indeed, as the South’s secession did—does not make it any the less an *insurrection* or *rebellion*. The fact that an attempted coup d’état, or declaration of independence, or secession, is claimed to be a “vindication” or “restoration” of rightful governmental authority—or asserted to be a pre-emptive effort to thwart some *other* person’s or group’s allegedly wrongful assertion of authority—does not immunize such action from the legal characterization of rebellion against the regime. If somebody in fact participates in an attempt to overthrow the government, it makes no difference that he might think himself in the right for doing so, see himself as an agent for *preserving* lawful government, or view his acts and intention not as “rebellion” but restoration. Mistake of law is no defense to a coup d’état. The South offered a variety of constitutional legal theories in defense of the supposed lawfulness of secession to vindicate its

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<sup>278</sup> 67 U.S. (2 Black) 635, 666 (1862).

believed rights.<sup>279</sup> That did not make its acts of rebellion any less acts of rebellion.

As to the overlap and distinction between insurrection and rebellion, our working definition is more tentative. It is possible that a rebellion is simply a special case of an insurrection, in the way that a square is a special case of a rectangle. But it is also possible that the term rebellion is not necessarily limited to regime change *by force*, and thus may occupy some ground not covered by the word “insurrection” (which, we have suggested, must be forcible). There are such things as “bloodless coups”: actions that effectively displace or upend the prior constitutional order without shots being fired, but that nonetheless are in unlawful defiance or repudiation of the existing legal order.<sup>280</sup>

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279 For important accounts and discussion of Southern arguments for the constitutional propriety and validity of secession, on a variety of asserted grounds, see JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 240-42 (1988) (summarizing Southern constitutional and political theories); DANIEL FARBER, *LINCOLN'S CONSTITUTION* 57-91 (2003) (detailing interposition, nullification, and secession); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 *NOTRE DAME L. REV.* 1227, 1270-77 (2008) (setting forth Southern leaders' constitutional arguments that Lincoln's stance against the *Dred Scott* decision, against judicial supremacy, and against extension of slavery violated the judicially settled constitutional rights of slaveholding persons and states); Kenneth M. Stampp, *The Concept of a Perpetual Union*, 65 *J. AM. HIST.* 5 (June 1978) (providing detailed history of pre-Civil War constitutional and political arguments over the nature of Union and validity of secession); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM* 1829-61, at 228-37 (2005) (discussing constitutional arguments for and against the validity of secession). For the case against the constitutionality of secession, see Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 2 *ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1965*, at 215, 217-18 (Don E. Fehrenbacher, ed. 1989); Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in *id.* 246, 254-58, 260-61. See also Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 *U. CHI. L. REV.* 691, 703-15 (2004) (reviewing DANIEL FARBER, *LINCOLN'S CONSTITUTION* (2003), while distilling and building on Lincoln's arguments); Kesavan & Paulsen, *West Virginia*, *supra* note 161, at 303-11 (discussing Lincoln's views on secession). For further background, see generally WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776-1854* (1990), and for a comprehensive exposition of the Southern view, see generally ALEXANDER H. STEPHENS, *A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES; ITS CAUSES, CHARACTER, CONDUCT AND RESULTS* (1868). As a clarification: we use the term “secession” here and throughout this article to refer to unilateral secession without the consent of the federal government, as in the Civil War, and do not discuss ways the federal government might lawfully consent to the independence of a state or territory.

280 Indeed, one might characterize the process of adoption of the U.S. Constitution, replacing the regime of the Articles of Confederation, as a peaceful political *coup d'état*—an act of “rebellion” if judged by pre-existing law, but morally and politically justified by the failure of the prior regime and Lockean notions of self-governance and subsequently legalized by its own success. See PAULSEN & PAULSEN, *supra* note 35, at 3-8, 17-20; Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *HARV. J. L. & PUB. POL'Y* 818, 821, 844, 850 (2015). *But cf.* AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760-1840*, at 164-65 (2021) (emphasizing the states' retention of sovereignty under the Articles and the idea that states might thus legally exit that regime on the theory that the Articles had become a breached treaty).

To illustrate this hypothesized distinction between insurrection and rebellion: Imagine that the Southern attack on Fort Sumter in April 1861 had preceded any declared right to secession. The attack would have been an act of *insurrection*—an exercise of concerted, forcible defiance of the authority of the Union government—but not necessarily outright *rebellion*. Conversely, the ordinances of secession adopted by state conventions in the South in 1860 and 1861 preceded (mostly) any acts of actual forcible resistance to the authority of the United States to execute the laws.<sup>281</sup> The secession ordinances might still immediately constitute acts of “rebellion” even before any accompanying violence. In short: Sumter without secession would have still been insurrection. Secession without Sumter was already rebellion. Put the two events together (acts of forcible insurrection and declarations of avowed rebellion frequently travel in pairs, as they obviously did with the Civil War), and “insurrection” and “rebellion” will frequently overlap.

In the end we do not wish to make too much of the ways in which the terms differ in shades of color and in their implication. The coverage of the terms overlaps substantially. Sometimes, the terms, occupying much of the same ground, seem capable of being used almost interchangeably. Indeed, the bigger picture point for understanding Section Three is that “insurrection” and “rebellion,” in tandem, cover pretty much the entire terrain of large-scale unlawful resistance to government authority.

Our working definitions of “insurrection” and “rebellion” established, what does it mean to have “engaged in” such conduct? We believe one has “engaged” in insurrection or rebellion when one has been *actively involved in the planning or execution of intentional acts of insurrection or rebellion*; or when one has *knowingly provided active, meaningful, voluntary, direct support for, material assistance to, or specific encouragement of* such actions. Such planning, participation, support, assistance, or encouragement may be in the form of either words or deeds, as long as the person who has “engaged in” such activities embraced the objectives of the insurrection or rebellion in question and did things that contributed in a meaningful way to advancing those objectives.<sup>282</sup> (There is obvious overlap here with the closely related concept

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<sup>281</sup> The secession resolutions were adopted by state “conventions,” purporting to parallel the process by which the states ratified the Constitution, and sometimes echoing the Declaration of Independence as well. See MCPHERSON, *supra* note 279, at 234-84.

<sup>282</sup> This working definition of having “engaged in” wrongful activity resembles familiar common law understandings of accomplice liability in the area of criminal law, which typically resulted from the combination of (1) *assistance* to unlawful conduct (with “assistance” including uttering words of encouragement to, or agreeing not to interfere with, such conduct) and (2) the *intention to further* such unlawful conduct). See, e.g., JENS DAVIS OHLIN, WHARTON’S CRIMINAL LAW §§ 10:9, 10:11 (Thompson Reuters 16th ed., 2021) (describing accomplice liability as arising from any type of “assistance, encouragement, or aiding and abetting that facilitates the commission of the crime” with intent to promote or facilitate the crime’s commission). Federal criminal law

of having given “aid or comfort” to the nation’s enemies, which we discuss presently.)

Of course, there are important limits to how far the concept of having “engaged in” insurrection or rebellion extends. Mere passive acquiescence, resigned acceptance, silence, or inaction is not typically enough to have “engaged in” insurrection or rebellion unless a person possesses an affirmative duty to speak or act.<sup>283</sup> Further, mere abstract advocacy of, or theorizing concerning, the desirability of insurrection or rebellion, without more, is not the same as actually *engaging* in it. We think this is true even though the First Amendment does not formally constrain Section Three: it is simply the best understanding of Section Three’s terms.

Then there is the related question of what constitutes having given “*aid or comfort*” to “*the enemies thereof.*” This reads as a separate, independent ground for disqualification: Section Three is triggered by having engaged in insurrection or rebellion “*or*” having given aid or comfort to enemies. This language, of course, closely echoes the earlier constitutional language of the Treason Clause.<sup>284</sup>

In many cases, giving “aid or comfort” to enemies will be similar to the kind of conduct that counts as having “engaged in” insurrection or rebellion through intentional, active assistance. If there is a difference, it is that the term “aid or comfort” reinforces and emphasizes Section Three’s coverage of *indirect* but material assistance. Such material assistance—possibly including expression supporting, encouraging, counseling, or promoting the enemy—might more naturally fall into Section Three’s “aid or comfort” language, even where it might be debatable whether to characterize such conduct as directly “engag[ing] in” insurrection or rebellion.

Additionally, while Section Three uses some language paralleling the Treason Clause, Section Three is by no means limited to the constitutional crime of treason. “Insurrection” and “rebellion” are their own things, distinct from “treason.” While some acts of insurrection and rebellion might *also* constitute treason they need not do so in order to be encompassed within

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today is to similar effect. See 18 U.S.C. § 2(a) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”). Our interpretation is also supported by background mens rea principles. See William Baude & Stephen Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1108 (2017) (describing the default rule that courts typically consider an offense to have a mens rea component even when a statute does not expressly provide for one). That said, the context of the Civil War also suggests one important limitation: *there is no mistake-of-rebellion defense*. See *infra* text accompanying note 515 (maintaining that a false but sincerely held belief that an election was stolen does not excuse acts of insurrection or rebellion).

<sup>283</sup> See, e.g., Ohlin, *supra* note 282, at § 10:11; MODEL PENAL CODE § 2.01(3).

<sup>284</sup> See U.S. CONST. art. III, § 3, cl. 1 (“Treason against the United States, shall consist only in levying war against them, or in adhering to their Enemies, giving them Aid and Comfort.”).

Section Three. So even if “aid or comfort” in Section Three connotes the same type of assistance-and-embrace principles as “Aid and Comfort” in Article III’s Treason Clause,<sup>285</sup> the relevant conduct to which such assistance is given might well differ. (And, as noted earlier, it is plain that Section Three requires no prior criminal conviction, for treason or any other defined crime, as a prerequisite for its disqualification to apply.<sup>286</sup>)

Finally, aid or comfort to whom? “[T]he enemies thereof.” Before the Civil War, some might have limited “enemies” to those owing allegiance to a foreign power,<sup>287</sup> but that is not plausibly true of Section Three. Rather, Section Three covers enemies both foreign *and domestic*. That now-familiar phrase (“enemies foreign and domestic”) comes from the “Ironclad Oath,” written into law in 1862, in the midst of the Civil War,<sup>288</sup> and it seems clear from the political context of Section Three that it likewise treats domestic enemies as enemies. Indeed, it is almost unthinkable that Confederate rebels would not have been thought “enemies” in the sense employed by the text.

What is less clear is how to define the foreign and domestic enemies covered by Section Three. The most straightforward option, which strikes us as the more likely one, is that “enemies” essentially cross-references the domestic rebels and insurrectionists just described earlier in the sentence (as well as more traditional foreign enemies). On this straightforward reading, Section Three would cover a domestic officeholder (or ex-officeholder) who directly engages in insurrection or rebellion, as well as one who gives aid or comfort to others who do so (as well as one who gives aid or comfort to foreign enemies). This straightforward reading is also consistent with the operation of another 1862 statute, the Second Confiscation Act.<sup>289</sup> That said, we cannot rule out another narrower possibility, that “enemies” is limited to those with whom the United States is effectively at war, and thus excludes insurrections and rebellions that do not rise to the level of a civil war.<sup>290</sup> This would create a more complicated two-track system where Section Three covers all direct engagement in insurrections and rebellions, as well as “aid or comfort” only to a more limited set of insurrections and rebellions. While it strikes us as less likely, we cannot definitively rule it out.<sup>291</sup>

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<sup>285</sup> See *infra* note 310.

<sup>286</sup> See *supra* Section II.A.

<sup>287</sup> See Lynch, *supra* note 5, at 174 (discussing *United States v. Greathouse*, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254)).

<sup>288</sup> See *infra* Section IV.A.4.b.i.

<sup>289</sup> See *infra* Section IV.A.4.b.ii.

<sup>290</sup> See Lynch, *supra* note 5, at 173-78.

<sup>291</sup> And what is the referent of “enemies *thereof*”? Does “thereof” refer to enemies of the *United States* or enemies of the *Constitution* of the United States? We think this replicates the question of what “*the same*” refers to, earlier in the sentence, and presents the same issue of minor and seemingly inconsequential ambiguity. (I.e., does “insurrection or rebellion *against the same*” refer to

Our sense of the whole—of Section Three’s substantive terms triggering disqualification for those who have engaged in the conduct described—is that Section Three is quite sweeping, using overlapping terms to cover several different characterizations of major collective resistance to the authority of government under the Constitution. Whether it be called “insurrection” or “rebellion”; and whether a covered individual is thought to have “engaged in” such activity or given “aid or comfort” to “enemies,” Section Three’s disqualification is triggered. The language is not unlimited, to be sure. But the broad and overlapping terms are not intended to be hospitable to loopholes or artful, narrow, technical evasions.

Finally, let us reiterate one consequence of Section Three’s breadth and capaciousness. Because Section Three’s terms possess a range of meaning, both a determinate core and a fuzzier periphery, we need a second-order rule concerning the authority of decisionmakers to act on the basis of fair interpretations of indefinite terms. We think that the general rule of our constitutional order is that political officials may take actions premised on fair interpretations of indefinite terms, and that when they do so, their actions cannot rightly be held “unconstitutional” by the courts, precisely because they fit within the fair range afforded by the Constitution. Where the Constitution admits of a range of choice, political authorities may exercise choices within that range.

This is foundational to our constitutional law.<sup>292</sup> It is the premise of judicial review as set forth in *Marbury v. Madison*, which justifies setting aside the acts of other branches only because, and only to the extent that, they deviate from the Constitution’s meaning.<sup>293</sup> It is classically illustrated by the

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insurrection or rebellion against “the United States”?) On balance, we think that it probably makes little practical difference: rebellion against the United States and rebellion against the Constitution of the United States will often amount to the same thing—either one is capable of being considered an instance of the other. Whatever the answer, it should be the same for both—“against the same” and “thereof” refer to the same thing. Our best guess is that it is “the United States.”

<sup>292</sup> See, e.g., Paulsen, *Rules for Its Own*, *supra* note 9, at 858 (arguing that where constitutional language states a general principle, “actions of government that fall within the scope of judgment or discretion admitted by the breadth with which that principle is expressed do not violate the Constitution, and are thus allowable.”); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL’Y 991, 995 (2008) (arguing that where a constitutional text possesses a range of meaning, the correct constitutional answer in cases of such textual indeterminacy is that elected officials constitutionally may enact or implement policies that lie within the range of the text’s meaning; and “the more indeterminate or under-determinate the range of a constitutional provision, the broader the duty of the courts to defer to what the legislature has enacted”); Kesavan & Paulsen, *supra* note 9, at 1129-30 n.54; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 333 (1994); Baude & Sachs, *supra* note 282, at 1120 (describing “the presumption of constitutionality” as a rule of unwritten law); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 35-36, 44 (2019). Again, we bracket any differences in emphasis between our respective views of the adjudication of ambiguities.

<sup>293</sup> See 5 U.S. (1 Cranch) 137, 170 (1803).

Court's reasoning in *M'Culloch v. Maryland*, which upheld Congress's power to create the Bank of the United States because a generation of political actors had acted within the fair range of meaning of constitutionally granted powers.<sup>294</sup> And this principle means, as a practical matter, that the breadth of Section Three's broad terms cannot be ignored, or artificially limited, by judicial construction. Where those charged with responsibilities that involve applying Section Three's terms have given that language its full legitimate sweep, that breadth must be honored.

We now canvass—perhaps too briefly and yet at too great a length—some of the evidence supporting these working definitions.

## 2. Contemporaneous Dictionary Definitions

As we have said, the task of ascertaining true constitutional meaning consists of seeking out the *objective, original* meaning of the words and phrases of the text: that is, the meaning Section Three's terms and structure would have had in the legal system at the time the Fourteenth Amendment was proposed and ratified. A starting point for such an inquiry—though not the ending point—is to look at contemporaneous dictionary definitions. We think that evidence of contemporaneous political and legal usage of words and phrases contained in the constitutional text is actually quite often stronger evidence of original, objective linguistic meaning. It can serve as a kind of operational, practical concordance that may “define” terms more precisely in their application than can a cold dictionary definition.

Nineteenth-century dictionaries contain definitions of “insurrection” and “rebellion” that substantially corroborate our working definitions. Webster defined “insurrection” as a “rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state.”<sup>295</sup> Rebellion was an “open and avowed renunciation of the authority of the government to which one owes allegiance.”<sup>296</sup>

Importantly, Webster noted several distinctions between these and other terms. In defining “rebellion,” he distinguished an insurrection as “a rising in opposition to a particular act or law, without a design to renounce wholly all subjection to the government,”<sup>297</sup> while a rebellion was a more categorical “attempt to overthrow the government, to establish a different one or to place

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<sup>294</sup> 17 U.S. (4 Wheat.) 316, 420-21 (1819).

<sup>295</sup> *Insurrection*, WEBSTER'S 1864, *supra* note 46, at 702; *see also Insurrection*, NOAH WEBSTER, 1 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) [hereinafter WEBSTER'S 1828] (stating the same definition); *Insurrection*, 1 A POPULAR AND COMPLETE ENGLISH DICTIONARY 727 (John Boag ed. 1848) [hereinafter BOAG'S] (same).

<sup>296</sup> *Rebellion*, WEBSTER'S 1864, *supra* note 46, at 1094; *see also Rebellion*, 2 BOAG'S, *supra* note 295, at 319 (similar).

<sup>297</sup> *Rebellion*, 2 WEBSTER'S 1828, *supra* note 295.

the country under another jurisdiction.”<sup>298</sup> And in defining insurrection, Webster noted that insurrection is “equivalent to sedition, except that sedition expresses a less extensive rising of citizens.”<sup>299</sup> This suggests a spectrum from sedition (not covered by Section Three) to insurrection to rebellion (both covered).

At the same time, Webster also conceded some overlap in these terms, writing that “[i]nsurrection may be, but is not necessarily, rebellion,”<sup>300</sup> and that despite these technical distinctions, “[i]nsurrection is however used with latitude as to comprehend either sedition or rebellion.”<sup>301</sup> This suggests a great deal of potential breadth and overlap in these terms.

Along similar lines, a prominent mid-century legal dictionary, *John Bouvier’s Law Dictionary* in its 1868 edition, contains detailed definitions of *insurrection*, *rebellion*, and *aid and comfort*. “Insurrection” is defined simply as “[a] rebellion of citizens or subjects of a country against its government.”<sup>302</sup> “Rebellion” is correspondingly defined: “The taking up arms traitorously against the government. *The forcible opposition and resistance to the laws and process lawfully issued.*”<sup>303</sup> Bouvier’s Dictionary thus treated “insurrection” and “rebellion” as nearly interchangeable terms, both involving some degree of concerted and forcible opposition to the authority of the lawfully constituted government.<sup>304</sup>

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298 *Insurrection*, 1 WEBSTER’S 1828, *supra* note 295 (“Insurrection”). Compare *Insurrection*, 1 BOAG’S, *supra* note 295, at 727, with *Rebellion*, 2 BOAG’S, *supra* note 295, at 319 (similarly distinguishing “insurrection” and “rebellion”).

299 *Insurrection*, 1 WEBSTER’S 1828, *supra* note 295, at 111. For comparison, Webster defined “sedition” as: “A factious commotion of the people, or a tumultuous assembly of men rising in opposition to law or the administration of justice, and in disturbance of the public peace. Sedition is a rising or commotion of less extent than an insurrection, and both are less than rebellion . . . .” *Sedition*, 2 WEBSTER’S 1828, *supra* note 295, at 66.

300 *Rebellion*, 2 WEBSTER’S 1828, *supra* note 295, at 51; see also 2 BOAG’S, *supra* note 295, at 319 (similar).

301 *Insurrection*, 1 WEBSTER’S 1828, *supra* note 295, at 111. Daniel Hemel argues that “Webster’s definition of ‘insurrection’ seems implausibly broad for Section 3 purposes.” Hemel, *How-to Guide*, *supra* note 5.

302 *Insurrection*, 1 JUDGE BOUVIER’S LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION: WITH REFERENCE TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW 729-730 (Philadelphia, George W. Childs, 12th ed., rev. & enl. 1868) [hereinafter BOUVIER’S LAW DICTIONARY 1868].

303 *Rebellion*, 2 *id.* at 415 (emphasis added).

304 Similarly, Joseph Worcester, Noah Webster’s contemporary and competitor in lexicography, generally equated insurrection and rebellion. Compare *Insurrection*, JOSEPH E. WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE 764 (Boston, Swan, Brewer & Tileston 1860), with *Rebellion*, 1 BOUVIER’S LAW DICTIONARY 1868, *supra* note 302, at 1190. Elsewhere in the same edition, Bouvier drew a distinction in connotation between “rebel” and “insurgent,” suggesting that “rebel is always understood in a bad sense, as one who unjustly opposes the constituted authorities; insurgent may be one who justly opposes the tyranny of constitute authorities,” and thus that “[t]he

*Bouvier's Law Dictionary* also offers an instructive definition of “aid and comfort” as “[h]elp; support; assistance; counsel; encouragement.” The entry adds this discussion, noting the lack of U.S. judicial interpretation at the time but a generally accepted English background understanding of the term:

The constitution of the United States, art. 3, s. 3, declares that adhering to the enemies of the United States, giving them aid and comfort, shall be treason. These words, as they are to be understood in the constitution, have not received a full judicial discussion. They import, however, help, support, assistance, countenance, encouragement. The word *aid*, which occurs in the stat. Westm. 1, c.14, is explained by Lord Coke (2 Inst. 182) as comprehending all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act . . . .<sup>305</sup>

This explanation supports our broad construction of “aid or comfort” as encompassing many kinds of intentional support, consistent with the English common law understanding of the term.

### 3. Intratextualism

In some cases, the Constitution can also serve as its own internal dictionary. The meaning of a constitutional term in one part of the document can inform its meaning in another, either because of the complete (or nearly complete) copying of one constitutional text by another or by virtue of subtle contrast, refinement, or qualification in a term's usage. (Professor Akhil Amar has dubbed this method of interpretation “Intratextualism.”<sup>306</sup>) Chief Justice Marshall, for example, famously employed this method in *M'Culloch v. Maryland* as part of his argument for the constitutionality of Congress's chartering of a Bank of the United States.<sup>307</sup>

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colonists who opposed the tyranny of the English government were insurgents, not rebels.” *Insurgent*, 1 BOUVIER'S LAW DICTIONARY 1868, *supra* note 302, at 729; *Rebel*, 2 *id.* at 415.

In a much later edition, Bouvier distinguished *insurrection* and *rebellion* as two different varieties of “actual and open resistance to [government] authority.” *Rebellion*, 2 BOUVIER'S LAW DICTIONARY 830 (Francis Rawles ed., Boston, The Boston Book Co. 1897). *Insurrection* was “an actual uprising against the government,” *Insurrection*, 1 *id.* at 1086, while *rebellion* “goes beyond insurrection in aim” and attempts actually to overthrow the government authority in question. *Rebellion*, 2 *id.* at 830. Lynch misstates the date of this edition as 1867, and thus mistakenly cites it as “contemporarily authoritative.” Lynch, *supra* note 5, at 167 n.80.

<sup>305</sup> *Aid and Comfort*, 1 BOUVIER'S LAW DICTIONARY 1868, *supra* note 302, at 107.

<sup>306</sup> Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

<sup>307</sup> See 17 U.S. (4 Wheat.) 316, 413-14 (1819). In construing the scope of the legislative power conferred by the Necessary and Proper Clause, Marshall noted how the word “necessary” was used differently, and subjected to different qualifications, in other parts of the Constitution and found that those differences were useful in interpreting the clause at hand. *Id.* For discussion of the prominence of intratextual and structural-logic, whole-text arguments in some of Chief Justice Marshall's most significant Supreme Court opinions, including *Marbury* and *M'Culloch*, see Paulsen,

Might the Constitution's other usages of terms that appear in Section Three serve as such markers of meaning for "insurrection" "rebellion," and "aid or comfort"? A quick canvass suggests only limited help.

The word "insurrection" appears in the Militia Clause of Article I, Section 8 of the original Constitution: Congress is given the enumerated power to "provide for calling forth the Militia to execute the Laws of the Union, suppress *Insurrections* and repel *Invasions*."<sup>308</sup> The word "rebellion" appears in the Writ Suspension Clause of Article I, Section 9: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of *Rebellion* or *Invasion* the public Safety may require it."<sup>309</sup> In neither instance, however, does the context suggest any particular definition or explication of the term. They are thus of little direct assistance to the task of unpacking the meaning of Section Three.

As noted, the language in Section Three's alternative trigger—the giving of "aid or comfort" to enemies—borrows nearly identical language from the Treason Clause of Article III. But once again, the similar language in Article III is not self-defining. Nor was there an established, settled, authoritative judicial interpretation of this language that might have been understood specifically to define "aid and comfort" as a constitutional term-of-art at the time of the framing of the Fourteenth Amendment.<sup>310</sup> Moreover, in the 1860s,

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*supra* note 76, at 2711–42. See also Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 33 n.72 (2013).

<sup>308</sup> U.S. CONST. art. I, § 8, cl. 15 (emphasis added).

<sup>309</sup> U.S. CONST. art. I, § 9, cl. 2 (emphasis added).

<sup>310</sup> Perhaps the most notable U.S. treason case before the ratification of the Fourteenth Amendment was *Ex parte Bollman*, in which Chief Justice Marshall delivered an opinion for the Court granting habeas relief to two of the co-conspirators in Aaron Burr's plot to seize Spanish territory in the American then-southwest and attempt to form his own independent nation. 8 U.S. (4 Cranch) 75, 135 (1807). The opinion combined a relatively narrow construction of the substantive crime of treason (in part attributable to Article III's language of "levying War", U.S. CONST. art. III, § 3, cl. 1) with a relatively broad construction of complicity. Thus, on one hand: "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason." *Bollman*, 8 U.S. at 126. But on the other hand:

[I]f war be actually levied, that is, if a body of men be actually assembled, for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.

*Id.* at 126. *Ex parte Bollman* was an early and prominent legal landmark supporting some key propositions that would have been familiar to lawyers during the Civil War era: First, that there are such things as conspiracies and plots to "overturn the government," in whole or in part, which though they might not qualify as treason, remain great and culpable legal wrongs. Second, that the crime of treason specifically requires showing the existence of an armed assembly to employ force for a treasonable purpose. And third, that one may be said to have engaged in (or provided "aid and comfort" to) treason where one is in league with the conspiracy and has done any act, large or small, or played "any part," however remote, to further that plot. Whether or not *Bollman's* construction

the pairing of “aid” and/or “comfort” had become ubiquitous in legal and public discourse as a general allegation of improper assistance, making it even less clear that it was perfectly coterminous with the law of the Treason Clause.<sup>311</sup>

Finally, the words “insurrection” and “rebellion” also appear elsewhere in the Fourteenth Amendment itself, but in ways that again shed little external light on Section Three. A person’s “participation in *rebellion*” is specified in Section Two as an allowable ground for denying the right to vote that does not trigger a reduction in a state’s representation as a consequence.<sup>312</sup> Section Four of the amendment prohibits payment of “debt[s] or obligation[s] incurred in aid of *insurrection* or *rebellion*.”<sup>313</sup> These neighboring sections use slightly different phrases for the behavior they cover (“participation” in Section Three and “engaged in” in Section Four; “aid or comfort” in Section Three and “in aid of” in Section Four), but it is difficult to say whether the variations are meaningful.

#### 4. Contemporaneous Public, Political, Legal Usage

Perhaps the best evidence of the public meaning of the terms “insurrection,” “rebellion,” and “engaging in,” as they came to be used in Section Three, consists of their common and frequent public, political, and legal usage in the 1860s—the years immediately surrounding the adoption of the Fourteenth Amendment—by a variety of actors: by President Abraham Lincoln, in prominent speeches, messages, public letters, and proclamations; by Congress, in major acts of legislation; and by the Supreme Court, in its landmark decision in *The Prize Cases*. The consistent pattern of usage was to treat the actions of the South as being, legally, “insurrection” or “rebellion.” A wide range of actions supportive of secession appears to have constituted “engaging in” or giving “aid or comfort” to rebellion or insurrection.

This leads us to what we think is an obvious “sure shipwreck” for understanding Section Three’s terms.<sup>314</sup> Whatever else “insurrection” or “rebellion” might embrace, they certainly embrace the cluster of actions with which Section Three was, historically, immediately and directly concerned:

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was sufficiently established to be read in to Section Three itself, *Bollman* was cited occasionally in the 1860s Congress. See, e.g., CONG. GLOBE, 37th Cong., 2nd Sess. 414 (1862) (statement of Sen. Charles Sumner) (citing a portion of the *Bollman* passage quoted above to argue for the expulsion of Senator Jesse Bright for writing a letter to Jefferson Davis).

<sup>311</sup> See HAROLD HOLZER, LINCOLN AND THE POWER OF THE PRESS: THE WAR FOR PUBLIC OPINION 361 (2014) (referring to the phrase “aid and comfort to the enemy” (by the press) as “that catch-basin phrase again.”).

<sup>312</sup> U.S. CONST. amend. XIV, § 2 (emphasis added).

<sup>313</sup> U.S. CONST. amend. XIV, § 4 (emphasis added).

<sup>314</sup> Cf. Morse, *supra* note 275, at 1387–88.

First, the attempted *secession* from the authority of the U.S. Constitution—the effort to displace the lawful authority of the United States in favor of the supposedly “seceded” state governments and the “Confederate States of America.” And second, engaging in forcible resistance to the authority of the United States to execute the laws of the United States—armed resistance to the Constitution, specifically in the shape of waging civil war against the nation. Conduct participating in, advancing, supporting, or assisting either secession or armed resistance to U.S. authority constituted “engaging in” or giving “aid or comfort to” the Union’s enemies. Section Three encompasses *all* such actions in support of secession and civil war as included within its substantive trigger.

a. *President Lincoln*

An extremely important contemporaneous source for understanding the public constitutional meaning of “insurrection” and “rebellion” in 1860s public discourse is President Abraham Lincoln. Lincoln looms large in the public understanding of the day concerning the meaning of those terms. Lincoln consistently characterized secession and the Civil War as acts of *insurrection* or *rebellion*, avoiding wherever possible treating “secession” as if it were a separate legal category. Secession, for Lincoln, was a Southern euphemism for rebellion and treason. The Confederacy had no valid legal existence: what was going on with the Civil War was properly called insurrection and rebellion—the lawless attempt to overthrow the constitutional processes of the United States and displace lawful government with unlawful governments.

Lincoln was insistent and relentless—and very public and prominent—on this point, consistently so, across a range of contexts. For instance, the Civil War was emphatically *not*, in Lincoln’s view, a “war” between the United States and another sovereign.<sup>315</sup> It was not subject to Congress’s Article I, Section Eight, *Clause Eleven* power to “declare War,” but was rather an illegal *rebellion*—a “giant insurrection”—to be suppressed by executive authority pursuant to Congress’s Article I, Section Eight, *Clause Fifteen* power to

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<sup>315</sup> For Lincoln’s understanding of secession as unconstitutional and his resulting conception of the Civil War as, legally, a situation of insurrection or rebellion (not declared war), see sources cited in *supra* note 279. That does not exclude the existence of full constitutional Commander in Chief Clause powers in the situation of actual civil war, however. See Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807, 814-23 (2006) (laying out the argument for the constitutionality of the Emancipation Proclamation under Lincoln’s powers as Commander in Chief).

“provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>316</sup>

Consider just a few prominent and illustrative statements. In his First Inaugural Address on March 4, 1861, Lincoln, after setting forth arguments that “no State upon its own mere motion can lawfully get out of the Union,” concluded that “acts of violence within any State or States against the authority of the United States” are “*insurrectionary or revolutionary, according to circumstances*.”<sup>317</sup> Following the attack on Fort Sumter, Lincoln’s April 15, 1861 proclamation calling forth the militia similarly characterized the attack as fitting the Insurrection Acts’ definition of *insurrection*.<sup>318</sup> And in his July 4, 1861, Message to Congress, Lincoln labelled the South’s purported secession a “*giant insurrection*” and, vividly, as “*rebellion . . . sugar coated*.”<sup>319</sup> The “so-called ‘Confederate States’” had formed an “*insurrectionary government*.”<sup>320</sup> In the same July 4 Message, Lincoln used the nature of secession as *rebellion* to justify suspension of the writ of habeas corpus as authorized by the terms of Article I, Section Nine, Clause Two of the Constitution,<sup>321</sup> which used exactly that language of “rebellion.” Lincoln’s use of terms was significant and pulled no punches: efforts to displace lawful government authority with unlawful government—no matter how labelled by their perpetrators and no matter how deluded participants might be as to the lawfulness or propriety of their actions—were *insurrectionary*; such declarations and actions constituted *rebellion*.

Two years later, at the height of the war, Lincoln returned to the characterization of the South’s actions as “rebellion” (and the constitutional question of power to suspend habeas corpus) in a notable incident testing the limit of Union military suppression of anti-war and disloyal speech. In a June 12, 1863 public letter, nominally addressed to Erastus Corning, Lincoln defended the military arrest of former Ohio Congressman Clement

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<sup>316</sup> Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *reprinted in* 4 COLLECTED WORKS OF LINCOLN 421, 427 (Roy P. Basler ed., 1953) [hereinafter CWL]. Compare U.S. CONST. art. I, § 8, cl. 11 (Declare War Clause), with U.S. CONST. art. I, § 8, cl. 15 (providing Congress with power “to provide for calling forth” the Militia for law execution and to “suppress Insurrections”). Congress’s exercise of this power—the Insurrection Acts of 1795 and 1807—is discussed *infra* Section IV.A.5.a.

<sup>317</sup> Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* 4 CWL, *supra* note 316, at 262, 265 (emphasis added).

<sup>318</sup> Abraham Lincoln, Proclamation Calling Militia and Convening Congress (Apr. 15, 1861), *reprinted in* 4 CWL, *supra* note 316, at 331, 332; *cf.* Act of July 29., 1861, 12. Stat. 281 (granting the President power to call forth the militia to suppress “unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States”).

<sup>319</sup> Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *reprinted in* 4 CWL, *supra* note 316, at 421, 427, 433 (emphasis added).

<sup>320</sup> *Id.* at 427 (emphasis added).

<sup>321</sup> *Id.* at 429-31 (emphasis added).

Vallandigham, a notorious racist and prominent “Copperhead” pro-South, anti-Union Northerner, who had made a public speech vehemently condemning the Emancipation Proclamation and the Union’s war effort.<sup>322</sup>

Lincoln distinguished ordinary law enforcement arrests from detentions in cases of *rebellion*. Wrote Lincoln: “Ours is a case of *Rebellion*—so called by the resolutions before me—in fact, a clear, flagrant, and gigantic case of *Rebellion*.”<sup>323</sup> And that, Lincoln concluded, was what allowed suspension of habeas corpus.<sup>324</sup> In the course of his argument, Lincoln described rebellion as “sudden and extensive uprisings against the government.”<sup>325</sup> This description supports our working definition: Rebellion is an “uprising.” It is something more than mere protest. It is, often, “sudden.” It is “extensive.” It is directed “against the government.” *Rebellion* is something more than ordinary law violation and that is why it is treated differently by the Constitution.

How did Vallandigham’s actions associate him with the rebellion? Lincoln made a forceful case that even pure speech might constitute assistance to rebellion—if it were advocacy producing direct, material effects benefitting the rebel enemy cause, by tangibly harming the military authority engaged in trying to suppress that rebellion. In the Corning Letter, Lincoln wrote that, “under cover of ‘Liberty of speech,’ ‘Liberty of the press,’ and ‘Habeas corpus,’” rebel sympathizers “hoped to keep on foot amongst us a most efficient corps of spies, informers, supplyers, and aiders and abettors of their cause in a thousand ways.”<sup>326</sup> Claims of freedom of speech could *improperly* furnish a shield or cloak for wrongful conduct; they supplied “cover” for, and thus assisted, rebellion and insurrection.

Lincoln expanded these arguments in yet more arresting ways. He suggested that, in some circumstances, a person’s refusal to speak out *against* rebellion might be tacit support *for* such rebellion: a “man who stands by and says nothing, when the peril of his government is discussed, cannot be misunderstood. If not hindered, he is sure to help the enemy.”<sup>327</sup> He also hinted at regret that he had not earlier arrested prominent oath-breaking officers now “occupying the very highest places in the rebel war service,” such as John Breckinridge, Robert E. Lee, Joseph Johnston, and John Magruder: “I think the time not unlikely to come when I shall be blamed for having

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322 Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), *reprinted in* 4 CWL, *supra* note 316, at 260, 266-69 (“[Mr. Vallandigham’s] arrest was made because he was laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it.”).

323 *Id.* at 264 (emphasis added).

324 *Id.*; *cf.* U.S. CONST. art. I, § 9, cl. 2.

325 Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), *reprinted in* 4 CWL, *supra* note 316, at 260, 265 (emphasis added).

326 *Id.* at 263.

327 *Id.* at 265.

made too few arrests rather than too many.”<sup>328</sup> Lincoln’s position seems clear, if perhaps a bit unsettling: claims of freedom of speech did *not* invariably prevail over the imperative constitutional necessity of suppressing rebellion; where words fueled insurrection, or thwarted its suppression, or signaled disloyalty, the speaker was aiding the enemy. Such expression was not necessarily privileged.

This is not exactly an expansive conception of First Amendment rights. Lincoln fully recognized the difficulties with his stance. He did not ignore the tension between his conclusions and peacetime free speech principles but argued that the tension could be reconciled.<sup>329</sup> In a colorful metaphor, Lincoln ventured:

I can no more be persuaded that the government can constitutionally take no strong measure in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one. Nor am I able to appreciate the danger, apprehended by the meeting, that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and Habeas corpus, throughout the indefinite peaceful future which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness, as to persist in feeding upon them during the remainder of his healthful life.<sup>330</sup>

Lincoln also stressed a distinction between speech directed at criticism of the government’s political policy—fully protected by the Constitution—and expression more or less directly aimed at harming the military’s recruitment and war effort. If Vallandigham had been arrested merely because he was “damaging the political prospects of the administration” or “the personal interests of the commanding general,” that would be one thing, Lincoln

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<sup>328</sup> *Id.*

<sup>329</sup> In several respects, Lincoln anticipated later judicial free speech doctrines and decisions, such as those (1) distinguishing pure speech from speech linked to prohibited *conduct*; (2) recognizing limits on speech posing a danger of inciting to crime or lawlessness; (3) recognizing “compelling interest” overrides in exceptional circumstances, including for reasons of national security or military secrecy; and (4) finding that government’s motives and purposes for a particular action may matter to its lawfulness. See Paulsen, *Civil War*, *supra* note 279, at 700-01, 700 n.23 (noting how Lincoln anticipated many of the issues and exceptions contemplated by later judicial doctrine concerning the First Amendment’s freedom of speech).

<sup>330</sup> Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), *reprinted in* 4 CWL, *supra* note 316, at 260, 267 “Emetics” referred to a medicine or substance used to induce vomiting.

observed.<sup>331</sup> “[I]f there was no other reason for the arrest, then I concede that the arrest was wrong.”<sup>332</sup> But as Lincoln understood it, the arrest “was made for a very different reason”—that Vallandigham was “laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it.”<sup>333</sup> Vallandigham was, in short, “warring upon the military.”<sup>334</sup> “[H]e who dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a union soldier in battle.”<sup>335</sup> In a famous line, Lincoln asked rhetorically, “Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?”<sup>336</sup> (Desertion was punishable by death, of course.) Lincoln’s answer was no: “I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal a great mercy.”<sup>337</sup>

Lincoln continued:

If I be wrong on this question of constitutional power,” he added, “my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them—in other words, that the constitution is not in its application in all respects the same, in cases of Rebellion or invasion, involving the public Safety, as it is in times of profound peace and public security.<sup>338</sup>

Lincoln thus embraced the view that material assistance to insurrection or rebellion could in some cases take the form of effective advocacy of unlawful conduct that, if engaged in by substantial numbers, would materially advance the rebel cause or harm the military prospects of the Union. The fact that such assistance to rebellion came in the form of words did not furnish any constitutional privilege to such action. Where rebellion threatens public safety or public security, the Constitution permits restriction on advocacy furthering, supporting, or assisting such rebellion.

To be sure, one might well conclude that Lincoln went too far in his arguments in the Corning Letter or in some of his actions during the war. That is an interesting and difficult question—and not our point here. Our

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<sup>331</sup> *Id.* at 266.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 264.

<sup>336</sup> *Id.* at 266.

<sup>337</sup> *Id.* at 266-67.

<sup>338</sup> *Id.* at 267.

point is that Lincoln's view was a prominently expressed contemporaneous understanding—and on the issues of insurrection, rebellion, and complicity, it was consistent with his longstanding and oft-repeated views. This does not directly answer the question whether or to what extent such thinking specifically informed general public understanding of Section Three. But Lincoln's thinking, articulated in such a public context, may well have informed the potential reach of the terms “insurrection or rebellion,” and what constitutes engaging in or aiding such conduct, as those terms came to be employed in Section Three of the Fourteenth Amendment.

At all events, Lincoln made clear and prominent the position that declaring secession, engaging in forcible opposition to the constitutional authority of the Union, and materially assisting others in such conduct *all* constituted forms of support for and participation in “insurrection” or “rebellion.” And this stance continued throughout the war, even as the nation began to look to the war's conclusion and to questions of the post-war status of persons who had participated in that rebellion—questions at the core of Section Three of the Fourteenth Amendment.<sup>339</sup>

b. *Congress*

President Lincoln was not the only public figure grappling with concepts of insurrection and rebellion during the Civil War. Similar themes can be found in the statements and actions of Congress and the Supreme Court.

Start with Congress: Two specific enactments of Congress during the Civil War are especially probative of the understandings of “insurrection” and “rebellion” and of what conduct was publicly understood to constitute having “engaged in” or given assistance to rebellion. First, there is the so-called “Ironclad Oath,” adopted on July 2, 1862 as the oath one must be able to swear in order to hold federal office.<sup>340</sup> Second, there is the “Second Confiscation

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<sup>339</sup> Lincoln's characterization of Southern secession as *rebellion* continued throughout the war. His December 8, 1863 Message to Congress referred to the Confederacy as “the rebellion.” Annual Message to Congress (Dec. 8, 1863), *reprinted in 7 CWL, supra note 316*, at 36, 46-51. In his accompanying offer of amnesty and pardon in the Amnesty Proclamation of December 8, 1863, Lincoln referred, repeatedly, to the “rebellion” that “now exists whereby the loyal State governments of several States have for a long time been subverted,” to “said rebellion and treason,” to “said rebellion,” and to persons who had provided “aid” to the “rebellion” in various forms. Abraham Lincoln, Proclamation of Amnesty and Reconstruction (Dec. 8, 1863), *reprinted in 7 CWL, supra note 316*, at 53, 53-55. Interestingly, Lincoln *excepted* from his offer of forgiveness—in language that would seem to presage the similar terms of Section Three—“all who have left judicial stations under the United States to aid the rebellion” and “all who resigned commissions in the army or navy of the United States, and afterwards aided the rebellion.” *Id.* at 55. Lincoln also left to the respective houses of Congress the exclusive judgment “whether members sent to Congress from any State shall be admitted to seats.” *Id.* at 56.

<sup>340</sup> Act of July 2, 1862, ch. 128, 12 Stat. 502 (codified at 5 U.S.C. § 3331).

Act,” adopted that same month, on July 17, 1862, to authorize legal forfeitures of property and slaves, and also to enforce disqualifications from federal office, by persons who had engaged in specified activities constituting “rebellion or insurrection.”<sup>341</sup> These two enactments, and their implementation to exclude former insurrectionists and rebels from future office, say much about the terms they employed.

### i. The Ironclad Oath

Congress adopted the Ironclad Oath in the thick of the Civil War and it was required of most federal officeholders from 1862 to 1884.<sup>342</sup> The text of the Oath sets forth the types of misconduct regarded as disqualifying an individual from eligibility for federal office because he had been engaged in supporting the rebellion—an inquiry very closely parallel to that contained in Section Three of the Fourteenth Amendment, proposed by Congress just a few years later.

The Ironclad Oath required that prospective officeholders swear or affirm that they *had not done any of several things*. In that sense, it did not function like a traditional oath of office—a promise of future behavior—but much more like a disqualification for past misbehavior.<sup>343</sup> It did indirectly what Section Three was soon to do directly. That makes the Ironclad Oath’s list of never-have-I-evers particularly instructive. Here is the Oath, with its most-relevant-to-Section-Three features and phrases italicized (and with bracketed numbers inserted):

I . . . do solemnly swear (or affirm) that I have never [1] *voluntarily borne arms against* the United States since I have been a citizen thereof; that I have [2] *voluntarily given no aid, countenance, counsel, or encouragement to persons engaged* in armed hostility thereto; that I have [3] *neither sought nor accepted nor*

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<sup>341</sup> Act of July 17, 1862, ch. 195, 12 Stat. 589 (codified at 18 U.S.C. § 2383); *id.*, ch. 197, 12 Stat. 627.

<sup>342</sup> See 12 Stat. 502 (1862); Act of May 13, 1884, ch. 46, 23 Stat. 21 (current version at 5 U.S.C. § 3331) (amending the Ironclad Oath). There was an important exception. In 1868, Congress provided that anybody who had received amnesty from two-thirds of each house of Congress under Section Three was exempt from the Ironclad Oath and need only swear future loyalty, and in 1871 it added that anybody “who is not rendered ineligible to office by the provisions of the fourteenth amendment to the Constitution” yet would otherwise “not be able on account of his participation in the late rebellion to take” the Ironclad Oath, could take the forward-looking oath instead. Act of July 11, 1868, ch. 139, 15 Stat. 85; Act of Feb. 15, 1871, ch. 53, 16 Stat. 412. These two provisions effectively equated the Ironclad Oath to Section Three from 1871 on.

<sup>343</sup> For this reason, Lincoln famously wrote: “On principle I dislike an oath which requires a man to swear he *has* not done wrong. It rejects the Christian principle of forgiveness on terms of repentance. I think it is enough if the man does no wrong *hereafter*.” Endorsement by Abraham Lincoln in Letter from Richard M. Edwards, Fourth Tennessee Cavalry, to Edwin M. Stanton, Sec’y of War (Feb. 5, 1864), *reprinted in* 7 CWL, *supra* note 316, at 169, 169.

*attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have [4] not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto.*<sup>344</sup>

While not using the words *insurrection* or *rebellion*, the Ironclad Oath's list of never-have-I-ever's would seem strongly suggestive of how Section Three's triggering language likely would have been understood in public usage at the time. The Ironclad Oath is not a *definition* of Section Three's constitutional terms. But it would appear an apt descriptive *specification* of the kinds of misconduct included within those terms. Under the Oath, disqualifying behavior included: (1) fighting against the United States; (2) aiding or encouraging such armed hostility; (3) accepting office under a hostile authority (or "pretended authority"); and—a highly evocative phrase—(4) "yield[ing]" one's "voluntary support" to "*any pretended government, authority, power or constitution . . . hostile or inimical*" to the United States.

The content of this oath's requirement establishes a useful, historically prominent marker for the scope of Section Three: what the Ironclad Oath understood to be disqualifying for federal office, Section Three likely embraced as constitutionally disqualifying conduct for the far broader sweep of offices to which it extended.<sup>345</sup>

## ii. The Second Confiscation Act

Barely more than two weeks after adopting the Ironclad Oath, the Civil War Congress enacted what is popularly called the "Second Confiscation Act."<sup>346</sup> Its full title spoke explicitly in terms of insurrection and rebellion: "*An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes.*"<sup>347</sup>

This Second Confiscation Act was a very prominent piece of legislation. It imposed sweeping penalties, forfeitures, and disqualifications on anybody who had engaged in or assisted the rebellion.<sup>348</sup> Extensively and vigorously debated in Congress, the Second Confiscation Act was much discussed in the press and in public discourse, objected to by many on constitutional grounds,

<sup>344</sup> Act of July 2, 1862, ch. 128, 12 Stat. 502 (emphasis added).

<sup>345</sup> The extensive overlap between the meaning of the Ironclad Oath and the Section Three disqualification is confirmed by Congress's own interpretation and application of the Oath to its own members, during and after the enactment of Section Three. These applications are detailed in *infra* Section IV.A.5.b.

<sup>346</sup> Second Confiscation Act, ch. 145, 12 Stat. 589 (enacted July 17, 1862).

<sup>347</sup> *Id.* An "explanatory" joint resolution amended or clarified the Act. See Joint Resolution of July 17, 1862, 12 Stat. 627.

<sup>348</sup> An earlier act had provided for forfeiture more specifically of property or slaves actually used in service of rebellion. Act of Aug. 6, 1861, ch. 60, 12 Stat. 319.

and nearly vetoed by President Lincoln.<sup>349</sup> Enactment of the Second Confiscation Act gave rise to very public pressure on President Lincoln to take aggressive action against slavery in rebel states—pressure that helped spur Lincoln to issue his Emancipation Proclamation as an executive military order.<sup>350</sup> The Second Confiscation Act was a big deal.

The Act itself was a complicated and somewhat confusing hodgepodge of distinct provisions, combining property confiscation, emancipation, a new federal crime, and disqualification from office. But the terms it used are especially evocative, visiting legal consequences on persons who “engage[d] in,” “incite[d],” “set on foot,” or “assist[ed]” “rebellion” or “insurrection” or who had “given aid or comfort” to rebellion or done acts “aiding and abetting” rebellion.<sup>351</sup> The Act is practically a glossary of the terms used in Section Three of the Fourteenth Amendment proposed by Congress just four years later.

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349 See David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1185-95 (2006). Among many noteworthy twists and turns in the road to enactment, President Lincoln came close to vetoing the bill, preparing a veto message with his objections and signing the bill only after Congress passed an “explanatory” joint resolution (which Lincoln signed together with the bill). *Id.* at 1194. Lincoln nonetheless appended his original draft veto message setting forth his objections. *Id.* For discussion of the constitutional objections of Lincoln and others to various aspects of the bill, and his unusual course of action in signing it but nonetheless appending his objections, see *id.* at 1193-94. See also BURRUS M. CARNAHAN, ACT OF JUSTICE: LINCOLN’S EMANCIPATION PROCLAMATION AND THE LAW OF WAR 105-06 (2007) (noting Lincoln’s initial concern that the Act would violate Article III’s limitations on the punishment for treason and the objections of others that the Act was a bill of attainder); ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 215-16 (2010) (describing Lincoln’s constitutional objections and negotiations with members of Congress before signing the Act and sending his draft veto message). For Lincoln’s July 17, 1862 message to Congress, detailing his objections, see 7 COMPLETE WORKS OF ABRAHAM LINCOLN 280-86 (John G. Nicolay & John Hay eds., new & enl. ed. 1894).

350 A month after the Act had been adopted, Horace Greeley published a scathing editorial titled *The Prayer of Twenty Millions*, in which he demanded that Lincoln “EXECUTE THE LAWS” faithfully with specific reference to the Second Confiscation Act. Horace Greeley, Editorial, *The Prayer of Twenty Millions*, N.Y. DAILY TRIB., Aug. 20, 1862, at 4. Greeley condemned Lincoln’s “mistaken deference to Rebel Slavery” and his failure to rebuke his generals for having “habitually disregarded” the Confiscation Act. *Id.* Lincoln replied to Greeley, equally prominently, within days, in a famous public letter dated August 22, 1862, published in a rival newspaper and “widely reprinted,” defending his course of action. See HOLZER, *supra* note 311, at 400-01; Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), reprinted in 8 COMPLETE WORKS OF ABRAHAM LINCOLN, *supra* note 349, at 15-16. One month later, Lincoln issued his Preliminary Emancipation Proclamation of September 22, 1862, in which he noted and quoted provisions of the Second Confiscation Act (without invoking the statute as actual authority for his proclamation). See Preliminary Emancipation Proclamation (Sept. 22, 1862), reprinted in 8 COMPLETE WORKS OF ABRAHAM LINCOLN, *supra* note 349, at 36-41 (stating that “attention is hereby called to” provisions of the Act but relying for authority on his powers as executive and military Commander in Chief); see also FONER, *supra* note 349, at 215 (“[T]he Second Confiscation Act embodied a major shift in national policy.”).

351 Act of July 17, 1862, ch. 195, §§ 2, 6-7, 12 Stat. 590-91 (emphasis added).

Specifically: Section Two of the Act made it a new crime, distinct from treason, to “*incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof*” or to “*give aid or comfort thereto*” or to “*engage in, or give aid and comfort to,*” any “*existing rebellion or insurrection.*”<sup>352</sup> It is worth pausing to parse the linguistic resemblances to Section Three, and the ways in which like terms are used and explained. Following Lincoln, secession and civil war are equated with “rebellion or insurrection.”<sup>353</sup> Those terms are described as involving acts “against the authority of the United States, or the laws thereof” (a formulation closely conforming to our working definitions).<sup>354</sup> Section Two imposes criminal liability on persons who “incite” such acts; who “set on foot” such acts; who “assist” such acts; who in any other way “engage in” such conduct; or who “give aid and comfort to” such conduct.<sup>355</sup> All of these terms have close parallels in Section Three of the Fourteenth Amendment.

Section Three of the Act then imposed a sweeping *disqualification from future officeholding*—a kind of proto-Section Three of the Fourteenth Amendment: “[E]very person guilty of either of the offences described in this act shall be forever incapable and disqualified to hold any office under the United States.”<sup>356</sup> Section Five directed the President to seize rebel property belonging to a long list of confederate officers *plus* anyone in a loyal state who “shall hereafter *assist and give aid and comfort to* such rebellion.”<sup>357</sup> Officeholding in a rebel government or military was *per se* blameworthy participation; general giving of assistance or aid or comfort also qualified as participation in rebellion. Section Six further authorized seizure of the property of any person not already mentioned who, “being *engaged in armed rebellion* against the government of the United States, or *aiding* or abetting such *rebellion,*” and, after sixty days’ notice issued by the President, did not “cease to *aid, countenance, and abet such rebellion,* and return to his allegiance to the United States.”<sup>358</sup> Sections Seven and Eight provided for in rem

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<sup>352</sup> *Id.* § 2, at 590 (emphasis added). Section Two provided penalties for conviction, which included confiscation of slaves. A modified version of this provision remains a crime today, and continues to incorporate the Confiscation Act’s disqualification from *federal* office, as well. See 18 U.S.C. § 2383 (“Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.”). Needless to say, a prosecution under § 2383 of Title 18 is neither a prerequisite to nor preclusive of the self-executing application of Section Three of the Constitution.

<sup>353</sup> *Id.* § 6, at 590.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* § 3.

<sup>357</sup> *Id.* § 5 (emphasis added).

<sup>358</sup> *Id.* § 6, at 591 (emphasis added).

proceedings against property “found to have belonged to a person *engaged in rebellion*, or who has given *aid or comfort thereto*,” in which case it “shall be condemned as *enemies’* property.”<sup>359</sup> And Section Nine famously emancipated slaves of persons “who shall hereafter be *engaged in rebellion*” against the Union or who “shall *in any way give aid or comfort thereto*.”<sup>360</sup> Throughout these sections, one can see the recurrent use of terms and concepts, and synonyms for such terms, that would reappear in Section Three of the Fourteenth Amendment: “engaged in,” “rebellion,” “aid or comfort,” “abet,” “countenance,” “enemies.”

Unlike the Ironclad Oath, the Second Confiscation Act did not give rise to many opportunities for immediate application and further interpretation. In part, this was simply due to the exigencies and realities of Civil War at the time.<sup>361</sup> For example, the civil forfeiture provisions contemplated *in rem* judicial proceedings against persons in the district where property was located.<sup>362</sup> At the time, such property was often located in areas of rebel control. Often, the federal courts were not even functioning in those areas.<sup>363</sup> Similarly, as a practical matter, criminal prosecutions of rebels for treason and insurrection had to await Union military success. (And after success came, President Andrew Johnson ultimately pardoned a great many offenders.<sup>364</sup>) The Lincoln administration, focused on other matters, showed little interest in bringing legal actions to enforce the Act’s specific policies. The administration, according to one scholar, “chose not to implement the law vigorously.”<sup>365</sup> Attorney General Bates “exerted no more than a minimal effort

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359 *Id.* §§ 7–8 (emphasis added).

360 *Id.* § 9 (emphasis added).

361 See SILVANA R. SIDDALI, FROM PROPERTY TO PERSON: SLAVERY AND THE CONFISCATION ACTS, 1861-1862, at 238 (2005) (“[I]t would be simply impossible to execute the law without ‘marching an army into the enemy’s country . . . .’”) (quoting Cong. Globe, 37th Cong., 2d Sess. 1858 (1862) (statement of Sen. Orville H. Browning)).

362 See Act of July 17, 1862, ch. 195, § 7, 12 Stat. 591.

363 See MCPHERSON, *supra* note 279, at 500 (noting confusing aspects of the Second Confiscation Act and the requirement of “*in rem* proceedings by district courts that were of course not functioning in the rebellious states”); cf. FONER, *supra* note 349, at 215 (“For most property, [the Act] established a cumbersome judicial process that helps to explain why little land was actually seized and sold under its provisions.”); SIDDALI, *supra* note 361, at 238 (“The confiscation bill that finally emerged was neither sweeping nor enforceable . . . . [But] if the law had not been hobbled by its own internal inconsistencies, it might have affected the lives and property of a large majority of southerners.”).

364 See ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 141-52 (1960) (summarizing Johnson’s four pardon proclamations, which gradually expanded in scope until, in 1868, he granted amnesty for treason to all).

365 JOHN SYRETT, THE CIVIL WAR CONFISCATION ACTS: FAILING TO RECONSTRUCT THE SOUTH 55 (2005).

to make the first and second confiscation acts work.”<sup>366</sup> And the Act’s section authorizing limited military emancipation section was rapidly overtaken—superseded in practical effect—by President Lincoln’s far more comprehensive Emancipation Proclamation, issued pursuant to his constitutional Commander-in-Chief power.

But in some ways, the lack of enforcement cases is beside our point here, which concerns the Act’s prominence in national discussions and its pervasive use of terms, phrases, and concepts (i.e., “rebellion,” “insurrection,” “engage in,” and “aid or comfort”) that would reappear in only slightly different form in Section Three of the Fourteenth Amendment. Like the Ironclad Oath, the Second Confiscation Act employed terminology nearly identical to that employed in Section Three of the Fourteenth Amendment. The usage of the terms in this landmark legislation, we think, helps explicate the meaning, in public legal context, of the language in the amendment. In the context of 1860s public legal usage, engaging in or giving aid or comfort to rebellion and insurrection extended to a broad range of activity advancing or furthering efforts to unlawfully upend the lawful operation of the U.S. constitutional regime. This strongly supports the conclusion that Section Three’s terms can fairly be read quite expansively, as embracing a broad range of conduct directed against the authority of government under the Constitution.

c. *The Supreme Court’s Decision in The Prize Cases*

The most important constitutional decision of the U.S. Supreme Court during the Civil War was *The Prize Cases*.<sup>367</sup> There, the majority upheld the constitutionality of Lincoln’s unilateral military order, made very early in the Civil War, imposing a blockade on Southern ports.<sup>368</sup> In a truly landmark decision, the Supreme Court held that the President’s war powers (including the power to impose a blockade) were triggered immediately, as soon as the South’s rebellion took the form of organized military resistance to the authority of the U.S. government.<sup>369</sup> The President’s power to wage civil war against rebel forces derived from his delegated statutory power to employ force to suppress *rebellion*, the Court held.<sup>370</sup> A congressional declaration of war was neither a prerequisite nor legally appropriate for this type of use of force: “This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections” but

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<sup>366</sup> *Id.* at 72; see JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 288-92 (1926) (describing minimal enforcement of the Second Confiscation Act).

<sup>367</sup> 67 U.S. (2 Black) 635 (1863).

<sup>368</sup> *Id.* at 636.

<sup>369</sup> See *id.* at 666-67.

<sup>370</sup> See *id.* at 647.

“sprung forth suddenly . . . in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name.”<sup>371</sup>

The Court’s decision in *The Prize Cases* is today regarded as the leading judicial exposition of the Constitution’s allocation of war powers.<sup>372</sup> At the time, the case had other hugely consequential implications. The principles set forth in the decision essentially endorsed in advance (but of course without addressing the question directly) Lincoln’s constitutional justification for the Emancipation Proclamation, which he had issued earlier that year.<sup>373</sup> The decision of *The Prize Cases* was a very big deal indeed.

Of special interest for our purposes is the Court’s usage and explanation—in a highly prominent legal context—of the terms *insurrection* and *rebellion*, and their relationship to war and the war powers of the national government. “*Insurrection* against a government may or may not culminate in an organized *rebellion*, but a civil war always begins by *insurrection* against the lawful authority of the Government,” the majority said.<sup>374</sup> A civil war “becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on.”<sup>375</sup> Where a rebellion has come to possess certain military characteristics, the “party in rebellion” might come to be treated as a belligerent for law-of-war purposes, even though a domestic rebellion stands on different constitutional legal ground than war with a foreign nation. “It is not the less a civil war, with belligerent parties in hostile array, because it may be called an ‘*insurrection*’ by one side, and the insurgents be considered as rebels or traitors.”<sup>376</sup>

In a nutshell: insurrection or rebellion were forms of active resistance to the lawful authority of the government. An *insurrection* might be something short of outright *rebellion*. But an insurrection against government authority sometimes grows into full-on “rebellion.” A *rebellion*, in turn, need not take the form of civil war in order to be a rebellion. But sometimes it does. At all events, *rebellion* seems its own distinct, more general legal concept of repudiation or attempted overthrow of the lawful constitutional regime by unlawful means.

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371 *Id.* at 668-69.

372 See generally, e.g., Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 177-80 (2004).

373 See Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, *supra* 315, at 814-23.

374 *The Prize Cases*, 67 U.S. (2 Black) at 666 (emphasis added).

375 *Id.*

376 *Id.* at 669 (emphasis added).

*The Prize Cases* also held that persons engaged in insurrection or rebellion could be treated as “enemies” (as well as traitors) for legal purposes.<sup>377</sup> Further, the war power, such as imposition of a blockade, could lawfully affect the legal property rights of persons engaged in “commerce” that “supplies” rebels or insurrectionists—and could do so irrespective of the supposed loyalties of the property owner.<sup>378</sup> Even “neutral” powers’ shipping could be seized when it violated a blockade: “Whether property be liable to capture as enemies’ property does not in any manner depend on the personal allegiance of the owner. It is the illegal traffic that stamps it as “enemies’ property.”<sup>379</sup>

*The Prize Cases’* treatment of the concepts of insurrection and rebellion, of who constituted “enemies,” and of what actions constituted support for rebellion would have been very much part of the legal culture of the day. It provides important legal background as to how these terms would have been understood when Section Three of the Fourteenth Amendment was drafted just a few years later. *Insurrection* and *rebellion* involve varying degrees of concerted resistance to “the lawful authority of the Government,” with insurrection being the arguably somewhat lesser form and rebellion the somewhat greater. A rebellion or insurrection need not involve acts tantamount to levying war. (War is *sometimes* a feature of rebellion but does not define it.) The Civil War was an *outgrowth* of insurrection or rebellion. But the fundamental act of rebellion remains the attempt to displace the lawful authority of government by unlawful means. And those who give material assistance to the enemy may also suffer legal consequences.

We find the overall evidence of prominent 1860s political and legal usage of the same concepts and language as would soon be employed by Section Three—“insurrection,” “rebellion,” and what it meant to “engage in” it or provide “aid or comfort” to enemies—highly probative of Section Three’s original public meaning. President Lincoln, Congress, and the Supreme Court used these terms in connection with secession, forcible resistance to the legal authority of the Constitution, and participation to varying degrees in efforts to overthrow, subvert, or undermine the authority of lawful

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<sup>377</sup> *Id.* at 674.

<sup>378</sup> *Id.* at 673-74.

<sup>379</sup> *Id.* at 674 (quotations omitted). That said, the Court also cautioned that “enemies’ property” was “a technical phrase peculiar to prize courts, and depends upon principles of public policy, as distinguished from the common law.” *Id.* at 674. The point that, in a military context, property could be treated as “enemies’ property” irrespective of the allegiance of the owner was important to the lawfulness of the Emancipation Proclamation. Even though Lincoln’s proclamation purported to free the slaves of *all* persons in rebel-controlled territory (including slaves held by persons claiming to be loyal to the Union), such “property” constituted a resource assisting or supplying the rebellion and thus could be declared seized, confiscated, and liberated as a matter of the military law of war. See Paulsen, *supra* 315, at 815-16. See generally JOHN FABIAN WITT, LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012).

government. These usages were public, prominent, *legal*, and essentially undisputed within the Union. While the specific circumstances of secession and civil war gave rise to these formulations, they did not define or limit the terms' meanings, which were more general. Secession, and civil war, were *species* of insurrection and rebellion—organized, group resistance to the authority of government to execute the laws and attempts to substitute an unlawful legal regime for the lawful, constitutional one. But insurrection and rebellion were the broader categories. It is hard to avoid the conclusion that these 1860s Civil War usages of terms carried over into the meaning of Section Three.

## 5. Other Extant Statutory Sources and Notorious Examples

### a. *The Insurrection Acts (and Insurrections Generally)*

What about the Insurrection Acts themselves—the statutes that comprised the statutory authority supporting Lincoln's use of military force to suppress secession? These statutes implemented Congress's power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," as well as its other war powers over the army and navy.<sup>380</sup> The central statute was enacted in 1795 (superseding a similar enactment in 1792) and was amended in 1807 and 1861. These statutes—the conduct they were understood to reach, the forms and degree of opposition to government authority that were believed to trigger the statutes' application, and the circumstances in which they had been invoked and applied in the past—also would have been part of the background understanding of the term "insurrection" as it came to be incorporated into Section Three.

The 1795 Act explicitly recited that it was enacted in part to carry into execution the power to "suppress insurrections."<sup>381</sup> But it also applied to repel invasions and to enforce federal law.<sup>382</sup> Together, these were the three circumstances where Congress had the power to provide for calling out the militia.<sup>383</sup> Section One of the Act allowed the President to call forth the militia "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe," as well as, upon request of state authorities, "in case of an insurrection in any state against the

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<sup>380</sup> U.S. CONST. art. I, § 8, cl. 15.

<sup>381</sup> Insurrection Act, ch. 36, 1 Stat. 424 (1795).

<sup>382</sup> *Id.*

<sup>383</sup> See U.S. CONST. art. I, § 8, cl. 15 ("Congress shall have Power . . . to execute the Laws of the Union, suppress Insurrections and repel Invasions.").

government thereof.”<sup>384</sup> Section Two allowed the President to call forth the militia “whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act.”<sup>385</sup> Section Two encompasses insurrections against the United States.<sup>386</sup> (Section One specifically deals only with insurrections against a state government.)

In 1807, Congress supplemented this power with the power to call forth the army and navy in similar circumstances:

[I]n all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States as shall be judged necessary . . . .<sup>387</sup>

The 1807 act thus carried forward and repeated the 1795 act’s understanding of insurrection.<sup>388</sup>

Finally, on July 29, 1861, Congress amended the trigger again to specifically describe “*rebellion*.” It allowed the President to call forth the militia:

[W]henever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States . . . .<sup>389</sup>

The various versions of the Insurrection Act illustrate a common theme: insurrection is more than ordinary law violation. It entails “combinations” or “assemblages,” acting together, to “oppose[]” or “obstruct[]” the ability of government to “execut[e]” the law, in numbers “too powerful” to be suppressed by the usual means of law enforcement.<sup>390</sup> Moreover, several

<sup>384</sup> Insurrection Act, ch. 36, § 1, 1 Stat. 424 (1795).

<sup>385</sup> *Id.* § 3.

<sup>386</sup> *Id.* That said, because Section Two is supported by *both* Congress’s power to “suppress Insurrections” *and* its power “to execute the Laws of the Union,” U.S. CONST. art. I, § 8, cl. 15., it could encompass instances of law enforcement that do not rise to the level of a constitutional “insurrection.”

<sup>387</sup> Act of Mar. 3, 1807, ch. 39, 2 Stat. 443.

<sup>388</sup> *Id.*

<sup>389</sup> Act of July 29, 1861, ch. 25, 12 Stat. 281.

<sup>390</sup> *Id.*; Insurrection Act, § 1, ch. 36, 1 Stat. 424 (1795). Myles Lynch has written that there can exist no insurrection within the meaning of the Insurrection Acts unless the President *proclaims* that

famous instances in which this statutory authority had been (or might have been) invoked provide additional informative context for understanding “insurrection” or “rebellion.” Consider just a few.

The “Whiskey Rebellion” was one famous such instance. In 1794, acting under the 1792 predecessor statute, President George Washington personally led militia forces into western Pennsylvania to suppress a large uprising against the government spurred by resistance to the enactment of a federal tax on distilled spirits. Notably, the Whiskey Rebellion involved armed mobs, organized and employed for the purposes of intimidating and threatening federal officers, keeping them from performing their duties under the law, and preventing others from assuming federal office (or inducing them to renounce their authority).<sup>391</sup>

We believe the Whiskey Rebellion would have been regarded in the nineteenth century as a classic illustration of what was meant by the terms insurrection and rebellion.<sup>392</sup> Indeed, by the time of the drafting of Section Three, it seems to have been regularly referred to in precisely those terms.<sup>393</sup>

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an insurrection exists and, further, that as a consequence, there can exist no insurrection or rebellion within the meaning of Section Three of the Fourteenth Amendment unless the President proclaims that such an insurrection exists. Lynch, *supra* note 5, at 168, 214-15. This seems plainly wrong. If the Insurrection Act defines insurrection, it is defined as concerted and powerful obstruction of the execution of the laws by government. It is no part of this definition that an insurrection exists only if the President declares it to exist. The President’s proclamation is a statutory prerequisite to the use of military force, *not* part of the definition of insurrection. The President can use force if he proclaims that there is an insurrection. But it is not an insurrection only when he proclaims it to be one.

<sup>391</sup> See generally STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 461-74 (1993) (detailing actions of organized resistance, intimidation, and threats preventing federal officials from performing their duties—including such acts as armed mobs surrounding officials’ homes; tarring and feathering, whipping, and kidnapping of federal officials; and coercing officials to repudiate federal law enforcement authority); see also RON CHERNOW, *ALEXANDER HAMILTON* 468-78 (2004) (similar); ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878*, at 43-68 (1988) (documenting the resistance and military response).

<sup>392</sup> To be sure, one scholar of the Acts suggests, “It may have been dubious whether the actions of the Whiskey Rebellion farmers truly rose to the level of insurrection,” and that Washington may have treated it as law-obstruction rather than insurrection. Vladeck, *supra* note 372, at 161 n.46; see also COAKLEY, *supra* note 391, at 67 (suggesting that to “characterize[] the . . . affair as a ‘riot’ and the participants as ‘rioters’” is “far closer to the truth”). But later sources called it at least an insurrection, which goes to show that an “insurrection” in the legal sense did not necessarily have to rise to the level of an attempt to take over or displace the government. See *infra* note 393.

<sup>393</sup> For examples of historical sources referring to the Whiskey Rebellion as an insurrection see FRANCIS WHARTON, *Trials of the Western Insurgents*, in *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 102 (Philadelphia, Carey & Hart 1849); Townsend Ward, *The Insurrection of the Year 1794, in the Western Counties of Pennsylvania*, in *6 MEMOIRS OF THE HISTORICAL SOCIETY OF PENNSYLVANIA* 117 (Philadelphia, J.B. Lippincott 1858); H.M. BRACKENRIDGE, *HISTORY OF THE WESTERN INSURRECTION IN WESTERN PENNSYLVANIA, COMMONLY CALLED THE WHISKEY INSURRECTION. 1794*. (Pittsburgh, W.S. Haven, 1859).

In commonplace usage, as well as in political, and legal discourse, the Whiskey Rebellion was a familiar illustration of an “insurrection” or “rebellion.”

“Fries Rebellion,” in 1799, was another well-known anti-tax revolt, this time in *eastern* Pennsylvania.<sup>394</sup> President John Adams invoked the 1795 Act to suppress the “insurrection,” as he called it,<sup>395</sup> which had involved threats, intimidation, and violence directed at federal tax assessors by organized bands of persons designed to prevent the assessors from performing their duties, and further such acts directed against the ability of the government to arrest tax resisters.<sup>396</sup> In at least one instance, armed opponents of the government successfully freed prisoners from federal custody.<sup>397</sup> The Adams administration’s suppression of the insurrection led to widely publicized treason prosecutions of leaders and instigators of the unlawful resistance, including John Fries.<sup>398</sup> As with the Whiskey Rebellion, Fries Rebellion was characterized by concerted acts of forcible interference with federal officials’ ability to perform their duties under law.<sup>399</sup>

Nat Turner’s Rebellion, a violent slave revolt in 1831, did not lead to a presidential invocation of the Insurrection Act.<sup>400</sup> But it surely would have been a classic illustration of at least an “insurrection” and perhaps even a “rebellion”—a concerted uprising seeking forcibly to overturn the legal order and thwart government’s ability to execute the law. A published report of Turner’s own account called it both an insurrection,<sup>401</sup> and in one instance, an

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<sup>394</sup> See generally COAKLEY, *supra* note 391, at 69-77.

<sup>395</sup> John Adams, *Proclamation Concerning the Insurrection in Pennsylvania*, in 9 THE WORKS OF JOHN ADAMS 174, 175 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1854).

<sup>396</sup> COAKLEY, *supra* note 391, at 70-71.

<sup>397</sup> *Id.* at 71.

<sup>398</sup> These prosecutions also occasioned a widely-cited jury charge from Circuit Justice Chase, in which he repeatedly discussed “insurrection,” describing it as a “rising of any body of the people” and arguing that it qualified as treason because “an insurrection to resist or prevent, by force, the execution of any statute of the United States, has a direct tendency to dissolve all the bands of society, to destroy all order and all laws, and also all security for the lives, liberties and property of the citizens of the United States.” Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800); see also Ward, *supra* note 393, at 458.

<sup>399</sup> And, as with the Whiskey Rebellion, these events show that an “insurrection” in the legal sense did not necessarily have to rise to the level of an attempt to take over or displace the government. See also ELKINS & MCKITRICK, *supra* note 391, at 696-700 (questioning “whether the circumstances really called for military force of any kind”).

<sup>400</sup> Federal troops were used to suppress this and other slave rebellions, but “without following the legal procedures laid down in the statutes of 1795 and 1807.” COAKLEY, *supra* note 391, at 92-94. Coakley suggests that this failure to go through the Insurrection Acts reflected “the universal dread of slave revolt[s]” at the time and the fact that “[t]he slaves had no political constituency.” *Id.* at 94.

<sup>401</sup> See THOMAS R. GRAY, THE CONFESSIONS OF NAT TURNER, THE LEADER OF THE LATE INSURRECTION IN SOUTHAMPTON, V.A. 3, 5, 21-22 (1832) (calling it an “insurrection”); see also Thomas Wentworth Higginson, *Nat Turner’s Insurrection*, 8 ATL. MONTHLY 173, 184-86 (1861) (same).

“open rebellion.”<sup>402</sup> This example, too, likely would have formed part of the background understanding of the terms insurrection or rebellion at the time they were employed in Section Three.

More broadly, slavery and anti-slavery produced other prominent incidents that would have been classed as small or large insurrections against government—instances that went beyond individual instances of legal disobedience, or of resistance to the laws themselves, and rose to the level of active, concerted, unlawful resistance to the *authority* of government to execute the laws. Specifically, revolt against the Fugitive Slave Act of 1850 sometimes took the form of slave liberation in open defiance of government authority. For example, in Boston in 1850 and 1851, a local vigilance committee invoked “the ‘higher law’ doctrine” to openly harbor fugitive slaves to the point that President Millard Fillmore “threatened to send in federal troops.”<sup>403</sup> In Christiana, Pennsylvania in 1851, a Quaker community took up arms (!) to defend fugitive slaves, shooting several slaveowners who had arrived from nearby Maryland.<sup>404</sup> This was denounced as an “act of insurrection,” and this time President Fillmore did call out federal troops.<sup>405</sup> In Wisconsin in 1859, resistance to federal authority became so widespread as to prefigure the coming of the Civil War.<sup>406</sup> And of course John Brown’s fateful raid on Harper’s Ferry in 1859 was an explicit act of insurrection and rebellion: a quixotic and ill-prepared attempt to foment a massive slave insurrection and to overthrow the power of proslavery governments in the South.<sup>407</sup> These rebels and insurrectionists were fighting *deeply unjust* laws, but there is no question that they committed many acts of *insurrection*, nonetheless. Rebellion for a good cause is still rebellion.

Another prominently identified insurrection or rebellion would have been Dorr’s Rebellion, in Rhode Island, in 1841–1842 which led to the Supreme

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402 See GRAY, *supra* note 401, at 3 (“The late *insurrection* . . . is the first instance in our history of an open *rebellion* of the slaves . . .”) (emphasis added).

403 MCPHERSON, *supra* note 279, at 81–84; cf. COAKLEY, *supra* note 391, at 130–31 (noting the Senate debate about whether this disturbance in Boston was sufficiently great to trigger the insurrection acts).

404 See generally THOMAS P. SLAUGHTER, BLOODY DAWN: THE CHRISTIANA RIOT AND RACIAL VIOLENCE IN THE ANTEBELLUM NORTH (1991).

405 MCPHERSON, *supra* note 279, at 84–85; cf. SLAUGHTER, *supra* note 404, at ix (“The line between riot and rebellion was shifting during the antebellum period.”).

406 See H. ROBERT BAKER, THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR, at xi (2006) (describing resistance, in the mid-to-late 1850s, in Wisconsin to federal legal authority to execute the Fugitive Slave Act).

407 MCPHERSON, *supra* note 279, at 202–08. Federal troops helped suppress this insurrection and rebellion too. See COAKLEY, *supra* note 391, at 193 (“This intervention was, as in the case of Nat Turner’s Rebellion, an emergency measure undertaken without the usual formalities.”).

Court's 1849 decision in *Luther v. Borden*.<sup>408</sup> There, a cabal claiming to constitute the new, lawful government of Rhode Island engaged in forcible resistance to and sought to overturn the authority of the prior, lawful state government (the "charter" government that traced its authority to Rhode Island's original colonial charter).<sup>409</sup> The federal government did not invoke the Insurrection Act to intervene, but it well might have. When the Supreme Court ultimately adjudicated the case—through the vehicle of a trespass suit by a member of one faction, against members of the other—the Court held that the question of which government constituted the lawful government of the state was a political question committed to the judgment of Congress and the President and that the judiciary lacked authority to interfere with the political branches' actions (and inactions), which had tacitly supported the charter government.<sup>410</sup> The practical result of the decision—relevant to our inquiry—was that the losing side in the struggle (the faction headed by Mr. Dorr) legally could be treated by the prevailing side (the charter government) as having engaged in "insurrection" against the rightful state government. The Court noted, and seemingly accepted, the charter government's characterization of plaintiff and others having "assembled in arms . . . for the purpose of overthrowing the government by military force,"<sup>411</sup> and as having attempted "to assert the authority of [the Dorr] government by force,"<sup>412</sup> as amounting to having "engaged in the insurrection."<sup>413</sup> The Court also referred to the government's actions as having been designed to suppress that "insurrection."<sup>414</sup> The Court appeared to equate with "insurrection" the Dorr group's attempts to displace or supersede the existing government and forcibly assert its own claimed authority as a replacement.

Finally, several notable invocations of the Insurrection Act occurred during the period of Reconstruction during the presidency of Ulysses S. Grant.<sup>415</sup> While these events occurred *after* ratification of the Fourteenth Amendment (and thus could not have formed any part of the subjective understanding of the drafters and ratifiers of the meaning of Section Three), they nonetheless deserve mention as roughly contemporaneous evidence of the objective meaning of "insurrection." In South Carolina in 1871, Grant twice invoked the Insurrection Act (as well as suspending habeas corpus,

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<sup>408</sup> *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). On Dorr's Rebellion generally and the federal response, see COAKLEY, *supra* note 391, at 119-27.

<sup>409</sup> *Luther*, 48 U.S. (7 How.) at 4, 34.

<sup>410</sup> *See id.* at 34, 42-44.

<sup>411</sup> *Id.* at 34-37.

<sup>412</sup> *Id.* at 37.

<sup>413</sup> *Id.* at 46.

<sup>414</sup> *Id.* at 45.

<sup>415</sup> *See* The Ku Klux Klan Act of 1871, 17 Stat. 13, 14-15, §§ 3-4 (codified as amended at 10 U.S.C. §§ 253-254).

among other actions) to secure order in dealing with the Ku Klux Klan.<sup>416</sup> In Louisiana, in 1872, a contested gubernatorial election spawned efforts by white supremacists to overthrow the elected pro-Reconstruction Republican government, culminating in the infamous “Colfax Massacre” of April 13, 1873, in which a white mob attacked and massacred an estimated 150 black citizens who were defending a courthouse in Colfax, Louisiana and, more broadly, the Reconstruction Republican government.<sup>417</sup> President Grant invoked the Insurrection Act as authority to suppress the insurrection that sought to overturn the election result.<sup>418</sup> Later, in 1874, Grant again invoked the Insurrection Act in Louisiana, this time to suppress a white supremacist coup d’état that had overthrown the Republican governor by force.<sup>419</sup> Federal troops reinstated the lawful government, but the insurrectionists established a rival state government that effectively controlled much of Louisiana outside of New Orleans—the capital at the time.<sup>420</sup> (The conflict lasted until 1877, when Reconstruction was abandoned by the national government and white supremacists took full control of the state.)<sup>421</sup> In Mississippi, in 1874, white supremacists fabricated criminal charges against the newly elected black sheriff, Peter Crosby, and deposed him by mob action.<sup>422</sup> Black citizens organizing an effort to reinstate Crosby were attacked by white mobs, resulting in the massacre of as many as 300 black citizens. Again, President Grant invoked the Insurrection Act and sent federal troops to reinstate Crosby and prevent further violence. Also in 1874, in Arkansas, Grant invoked

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<sup>416</sup> Ulysses S. Grant, Proclamation No. 197, Law and Order in the State of South Carolina (Mar. 24, 1871) (ordering members of the KKK to disperse within 20 days), *reprinted in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 132-33 (James D. Richardson ed., Washington, Gov’t Printing Off. 1899) [hereinafter COMPILATION 1789-1897]; Ulysses S. Grant, Proclamation No. 200, Law and Order in the State of South Carolina (Oct. 12, 1871) (ordering members of the KKK to turn over to federal officials “all arms, ammunition, uniforms, disguises, and other means and implements” used for unlawful purposes), *reprinted in id.* at 135-36. For background, see generally Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 HARV. NAT’L SEC. J. 537, 613-14 (2014); LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871-1872, at 39-49 (1996).

<sup>417</sup> See generally LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 96-103 (2008) (detailing the events of the massacre); COAKLEY, *supra* note 391, at 323-24 (same).

<sup>418</sup> See Ulysses S. Grant, Proclamation No. 213, Law and Order in the State of Louisiana (May 22, 1873) (mobilizing federal troops to quell violence in Louisiana), *reprinted in* COMPILATION 1789-1897, *supra* note 416, at 223-24.

<sup>419</sup> See Ulysses S. Grant, Proclamation No. 220, Law and Order in the State of Louisiana (Sept. 15, 1874) (authorizing military force to suppress the insurrection), *reprinted in* COMPILATION 1789-1897, *supra* note 416, at 276-77.

<sup>420</sup> See generally COAKLEY, *supra* note 391, at 325-30.

<sup>421</sup> See *id.* at 339-41.

<sup>422</sup> See Ulysses S. Grant, A Proclamation (Dec. 21, 1874), *reprinted in* COMPILATION 1789-1897, *supra* note 416, at 322-23.

the Insurrection Act to quell violence in an ongoing dispute over the 1872 gubernatorial election results.<sup>423</sup> And finally in 1876, Grant invoked the Insurrection Act to protect South Carolina's gubernatorial election process from white supremacist groups.<sup>424</sup> Common to each of these instances was the idea that concerted efforts to overturn lawful popular election results by mob action, force, violence, and intimidation constituted "insurrection" against government.

It is difficult to evaluate precisely the probative force of all of these incidents, and application of federal authority to suppress "insurrections," for understanding Section Three. But they were unquestionably part of the picture, contributing to the background for understanding Section Three's terms. They were very much part of a common historical vocabulary of "insurrection" and "rebellion" and culpable participation in the same, familiar to those who drafted and ratified the Fourteenth Amendment: The Whiskey Rebellion, Shays' Rebellion, Nat Turner's Rebellion, Dorr's Rebellion, the insurrections against the Fugitive Slave Act in the 1850s, John Brown's raid on Harper's Ferry in 1859—all of these incidents would have informed the general understanding of what constitutes "insurrection or rebellion" and what actions amount to having "engaged in" or perhaps given "aid or comfort" to such uprisings. They all tend to support our working definitions of Section Three's terms. Even President Grant's post-1868 invocations of the Insurrection Act, to combat attempts to overthrow election results or displace lawful state authority, may shine some interpretive light backward on Section Three's meaning. If an uprising of similar nature to these events were to occur, it seems to us that it likely would have been understood as an insurrection or rebellion within the coverage of Section Three.

b. *The Congressional Exclusion Debates*

As noted above, the federal Ironclad Oath adopted during the Civil War closely paralleled the requirements and consequences of Section Three. These parallels are drawn more sharply by a series of cases where both houses of Congress enforced the oath to exclude their own prospective members from being seated. As one scholar has put it, these debates "were littered with relevant concepts, and we can judge the Fortieth Congress's reception to those similar arguments as indicative of their expectations as to Section 3's application."<sup>425</sup> Moreover, several of these proceedings occurred right around

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<sup>423</sup> *See id.* at 272-73.

<sup>424</sup> *See id.* at 369-97.

<sup>425</sup> Lynch, *supra* note 5, at 196. Lynch ably and accurately describes the most important such cases. *See id.* at 196-201, 207-10 (describing a series of significant decisions, including cases about the

the time of the proposal and ratification of the Fourteenth Amendment. In some cases after the Fourteenth Amendment was ratified, Congress applied Section Three itself, further demonstrating continuity and overlap with the Ironclad Oath.

The familiar source compiling the two houses' debates on such matters of internal administration is *Hinds' Precedents*, which we rely on here.<sup>426</sup>

First, Kentucky: In 1867, Kentucky submitted eight members-elect to the House, seven of whom were challenged as ineligible on the ground that they had given aid or comfort to the Confederacy during the Civil War. The Committee on Elections concluded that "no person who has been engaged in armed hostility to the Government of the United States, or who has given aid and comfort to its enemies during the late rebellion," ought to be sworn or seated.<sup>427</sup> A subsequent report determined that such charges needed to be "proved by clear and satisfactory testimony" and establish more than mere lack of active support for the Union or passive sympathy for the rebellion but that "the claimant has by act or speech given aid or countenance to the rebellion."<sup>428</sup> Such acts or speech need not rise to the level of constitutional treason, but they "must have been so overt and public, and must have been done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion."<sup>429</sup>

On this standard, the committee found that four of the challenged members-elect were not proved to have either "engaged in armed hostility to the Government" or provided "aid or comfort" to its adversaries. These four were admitted to their seats. Three others—John Y. Brown, John D. Young, and Lawrence Trimble—posed more serious difficulty, however. The House ultimately refused to seat either Brown or Young but admitted Trimble. The facts of these cases are instructive explorations of the boundaries between free speech and "aid or comfort."

The House addressed the John Y. Brown case first. "This election case," *Hinds'* reports, was "the first of its kind since the formation of the Constitution, and recognized by the House as of the highest importance."<sup>430</sup> It also involved an incident of pure *speech* as disqualifying a member-elect

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exclusion of elected officials involved in insurrectionist activity). We find little or nothing to disagree with in his account and analysis of these disputes and are indebted to Lynch's research and analysis.

<sup>426</sup> See generally 1 ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES*, §§ 441-63 (1907) [hereinafter *HINDS' PRECEDENTS*].

<sup>427</sup> *Id.* § 448, at 442.

<sup>428</sup> *Id.* § 448, at 443.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* § 449, at 445.

from office: John Y. Brown had explicitly embraced and advocated violent resistance to the Union in Kentucky. Indeed, he had gone so far as to urge the shooting of any man who volunteered for service in Union forces. Brown's disqualifying conduct consisted *solely* of such acts of speech. The committee relied on a letter Brown had written to the Louisville Courier in 1861 in which Brown had gone to great lengths to affirm his support for the rebellion in unequivocal terms:

Editors Louisville Courier:

My attention has been called to the following paragraph, which appeared in your paper of this date:

"JOHN YOUNG BROWN'S POSITION.—This gentleman, in reply to some searching interrogatories put to him by Governor Helm, said, in reference to the call of the President for four regiments of volunteers to march against the South—

'I would not send one solitary man to aid that Government, and those who volunteer should be shot down in their tracks.'"

This ambiguous report of my remarks has, I find, been misunderstood by some who have read it, who construe my language to apply to the *government of the Confederate States!* What I did say was this:

"Not one man or one dollar will Kentucky furnish *Lincoln* to aid *him* in his *unholy war against the South*. If this *northern army* shall attempt to cross our borders, *we will resist it unto the death*; and if one man shall be found in our Commonwealth to volunteer to join them *he ought* and I believe will be *shot down before he leaves the State*."

This was not said in reply to any question propounded by ex-Governor Helm, as you have stated, and is no more than *I frequently uttered public and privately* prior to my debate with him.

Respectfully,

John Young Brown.<sup>431</sup>

The House concluded, on the strength of this letter alone, that Brown had supported the rebellion and therefore voted to exclude him. Brown's speech, more specifically the letter, satisfied the standard. The facts, "proved by clear and satisfactory testimony," showed that Brown had, by an "act or speech . . . overt and public . . . done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion".<sup>432</sup> This became a precedent for the House's subsequent actions in other cases.

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<sup>431</sup> *Id.* § 449, at 445.

<sup>432</sup> *Id.* § 448, at 443.

Subsequently, in March 1868, the House excluded John D. Young under this standard. Young's case also involved numerous expressions of support and sympathy for the South, and the committee explicitly took the position "that *'aid and comfort' may be given to an enemy by words of encouragement, or the expression of an opinion*" by a person (like Young, a county judge) in an "influential position."<sup>433</sup> Ultimately, Young's case was overdetermined. There was also testimony that Young had provided material assistance to Confederate troops, by giving them food and provisions and assisting in the capture by Confederate troops of a Union soldier. According to the committee, Young's "expressions and admissions" of sympathy for the enemy, "*taken in connection with the open acts of 'aid and comfort to the enemies of the United States,'*" established that he could not "honestly and truly take the oath,"<sup>434</sup> and the full House agreed.

The contrasting case of Lawrence Trimble, however, showed that mere political opposition did not establish disloyalty. Aside from some overly vague allegations that he had traded with the enemy, the core of the case against Trimble were his political speeches. Trimble had been the *Union* candidate for Congress in 1861 and "made Union speeches in that canvass throughout the district." Trimble opposed Lincoln's war policies after the Emancipation Proclamation, asserting that the North was waging "an abolition war" and reportedly was "opposed to voting any more men or money to aid in carrying it on." These views and statements, however, were not materially different from other members' statements in Congress opposing the administration's policy. The committee (and House) considered Trimble's "loyalty unquestioned" and found no case for disqualifying him.<sup>435</sup>

Next consider Tennessee: Tennessee supplied two interesting membership cases, one in the House and one in the Senate. Both involved undoubtedly *pro-Union* men who nonetheless had held state office under Tennessee's secessionist regime and sworn oaths under it, while seemingly using their positions to support Union interests and resist the secession government. This presented a distinct problem under the Ironclad Oath, which required its swearer to disaffirm that he had ever accepted or exercised office under a pretended government hostile to the United States. What to do? In each case—Senator-elect David Patterson and Representative-elect R.R. Butler—the respective house ultimately admitted the applicant to his

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<sup>433</sup> *Id.* § 451, at 452 (quoting H.R. REP. NO. 40-29, at 2 (1868)) (emphasis added).

<sup>434</sup> *Id.* § 451, at 452 (quoting H.R. REP. NO. 40-29, at 6 (1868)) (emphasis added).

<sup>435</sup> *Id.* § 453, at 459.

seat and permitted him to take a modified oath omitting the never-held-office-under-a-hostile-regime sentence.<sup>436</sup>

A potentially broad understanding of “aid or comfort” also surfaced in the exclusion of Maryland Senator-elect Philip Thomas in 1867.<sup>437</sup> What had Thomas done to support the South in its rebellion? Apparently, he had *permitted* his minor son, a member of his household, to join the Confederate army, and given his son \$100 on the way out the door.<sup>438</sup> The Senate debated whether Thomas had done anything more by way of counsel or encouragement of his son’s taking up arms against the United States, and it is not clear how the senators evaluated such evidence. Some seemed to have thought Thomas’s treatment of his son disqualifying. Others focused instead on allegations that Thomas had resigned as President Buchanan’s Treasury Secretary because he disagreed with the President’s decision to send federal reinforcements to Charleston Harbor.<sup>439</sup>

Either theory of Thomas’s exclusion suggests that “aid or comfort” to rebellion was understood to sweep broadly and possibly include conduct of a somewhat more passive or quiescent nature—*allowing* one’s son to become a rebel soldier, under circumstances where such permission (and financial assistance) might have been withheld; opposing, or resisting, measures to suppress insurrection and defend national institutions and personnel, and resigning office in protest against such measures.

Cases like these continued in the House and Senate after Section Three of the Fourteenth Amendment had taken effect. By this point, the basic principles were more established, and the cases were sometimes more factbound or less illuminating, but they further confirm the continuity between Section Three and the Ironclad Oath, and illustrate the understanding of Section Three very shortly after its adoption.

To recount them very briefly: In 1868, John Christy had received the most votes for Congress in Georgia’s sixth district, but the House committee found that Christy, “by his own admission, had given ‘aid, countenance, counsel, and

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<sup>436</sup> *See id.* §§ 453–55, at 459–65 (omitting from the oath the words: “That I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the United States.”). In Butler’s case, two-thirds of both houses voted him amnesty. *Id.* § 455, at 464. In Patterson’s case, the Senate tried to pass a bill altering the oath for Patterson, but the House tabled it. *Id.* § 453, at 461. But perhaps that is okay, if application of the Ironclad Oath, to members of Congress, is a function of each house’s *separate* power to make rules governing its proceedings. *See* U.S. CONST. art. I, § 5, cl. 1.

<sup>437</sup> *See generally* HINDS’ PRECEDENTS, *supra* note 426, §§ 457–58, at 466–70.

<sup>438</sup> *Id.* § 458, at 469–70.

<sup>439</sup> *See id.* § 459, at 470 (reporting that Senator Sumner withdrew a resolution focused on Thomas’s son “it being urged that Mr. Thomas’s conduct as a Cabinet officer in 1860 afforded more certain grounds for action.”); *see also* CONG. GLOBE, 40th Cong., 2nd Sess. 1261–62 (1868) (emphasizing Thomas’s letter of resignation as a basis for his exclusion).

encouragement' to persons engaged in armed hostility" against the Union and therefore, "in accordance with the precedent in the case of John Y. Brown," was disqualified by the Ironclad Oath. He was not seated.<sup>440</sup> In 1869, the House admitted John Rice from Kentucky despite a divided House committee's conclusion that he was disqualified by Section Three.<sup>441</sup> The pages of the Congressional Globe reveal a debate about whether Rice had in fact joined the Confederate Army, which turned on the dubious credibility of two witnesses.<sup>442</sup> In 1870, the House allowed Representative George Booker of Virginia to keep his seat, despite subsequent charges that he had directly supported the militia of the rebel government in his role as justice of the peace. But Booker made an apparently persuasive case that he had been loyal all along, even as he worked within the Confederacy, and as a practical matter he had already been seated. For one reason or another, the House ultimately voted to table the issue, leaving Booker in office.<sup>443</sup> Also in 1870, the House allowed Representative Lewis McKenzie of Virginia to sit, despite various votes he had taken as a member of the Virginia House of Delegates in 1861—votes pledging Virginia's commitment to "unite her destiny with the slaveholding States of the South" should attempts to reconcile differences between North and South fail, supporting Virginia's willingness to fight, and to provision Virginia fighters.<sup>444</sup> Because all of these votes occurred *before* voter ratification of Virginia's secession ordinance on May 23, 1861, and because McKenzie remained "an outspoken Union man" after secession and throughout the war, the House concluded he had neither engaged in rebellion nor given it aid or comfort.<sup>445</sup>

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440 HINDS' PRECEDENTS, *supra* note 426, § 459, at 470-72. Interestingly, the Governor of Georgia had concluded that Christy was disqualified under Section Three while the House committee relied on the Ironclad Oath "independently of any question as to ineligibility under the fourteenth amendment." *Id.*

441 *See id.* § 460, at 472-73 ("[T]he report of the majority of the committee was overruled, and Mr. Rice retained the seat.").

442 *See* CONG. GLOBE, 41st Cong., 2nd Sess. 5443-47 (1870) ("The testimony of [the two witnesses] Colonel Dils and [ ] Mr. Thornberry has been rehearsed. . . . [T]he testimony of Colonel Dils is at variance with that of Thornberry."). Rice had also been in the Kentucky legislature and voted for a resolution against the coercion of the southern states. But everybody agreed this was not enough to count as aid or comfort, because it was only in January 1861: "[N]o war exist[ed] at the time" and it was before "the policy of the Government had been announced." *Id.* at 5443 (Butler); *see also id.* at 5445 (Garfield) (noting that the resolution came before the start of the war). Nor could Rice be excluded solely because of his politics. *See id.* at 5446 ("[T]his man was a Democrat. That is a political sin, but it is not a crime under the law. He is a Democrat yet. I think he is very wrong in being that, but yet it is not a crime.") (Logan).

443 HINDS' PRECEDENTS, *supra* note 426, § 461, at 474-475.

444 *Id.* § 462, at 477.

445 *Id.*

Finally, in 1871, the Senate refused to seat Senator-elect Zebulon Vance from North Carolina.<sup>446</sup> The exclusion of Vance was a particularly easy case. After serving in Congress, he had led Confederate troops in battle against the Union and then became the wartime governor of Confederate-regime North Carolina.<sup>447</sup> If anyone had engaged in rebellion and given aid or comfort to the Union's enemies, it was Vance. He was clearly barred by both Section Three and by the Ironclad Oath. He could be seated only if Congress chose to exercise amnesty, which it did not do until later.<sup>448</sup>

These congressional seating challenges suggest some rough lines as to what Congress thought was "aid or comfort" to the Confederacy. On one hand, direct material support for the rebel cause—providing supplies or working with enemy forces—was clearly aid or comfort. On the other hand, disfavored political beliefs and pre-war political stances were clearly not. In between lay contested territory. But, notably, there was no bright line protecting all speech or political activity. In some situations, speech alone *could* be disqualifying. A sufficiently clear and unequivocal statement of disloyalty in the form of proposed active resistance to Union authority or encouragement to violence against Union forces was thought disqualifying. Voluntarily holding confederate office or advocating resistance to the Union also could be enough to disqualify. We do not suggest these individual applications—many of which were contested and complicated—are strictly binding. But they provide useful concrete evidence for how parts of Section Three may well have been understood and thought to work.<sup>449</sup>

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<sup>446</sup> Magliocca, *supra* note 5, at 110.

<sup>447</sup> See generally Richard E. Yates, *Zebulon B. Vance: As War Governor of North Carolina, 1862-1865*, 3 J. S. HIST. 43 (1937).

<sup>448</sup> Vance ultimately had the last laugh. Vance was excluded from the 1872 amnesty statute because he had served in the thirty-sixth Congress. See Act of May 22, 1872, ch. 193, 17 Stat. 142; *Vance, Zebulon Baird*, BIOGRAPHICAL DIRECTORY OF THE U.S., <https://bioguide.congress.gov/search/bio/V000021> [<https://perma.cc/45E6-NTHG>] (last visited Dec. 4, 2023); cf. FRANKLIN RAY SHIRLEY, ZEBULON VANCE, TARHEEL SPOKESMAN 71, 152 n.36 (1962) (claiming that Vance had been waiting for the 1872 amnesty until his opponent Abbott had somehow engineered the amendment to the 1872 act that excluded Vance). Congress then passed a private bill granting him individual amnesty. Act of June 10, 1872, ch. 444, 17 Stat. 691. Thanks to Gerard Magliocca for this source. Vance subsequently returned to the North Carolina governorship, and then to the Senate until his death in 1894. Magliocca, *supra* note 5, at 111 n.126.

<sup>449</sup> Finally, though it occurred long after this period, there has been one additional congressional exclusion under Section Three: the 1919 exclusion of socialist newspaper editor Victor Berger from the House. See *supra* notes 270–272 and accompanying text. The Berger episode of course has no probative value about the original meaning of Section Three, since it occurred more than 50 years after Section Three was enacted. In our view, the House's decision was mistaken—an overzealous reading of the law, the facts, or both.

## 6. Legislative History

There is only a little guidance to be gleaned from the legislative history of the Fourteenth Amendment—the records of the proposing Congress’s debates over its various provisions and of state ratification debates. The Fourteenth Amendment’s legislative history is famously voluminous, and Section Three—like the other “forgotten” sections of the Amendment (Section Two and Section Four)—was much more salient to the debates than it is to today.<sup>450</sup> As briefly noted above, the legislative history supports the key propositions we advanced earlier in this article: Section Three was designed to be general and prospective, and *not* limited to the situation of the Civil War and Reconstruction. Section Three’s disqualification was seen by proponents and opponents alike to be self-executing and automatic. And Section Three was understood to supersede (or satisfy) prior constitutional limitations.<sup>451</sup>

Perhaps somewhat surprisingly, however, we have found relatively few interpretive insights about the scope of *conduct* triggering disqualification under Section Three. What evidence there is generally confirms the understanding that the provision would have sweeping consequences. Both opponents and proponents agreed that the provision would cover a broad range of activity supporting or assisting the South’s efforts to throw off the authority of the Union and the Constitution. The original proposal would have excluded all such persons from *voting*, not just officeholding, and would not have been limited in its coverage to former oath-swearing federal and state officeholders. However, the language concerning *what conduct triggered* disfranchisement (and, as later revised, disqualification from officeholding) was carried forward throughout the discussion. Opponents of what eventually became Section Three thought the range of what was included in disability-triggering conduct (that is, when one might be said to have “engaged in” insurrection or rebellion or given “aid or comfort” to it) was hugely broad in its reach, sweeping in nearly everybody in the rebel South—and viewed the proposal as regrettable on account of such breadth. Significantly, proponents of the amendment did not disagree with its opponents concerning the breadth of the description of disability-triggering conduct. The proponents thought such breadth appropriate, necessary, and valuable.<sup>452</sup>

As things proceeded, Congress narrowed the provision in two specific respects. Congress backed away from complete disfranchisement to disqualification from holding office. And relatedly, it narrowed Section Three

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<sup>450</sup> See generally GRABER, *supra* note 8.

<sup>451</sup> See *supra* notes 14, 69, 226.

<sup>452</sup> See generally GRABER, *supra* note 14.

to cover only those who had sworn a prior oath of loyalty to the U.S. Constitution as federal or state officeholders. Rather than disenfranchising pretty much the entire white South, it would disqualify from future office those who had held constitutional office and then rebelled.

But what did *not* change was the broad description of the *conduct* that triggered disfranchisement (in the earlier proposal) or disqualification from office (in the proposal eventually agreed to).<sup>453</sup> As noted, there is not a great deal of explication of what this conduct was, exactly. But the overall tenor of the debates over what eventually became Section Three suggest that all meaningful *connection with, support for, or aid to* the Confederacy—officeholding, military service (whether voluntary or not), political support or endorsement, provision of material assistance to rebellion or rebel forces—was regarded by the proposing Congress as covered. The legislative history of Section Three—such as it is—supports a broad understanding of the prohibition contained in its language.

### 7. Early Applications of Section Three

A final set of evidence comes from the handful of cases applying Section Three shortly after its adoption. Once again, because these examples come *after* the provision was adopted, they do not provide *direct* evidence of its original public meaning, but they remain informative.<sup>454</sup> Section Three came up in a range of procedural and institutional situations; each of these situations further confirms Section Three's broad substantive sweep.<sup>455</sup>

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<sup>453</sup> Congress also rejected a series of proposed amendments to Section Three that would have narrowed or limited the conduct or persons to which the language would apply. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2900 (1866) (rejecting a proposed limitation to only persons who had sworn oaths to the Constitution since 1851); *id.* at 2918-21 (rejecting a proposed limitation to only persons who had received a presidential pardon or amnesty “under the Constitution and laws”). Republican defenders of Section Three successfully opposed one proposed limitation to only persons who joined the Confederacy while still holding prior office under the Constitution, arguing that an oath to support the Constitution was permanently binding and that such a limit would indulge a fiction that *resignation* from office *before* engaging in or assisting rebellion absolved one of any prior duty of loyalty to the United States Constitution. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2897-99 (1866). Republicans likewise rejected the proposed limitation to persons who had “voluntarily” assisted or participated in rebellion, because it would raise difficult proof problems and permit spurious claims of involuntary participation. *See id.* at 2918, 2921. Indeed, one senator noted that Alexander Stephens, Vice President of the Confederacy, had testified before the Joint Committee on Reconstruction that he “never entered into the rebellion voluntarily”! *Id.* at 2918 (statement of Senator Willey).

<sup>454</sup> *See, e.g.*, Baude, *supra* note 292, at 61-62; Paulsen, *The Most Dangerous Branch*, *supra* note 292, at 293, 303.

<sup>455</sup> Additionally, some of Congress's application of the Ironclad Oath to its own members also entailed the application of Section Three. *See supra* Section IV.A.5.b.

For instance, the 1867 Military Reconstruction Act—which imposed provisional governments on the southern states until they obtained readmission to representation in Congress—directly incorporated Section Three of the proposed (but not yet ratified) Fourteenth Amendment as a restriction on those governments. Persons disqualified under Section Three could not hold office under the provisional governments, nor could they serve in—or even vote for those who would serve in—the state’s constitutional convention.<sup>456</sup>

Andrew Johnson’s Attorney General, Henry Stanbery, published a two-part opinion in 1867 setting forth his interpretation of the Act and thus, indirectly, of Section Three.<sup>457</sup> Stanbery’s opinion is explicitly slanted toward a narrow construction of Section Three, because of his concerns that it would be punitive and *ex post facto* as applied against ex-Confederates.<sup>458</sup> Even so, Stanbery’s opinion found Section Three’s definition of what constituted participation in rebellion to be quite broad:

*All those who, in legislative or other official capacity, were engaged in the furtherance of the common unlawful purpose, or persons who, in their individual capacity, have done any overt act for the purpose of promoting the rebellion, may well be said, in the meaning of this law, to have engaged in rebellion.*<sup>459</sup>

As to individuals, Stanbery also reiterated several times that *any* voluntary support, even if non-violent, was covered and culpable. He found “it to be clear, that in the sense of this law persons may have engaged in rebellion without having actually levied war or taken arms,”<sup>460</sup> and added that “wherever an act is done voluntarily in aid of the rebel cause . . . it must work disqualification under this law.”<sup>461</sup>

Subsequent cases took even broader positions. For instance, in the 1869 decision of *Worthy v. Barrett*, the North Carolina Supreme Court concluded that a state sheriff was disqualified under Section Three for holding basically the same office as a sheriff when his state was in rebellion. The court’s reasoning on this issue was succinct but clear:

What will amount to having engaged in the rebellion?

(1st.) Holding any of these offices under the Confederate government.

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456 Act of Mar. 2, 1867, ch. 153, §§ 5-6, 14 Stat. 428, 429.

457 The Reconstruction Acts, 12 Op. Att’y Gen. 141, 182 (1867).

458 *Id.* at 159-60. *But see supra* Sections III.A-B (explaining why the constitutional *ex post facto* and attainder principles do not apply to Section Three, *especially* as applied to new insurrections and rebellions).

459 *Id.* at 161-62 (emphasis added).

460 *Id.* at 161.

461 *Id.* at 165.

(2d.) Voluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary in the Confederate service.<sup>462</sup>

That is, the North Carolina Supreme Court embraced Stanberry's view that almost any voluntary assistance to the rebel cause was a form of engaging in rebellion, but *also* held that holding any office, even an ordinary non-military office far from the front lines, was a form of engaging in rebellion covered by Section Three.<sup>463</sup>

Shortly after this—and shortly after Chief Justice Chase's unsound and unfortunate decision in *Griffin's Case* had held that Section Three required congressional legislation in order to be put into operation—Congress enacted federal procedures to directly enforce Section Three in federal court. The 1870 Enforcement Act, also known as the First Ku Klux Klan Act, authorized district attorneys of the United States to bring quo warranto actions to remove officials holding office “contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution” and to bring criminal prosecutions against person who “shall hereafter knowingly accept or hold” office in violation of Section Three.<sup>464</sup> In proceedings brought under both enforcement sections of the Act, in the short period between 1870 and 1872, the scope of Section Three's prohibition was interpreted broadly. (Recall that in 1872 Congress removed Section Three's disqualification as to most former rebels.)

Consider first a notable criminal prosecution under the 1870 Act. In North Carolina again, this time in federal court, the government brought criminal charges against Amos Powell for accepting an appointment as county sheriff despite being covered by Section Three.<sup>465</sup> Powell's alleged act of rebellion was having “furnished a substitute for himself to the Confederate army,” and Powell's defense was that this was involuntary, because he was about to be involuntarily conscripted himself.<sup>466</sup> This gave the federal court, through Judge Hugh Lennox Bond, occasion to instruct the jury on the relevance of voluntariness to Section Three:

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<sup>462</sup> *Worthy v. Barrett*, 63 N.C. 199, 203 (1869). The court also applied the *Worthy* rule to the even easier case of a county attorney who “took part in th[e] rebellion by serving in the Confederate army, voluntarily.” *In re Tate*, 63 N.C. 308, 309 (1869).

<sup>463</sup> *See Worthy*, 63 N.C. at 200-05 (disqualifying a former county sheriff under the Confederacy from election to the same office); *In re Tate*, 63 N.C. at 309 (disqualifying a former county attorney under the Confederacy from admission into the office of Solicitor for the State). By contrast, Stanberry had concluded that officers who “discharged official duties not incident to war, but in the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion.” The Reconstruction Acts, 12 Op. Att'ys Gen. 162 (1867).

<sup>464</sup> First Ku Klux Klan Act, §§ 14-15, 16 Stat. 140, 142-43 (1870); *see supra* note 64.

<sup>465</sup> *United States v. Powell*, 27 F. Cas. 605, 606 (C.C.D.N.C. 1871).

<sup>466</sup> *Id.* at 607.

[T]he word “engage” implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellion, and to bring it to a successful termination; and unless you find the defendant did that, with which he is charged, voluntarily, and not by compulsion, he is not guilty of the indictment. *But it is not every appearance of force nor timid fear* that will excuse such actual participation in the Rebellion or Insurrection. Defendant’s conduct must have been prompted by a well grounded fear of great bodily harm and the result of force, which the defendant was neither able to escape nor resist. And further, *the defendant’s action must spring from his want of sympathy with the insurrectionary movement*, and not from his repugnance to being in an army, merely.<sup>467</sup>

In other words, only great duress *and* pure heart would be a defense if one’s conduct otherwise provided material support to the rebellion. Section Three’s disqualification for having “engaged” in insurrection covered a wide swath of voluntary participatory acts supporting or assisting rebellion, some bordering on near-passive acquiescence.

Meanwhile, in Tennessee, the U.S. Attorney brought dozens of federal enforcement actions, including against three members of the Tennessee Supreme Court.<sup>468</sup> Many of those charged were *unquestionably* covered by Section Three because they had fought in the Civil War, for the Confederacy. But some were charged for more remote participation. For instance, Thomas Nelson, one of the Tennessee Justices, had been a unionist during the war, and indeed at one point a *prisoner* of the Confederacy. His participation in the rebellion appears to have been limited to being elected to the U.S. House of Representatives from Tennessee, after Tennessee’s purported secession, and traveling to Washington to attempt to represent the state in Congress.<sup>469</sup> While these Section Three claims were never adjudicated, the fact that they were brought in the first place is consistent with the broad sweep of Section Three.<sup>470</sup>

The other scattered discussions of Section Three we have found are more ambiguous, but still consistent with these broad interpretations of Section

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<sup>467</sup> *Id.* (emphasis added). Additionally, Powell had served as a justice of the peace under the Confederate government, but the federal court held this not to qualify, for reasons similar to those articulated by Attorney General Stanberry.

<sup>468</sup> Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870*, 49 TENN. BAR J. 20, 26 (2013); see also Magliocca, *supra* note 5, at 109-10.

<sup>469</sup> For one fawning account of Nelson, see OLIVER P. TEMPLE, *NOTABLE MEN OF TENNESSEE FROM 1833 TO 1875: THEIR TIMES AND THEIR CONTEMPORARIES* 166-215 (1912).

<sup>470</sup> Justice Nelson resigned while these actions were pending, and the rest of the actions were abandoned with the passage of the 1872 Amnesty Act and a change in the federal attitude towards Section Three. Elliott, *supra* note 468, at 26.

Three's substantive disqualification—broad interpretations of insurrection, rebellion, “engaged in,” and so on. Recall, for instance, that in *Griffin's Case*, it was essentially taken as given that Judge Hugh Sheffey would be disqualified by Section Three (if it applied) because he was “a member of the legislature of Virginia in 1862 during the late Rebellion, and as such voted for measures to sustain the so-called Confederate States in their war against the United States.”<sup>471</sup> Other cases are consistent with similarly broad assumptions.<sup>472</sup> We have found none that took a substantially *narrower* view of Section Three, and even if some exist, they would seem to be the minority and inferior construction.

The application of Section Three immediately after its enactment is consistent with what the text, structure, context, and history of Section Three all tell us: to have “engaged in insurrection or rebellion,” or given “aid or comfort” to “enemies” embraced an incredibly broad sweep of voluntary conduct that provides support, material assistance, or specific encouragement to such actions.

In the end, the sum total of evidence concerning the original textual meaning of Section Three—contemporaneous dictionary definitions; parallel constitutional use of the same or similar language; the inferences that fairly may be drawn from the legislative history of Section Three's drafting; the especially strong evidence from 1860s Civil War—era political and legal usage of nearly the precise same terms (in prominent presidential statements, congressional enactments and their implementation, and a landmark Supreme Court constitutional decision employing the same terms); the general legal backdrop of eighteenth century Insurrection Acts and the myriad and familiar historical incidents of “insurrection” and “rebellion” to which they applied; and, finally, early practice enforcing Section Three—points in a consistent direction: toward a broad understanding of what constitutes insurrection and rebellion and a remarkably broad understanding of what types of conduct constitute engaging in or giving aid or comfort to such movements.

#### B. *What Prior Officeholders are Covered? What Future Offices are Barred?*

The next step in the analysis of Section Three is rather more tedious than difficult. But it is important to get it right: Holders of *what prior offices or positions* are covered by Section Three's disqualification from future office if

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<sup>471</sup> *In re Griffin*, 11 F. Cas. 7, 22 (C.C.D.Va. 1869).

<sup>472</sup> *See Sands v. Commonwealth*, 62 Va. (21 Gratt.) 871, 873, 885–87 (1872) (assuming that Section Three's disqualification applied to a former public official without much discussion). There is reason to think there were hundreds of other Section Three actions brought during this time period, but few records of the specifics of the cases. *See Magliocca, supra* note 5, at 109–10.

they engaged in insurrection or rebellion? And from what *future offices or positions* are they thereby disqualified? The text of Section Three takes up these points in reverse order (and so we shall too) and uses slightly different language for each category.

First, the offices or positions *from which a disqualified person is barred*:

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 . . . .<sup>473</sup>

Second, the offices or positions *previously held*, and for which an oath to the Constitution was taken, that trigger Section Three's disqualification:

[W]ho, 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 . . . .<sup>474</sup>

We begin with a few observations.

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.<sup>475</sup> Keep this in mind as we proceed: We think readers should be wary of any interpretation of Section Three that would impute to the text a hyper-technical set of hidden distinctions not fully warranted by the language. Where the simplest and most plausible explanation of minor textual

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<sup>473</sup> U.S. CONST. amend. XIV, § 3.

<sup>474</sup> *Id.*

<sup>475</sup> See Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-third Century*, 59 ALB. L. REV. 671, 674-76 (1995) (arguing that the "words of the Constitution" must not be treated as if "the exclusive province of an elite cabal of high priests" who render "unintelligible" its meaning). For instance, consider the story, passed down from Albert Gallatin to Max Farrand to William Treanor, that Gouverneur Morris slyly attempted to replace a comma with a semicolon in Article I in order to convert the "General Welfare" Clause from a limitation on the tax power into a freestanding power of regulation. See William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 20-24 (2021). Putting aside whether this story is really true, see David S. Schwartz, *Framing the Framers: A Commentary on Treanor's Gouverneur Morris as Dishonest Scrivener*, 120 MICH. L. REV. 51, 69-73 (2022), a sensible approach to constitutional interpretation should obviously resist such antics. Even if Morris had succeeded in smuggling in the semicolon, that maneuver should not be decisive in interpreting the Clause. See Kesavan & Paulsen, *supra* note 161, at 338-39 n.151.

differences is merely stylistic or accidental variation, that explanation should not lightly be cast aside.

Second, it appears that the list of disqualification-triggering offices tracks closely, but not identically, the listing of positions for which the original Constitution imposed an oath requirement. Article VI of the Constitution dictates that “Senators and Representatives[,] . . . Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”<sup>476</sup> Article II, overlapping this general oath mandate, prescribes a specific oath for the President, who swears both that he will “faithfully execute the Office of President of the United States” and “to the best of my Ability, preserve, protect, and defend the Constitution of the United States.”<sup>477</sup>

Section Three’s listing of triggering positions largely tracks the substance (and to some extent even the sequence) of the all-offices-legislative-executive-judicial-federal-and-state oath mandates. Section Three’s list of positions from which a covered person is disqualified *builds* on this list. All positions that trigger disqualification are disqualified-from. In addition, the disqualified-from list includes, notably, presidential electors, who are not listed in the Constitution as persons required to swear an oath to the Constitution. The wording also appears designed to clarify that the ban extends to “military” offices—including state military offices—whether or not they would be considered “executive” offices under state law or Article VI. Thus, in general: If the original Constitution required an oath for a position, Section Three treats having held such a position as the trigger for Section Three’s application. And if a person who once held any such position is disqualified under Section Three for engaging in or supporting insurrection, that person is barred (absent congressional relief) from holding any of those same positions plus disqualified from being an elector for President and Vice President. That seems to be the basic structure of the provision.

Our third observation is related. It appears to us that the text’s overall project of office-listing, in both clauses, was designed to be *reasonably comprehensive*, covering the waterfront: both taking care not to accidentally leave out anything considered important—including *everybody* who was constitutionally required to have sworn an oath—and *adding* positions where

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<sup>476</sup> U.S. CONST. art. VI, cl. 3.

<sup>477</sup> U.S. CONST. art. II, § 1, cl. 8. On the Presidential Oath Clause generally, see Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1260-67 (2004). On the phrase “to the best of my Ability,” see William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 310 (2011).

appropriate, as with adding the category of electors, to the list of positions from which a covered person is disqualified.

With these principles in mind, it appears to us that the two clauses—describing what past positions trigger disqualification and what future positions fall within the scope of that disqualification—can and should be read, together, in a straightforward manner. First, as to the persons to whom the provision *applies* (the second, “triggering” clause): Section Three’s disqualification attaches to persons who previously swore an oath to support the Constitution as:

- [i] a “*member*” of Congress, or as
- [ii] an “*officer of*” the United States, or as
- [iii] a “*member*” of any State legislature, or as
- [iv] an “*executive or judicial officer of*” any State.<sup>478</sup>

These four categories are then closely paralleled (with differences noted) in the description of offices from which covered persons are *excluded* (the first clause). Covered insurrectionists, rebels, and aid-and-comforters are disqualified from being:

- [i] “a *Senator or Representative*” in Congress (paralleling “*member*,” a seemingly purely stylistic variation) or
- [ii] an *elector* for President or Vice President (a new exclusion from a position that is not an oath-required triggering position); or
- [iii] holding “*any office, civil or military*,” “under” either federal or state government (paralleling “*officer*” of the United States or of any State, respectively, in the second and fourth triggering categories above—with the noted clarification of the inclusion of “*military*” officers).

The description “*civil*” office, in the disqualified-from list seems designed to embrace the categories of “*executive or judicial*” officer in the triggering list. Though somewhat more awkward, we think an elected office in a state legislature also qualifies as a “*civil*” office within the language and design of Section Three, reading the word “*office*” in this context in an ordinary, non-technical sense.<sup>479</sup>

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478 U.S. CONST. amend. XIV, § 3 (emphasis added).

479 See Hemel, *supra* note 5 (setting forth arguments why state legislative offices are included within the general catch-all category of excluded-from “*civil*” offices). *Contra* John Randolph Tucker, *General Amnesty*, 126 N. AM. REV. 53, 54 (1878) (arguing that “the disability imposed does not extend to being a member of a State Legislature”). None of this, in our view, affects the question whether a Member of Congress may properly be designated as an “*Officer*” to whom the duties of the office of President may devolve upon presidential and vice-presidential death, resignation, or inability, which turns on different considerations. Compare Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 121 (1995) (arguing that the Constitution implies that members of Congress “cannot be ‘officers’ within the meaning of the Succession Clause”), with John F. Manning, *Not Proved: Some Lingering Questions About Legislative*

The overall result is a broad list of disqualification-triggering positions covering essentially every major federal or state legislative, executive, and judicial office; and a list of barred-from positions embracing all of the above plus electors for president and vice president (and clarifying “military”). The legislative positions in question are the relevant *elected* offices—*members* of both state and federal legislatures,—and do not embrace unelected staff positions. The executive positions embrace anyone in the executive branches of federal or state government who holds an “office” within that branch.

To be sure, there might be ancillary questions concerning what federal executive and judicial positions qualify as an “office,” held by an “officer”—as opposed to non-officer, non-“office”-holding employees. That is: exactly *how far down* the organizational chart does the list of triggering and disqualified-from positions go?<sup>480</sup> Likewise, for the federal judicial branch, Article III judges and justices are plainly covered. Other officers in the judicial branch, such as the clerks in *Ex Parte Hennen*,<sup>481</sup> are presumably covered as well—as are perhaps bankruptcy judges, magistrate judges and the like.<sup>482</sup> Non-office-holding employees, again, would not be covered. And of course there might be similar residual questions as to what *state* government positions constitute state executive “office” held by “officers” (thus, perhaps, the special need for the designation “military,” to be sure state military positions are included), and what state judicial-branch positions constitute a judicial office. But in the main, the description of who all is covered by Section Three and what offices such person, if disqualified, is excluded from holding strikes us as fairly straightforward.

The only challenge anyone has raised concerning this general description is the argument by professors Josh Blackman and Seth Tillman that a person who has served as President (and the same argument is made as to Vice President), while *perhaps* having held an *office* “under” the United States, is

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*Succession to the Presidency*, 48 STAN. L. REV. 141, 141-42 (1995) (arguing against the proposition that the placing of “Officers” in the line of succession is unconstitutional and taking issue with the Amars’ definition).

480 Serious scholarship has explored those questions with respect to the Appointments Clause. See, e.g., Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 500 (2018). We do not address that somewhat peripheral question here, but leave such issues for another day.

481 38 U.S. 230, 258 (1839) (“[T]hat a clerk is one of the inferior officers contemplated by [the Appointments Clause] cannot be questioned.”). To be clear, *Hennen* dealt with the clerk of court, not what we would now call a term judicial law clerk.

482 That said, to the extent that one maintains that magistrate judges and bankruptcy judges cannot lawfully exercise judicial power or executive power of their own, see William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1554-56, 1574-75 (2020), one might question whether they are truly “officers” at all. Again, we leave this issue for another day.

not properly classified as an “*officer of*” the United States.<sup>483</sup> On this view, disqualified persons might be *barred from being* President or Vice President—the authors are somewhat non-committal about this<sup>484</sup>—but *having been* President or Vice President, and engaged in insurrection or rebellion, does not trigger disqualification of an individual from anything! On this argument, the President and Vice President—alone among constitutional oath-takers—are exempt from Section Three’s consequences.

We do not buy it, for many reasons. First, it adopts precisely the type of “secret code” hidden-meanings hermeneutic we think should be viewed extremely skeptically. Moreover, the code has a facially implausible consequence: The Presidency is (perhaps?) a disqualified-*from* office but not a disqualification-*triggering* office. This makes little sense.<sup>485</sup>

Second (and relatedly), the argument rather implausibly splits linguistic hairs. No one denies that the President is an executive branch officer holding executive office. At the risk of belaboring the obvious: Article II refers to the “office” of President innumerable times.<sup>486</sup> It specifies the length of term for which the President shall “hold his Office,” certain minimum qualifications for eligibility “to that Office,” what happens upon the President’s removal “from Office,” or inability to discharge “the Powers and Duties of said Office,” and the oath he shall take before entering “on the Execution of his Office.”<sup>487</sup> If the Presidency is not an office, nothing is.

So, the argument must rely instead on the fine parsing of prepositional phrases. The President (perhaps?) holds an “office *under*” the United States but is not an “*officer of*” the United States. This seems to defy textual common sense. Far more sensible and straightforward to conclude, we think, that the officeholder holding the office of President is an officer “*of*” the United States who holds office *under* the authority of the United States. The minor textual difference between the triggering clause (“*officer of*”) and the positions-disqualified clause (“office *under*”)—a choice between prepositions—appears

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483 Josh Blackman & Seth Barrett Tillman, *Is The President An “Officer of the United States” For Purposes of Section Three of the Fourteenth Amendment?*, 15 N.Y.U. J.L. & LIBERTY 1, 21-24 (2021).

484 See, e.g., *id.* at 17, 21, 25, 53.

485 To be sure, faithful readings of the Constitution sometimes yield counterintuitive outcomes. See Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 CONST. COMMENT. 245, 245-46 (1997) (suggesting the possibility that a straightforward reading of the constitutional text yields the “stupid”—and surely inadvertent—result that the Vice President would be the presiding officer over his own impeachment trial in the Senate and that this is a result to be rectified); Baude & Sachs, *supra* note 9, at 1467-68. But that does not mean we should close our eyes to plausibility and common sense, especially when the proposed textual reading is such a stretch. See also Paulsen, *Nothing but the Text*, *supra* note 11, at 1439-40 (noting cautions concerning use of the “absurdity” canon to deny plain textual meaning, but noting how the canon is a sometimes useful tool in discerning actual textual meaning.).

486 See generally U.S. CONST. art. II.

487 *Id.*

to be of no significant substantive consequence in Section Three, much as other minor textual variations in or among constitutional provisions often do not support differences in meaning.<sup>488</sup> Indeed, one far simpler and more straightforward explanation for the Constitution's use of "office under" and "officer of" in Section Three and elsewhere is that "office" and "officer" simply take different prepositions: The Constitution uses "of" when referring to an *officer* and "under" when referring to an *office*.

Finally, even if a plausible argument can be constructed that the difference might have once been thought capable of sustaining a term-of-art distinction with respect to different prepositional phrases in the original Constitution—surmounting the presumption against "secret code" interpretation—there is no evidence of such a distinction *in Section Three* and little logic to such a distinction either.<sup>489</sup>

Third, a variant of the Blackman–Tillman argument was explicitly made and explicitly refuted in the congressional debates proposing Section Three. 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.<sup>490</sup> "I do not see but that any one of these gentlemen may be elected President or Vice President of the United States,

<sup>488</sup> For instance, consider the differently phrased, but seemingly identical enforcement clauses of the Reconstruction Amendments. U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."). Or consider the Constitution's "gratuitous (one could also say strange) punctuation marks." Kesavan & Paulsen, *supra* note 161, at 348 (giving examples).

<sup>489</sup> One of us has previously complimented Tillman's prior scholarship that attempts to prove such a systematic term-of-art/secret code in the original Constitution. See generally William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016) <https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/> [<https://perma.cc/A26E-8FQX>]. But the very pieces of evidence that are most arresting in that context also confirm extensive linguistic drift or changing understandings in the decades after the founding. Compare *id.* (discussing foreign gifts received by President Washington without disclosure to Congress), with Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U.L. REV. COLLOQUY 180, 190 (2013) (discussing contrary practice by Presidents Van Buren, Tyler, and Jackson); compare Baude, *supra* this note (discussing Treasury Secretary Alexander Hamilton's list of "every' person holding 'office . . . under the United States," which did not include the President, Vice President, and members of Congress), with Seth Barrett Tillman, *The Reports of My Death Were Greatly Exaggerated*, at 20-21, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3037107](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037107) [<https://perma.cc/XMG8-MVR4>] (describing a scrivener's "condensed" version of this document likely made "circa 1830" that may reflect a different understanding of the constitutional terms). Cf. Blackman & Tillman, *supra* note 483, at 24-31 (acknowledging, and arguing against, the possibility of linguistic drift). In other words, such secret code (if any) turns out to have been written in disappearing ink.

<sup>490</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2899 (1866).

and why did you omit to exclude them?”<sup>491</sup> 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 Maine interrupted: “Let me call the Senator’s attention to the words ‘or hold any office, civil or military, under the United States.’”<sup>492</sup> 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.”<sup>493</sup>

The Blackman–Tillman argument is not *quite* the same, but it is the mirror image of Johnson’s concern. Johnson’s inquiry was whether a covered insurrectionist nonetheless might become President. The Blackman–Tillman argument is that an insurrectionist president is not an “officer of” the United States whose prior position triggers Section Three’s restrictions on future office. The Johnson–Morrill colloquy does not specifically address that reverse-image argument. But it certainly suggests that the framers of Section Three were not parsing it as a secret code with facially implausible consequences. The question whether Section Three applied to former Presidents and Vice Presidents does not appear to have been raised again, by anyone.<sup>494</sup> Nor did anybody else involved in drafting or ratifying Section Three suggest that the mirror-image question would be any different. Subject to all the usual reservations about the use of legislative history (and legislative silence) in determining textual meaning, this further confirms the more natural reading. The only time anything like the question was raised, the point was answered by a proponent of Section Three, clearly and unequivocally, and the questioning Senator accepted the answer as correct.

Fourth and finally, in an additional piece of prepositional jujitsu, Blackman and Tillman tellingly equivocate about whether the President holds “*office under*” the United States as well. (If he does, Section Three stops covered insurrectionists from becoming President, and if not, not.) Blackman and Tillman do not *deny* this possibility, but they do not *confirm* it either. The difficulty for them is that both answers show the implausibility of their position.

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<sup>491</sup> *Id.*

<sup>492</sup> *Id.*

<sup>493</sup> *Id.*

<sup>494</sup> Former President John Tyler of Virginia subsequently sided with the Confederacy and was elected to the Confederate Congress (but died before assuming office). And former Vice President John Breckinridge subsequently served as a Confederate general and, later, as Confederate Secretary of War. See Blackman & Tillman, *supra* note 483, at 45–46. While Tyler and Breckinridge had served in other disqualification-triggering posts, if the text really had failed to include the offices of President and Vice President as triggering disqualification, these incidents would have shown that to be a glaring and dangerous omission.

If Blackman and Tillman maintain that the President does *not* hold “office under” the United States, then they must fly in the face of the directly on point discussion between Senators Johnson and Morrill. They must claim to understand Section Three better than its framers. This seems unlikely. But if they confirm that the President *does* hold “office under” the United States, then they must maintain a sharp and crucial distinction between “office under” and “officer of.” As Mark Graber has observed, this distinction was *also* contradicted by Section Three’s framers:

[T]he members of the 39th Congress who framed Section 3 of the 14th Amendment often indicated—and sometimes explicitly stated—that all persons who held office “under the United States” were officers “of the United States.” During the debates over Section 3, no representative or senator alluded to the existence of a distinction between “of” and “under”. Representatives and senators often described the president as having an “office under the United States” and being an “officer of the United States.”<sup>495</sup>

If a secret code was really at work, it was an extraordinarily well-kept secret. The implausibility of both horns of the Blackman–Tillman straddle demonstrates the implausibility of their position.

In short, the ordinary sense of the text; the structure and logic of its provisions; the evident design to be comprehensive; the text’s many references to the office of the Presidency as an “office”; the seeming absurdity of the prospect of exclusion of the offices of President and Vice President; the fact that the only legislative debate over the language discussing whether Section Three inadvertently omitted the offices of President and Vice President rejected any such suggestion; and the fact that no one ever suggested that the “under/of” difference meant the presidency was not a covered office triggering Section Three, all convince us that the natural conclusion is the correct one: Section Three includes in its coverage, or “triggering” language, insurrectionists who once served as President and Vice

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<sup>495</sup> Mark A. Graber, *Disqualification From Office: Donald Trump v. the 39th Congress*, LAWFARE (Feb. 24, 2023, 4:40 PM), <https://www.lawfaremedia.org/article/disqualification-office-donald-trump-v-39th-congress> [<https://perma.cc/FAZ3-SQDU>]. Professor Graber notes further that a “unanimous House select committee report issued barely a month after Congress sent the 14th Amendment to the states concluded that ‘a little consideration of this matter will show that ‘officers of’ and ‘officers under’ the United States are ‘indiscriminately used in the Constitution.’” *Id.* In addition, “[t]he most comprehensive study of state ratification . . . does not point to a single example of any journalist or participant in a state convention who distinguished between ‘officers under’ and ‘officers of’ or who otherwise thought a president who participated in an insurrection could not be disqualified under Section 3.” *Id.*; see also John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 BRIT. J. AM. LEGAL STUD. (forthcoming); Lynch, *supra* note 5, at 158–60 (collecting authorities supporting the same point); Magliocca, *Foreground*, *supra* note 72, at 1067 n.48 (“My research . . . shows that President Andrew Johnson repeatedly referred to himself as “the chief executive officer of the United States”).

President. And Section Three excludes disqualified insurrectionists from subsequently holding the office of either President or Vice President.

### C. *The Attempted Overthrow of the 2020 Presidential Election*

We come finally to the urgent question of the day: How does Section Three apply to the events of 2020–2021—the efforts by Donald Trump (and others) to overthrow the results of the 2020 presidential election and install Trump as president for another term, despite his loss to Joseph Biden?

Consider the overall package of events: the dishonest attempts to set aside valid state election results with false claims of voter fraud; the attempted subversion of the constitutional processes for states' selection of electors for President and Vice President; the efforts to have the Vice President unconstitutionally claim a power to refuse to count electoral votes certified and submitted by several states; the efforts of Members of Congress to reject votes lawfully cast by electors; and, finally, the fomenting and incitement of a mob that attempted to forcibly prevent Congress and the Vice President from counting lawfully cast votes, culminating in a violent and deadly assault on the Capitol (and Congress and the Vice President) on January 6, 2021.

Taken as a whole, these actions represented an effort to prevent the lawful, regular termination of President Trump's term of office in accordance with the Constitution. They were an attempt to unlawfully overturn or thwart the lawful outcome of a presidential election and to install, instead, the election *loser* as president. They constituted a serious attempt to overturn the American constitutional order. Does Section Three cover this conduct? Did these events constitute "insurrection" or "rebellion" within the meaning of the Constitution? And if so, who all might be said to have "engaged in" that conduct, or perhaps given "aid or comfort" to those who did? We will consider those questions in turn.

#### 1. The Question of Coverage: Insurrection and Rebellion

We begin with the general legal question whether the attempted overturning of the result of the 2020 presidential election is covered by Section Three in any respect. Do such efforts, in part or in whole, qualify as insurrection or rebellion, disqualifying prior-oath-swearing persons who participated in such acts from future office? In our view, based on all the foregoing analysis, the answer is *yes*.

There are multiple arguments for how Section Three would apply to the events of 2020–2021, but let us first focus on the events of January 6, 2021.<sup>496</sup>

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<sup>496</sup> In describing these events, we rely generally here and throughout on the public record assembled by the House January 6th Committee. See FINAL REPORT, SELECT COMMITTEE TO

These include first the cluster of actions taken in assembling, encouraging, charging, and inciting an armed (in part) mob, producing the January 6, 2021 attack on the Capitol, Congress, and the Vice President. For some, importantly including Trump, these acts would also include subsequent deliberate *inaction* against the January 6 attack—by persons with duties and capacity to act to suppress, halt, or quell the insurrection in progress—that effectively facilitated, permitted, aided, and encouraged such insurrectionary violence.

Overall, it seems to us to be quite clear that the specific series of events leading up to and culminating in the January 6, 2021 attack qualifies as an insurrection within the meaning of Section Three: “concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect.”<sup>497</sup> The large group of people who descended upon, entered, and occupied the U.S. Capitol building used force to prevent a key step in the constitutional transfer of power. The group was partially coordinated, not merely a riot.<sup>498</sup> Some members of the group were armed,<sup>499</sup> and many used force and military training to breach the Capitol, to overpower law enforcement there, and to effectuate their unlawful aim.<sup>500</sup>

Furthermore, it seems that, as a whole, the group’s goal—to the extent the group had a specific objective in mind—was to disrupt the constitutional transfer of power by disrupting a necessary formal step in the constitutional process.<sup>501</sup> The invasion of the Capitol on January 6 was not simply a violation of the law (though it was that of course). It was not merely a protest of a particular legal measure, but a forcible prevention and disruption of it. And it was not the disruption of *just any* legal measure, but of one that was itself central to the allocation of authority under our Constitution. If this is a fair description of what happened on January 6, then that day was something quite different from more common acts of protest, even disruptive protest. January 6 was an *insurrection*.

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INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, H.R. REP. NO. 117-663 (2022) [hereinafter “January 6 Report”]. Of course, to the extent that a potentially disqualified officer wished to prove that this public record was inaccurate or incomplete as relevant to them, they could attempt to do so in the relevant proceedings and to the relevant decisionmaker. See generally *supra* Section II.B.

<sup>497</sup> *Supra* Section IV.A.1. The fact that President Trump may have supported the insurrection, see *infra* Section IV.C.2.b, does not change this. In our system, the President is not “the government,” and especially not when Congress is carrying out a constitutionally mandated role in supervising the transfer of power.

<sup>498</sup> See, e.g., January 6 Report, *supra* note 496, at 499-502, 530-31.

<sup>499</sup> *Id.* at 640-42.

<sup>500</sup> *Id.* at 646-47, 651-59.

<sup>501</sup> *Id.* at 502-10, 521-30.

To be sure, the events of January 6 itself—the attack on Congress and the Capitol—did not remotely rival in overall magnitude, or in sheer carnage, the experience of the U.S. Civil War, where more than 600,000 people died. Still, considered as discrete events, it is notable that more people died, and many more were injured, as a result of the January 6, 2021 attack on the Capitol than died or suffered injuries as a result of the attack on Fort Sumter. The events of January 6 match, in their essential elements—concerted resistance to federal authority, serious attempts to frustrate execution of national law, attacks on government officials and facilities, intimidation and violence—and arguably exceeded in their seriousness, the events of the Whiskey Rebellion, Fries’ Rebellion, and other more limited historical insurrections. And at all events, it is less the magnitude or degree of disruption occasioned by an insurrection than whether it fits within the broad meaning of Section Three, as illuminated by evidence of its original meaning and historical understandings. As the *Prize Cases* teach, not every insurrection or rebellion ripens into a full-fledged war.<sup>502</sup> Most of the time, the authority of the state can nip it in the bud. But it is still an insurrection.<sup>503</sup>

Our assessment of the events of January 6, specifically, as an “insurrection” confirms the judgment made by public authorities. An act of Congress, which awarded “four congressional gold medals to the United States Capitol Police and those who protected the U.S. Capitol on January 6, 2021,”<sup>504</sup> found that the events of January 6 constituted an insurrection. The text of the act contains an official finding: “On January 6, 2021, a mob of *insurrectionists* forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers.”<sup>505</sup> Another finding noted the historic

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<sup>502</sup> See *supra* Section IV.A.4.c.

<sup>503</sup> What about other disruptive, disorderly, even violent protests during the same time period? For instance, the many such events that erupted during the summer of 2020 in the wake of the police killing of George Floyd? So far as we can tell, none of these were covered by Section Three. Of course, mere protest is not insurrection. Some of these protests devolved into riots, but even a riot is not necessarily an insurrection. And even if some of them went further, and amounted to “concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect,” and met the definition of insurrection, they would seem to be insurrections against the *state* governments, not the United States, and thus outside the scope of Section Three. But of course, if there were any other insurrections against the United States, Section Three applies to them all.

<sup>504</sup> Act of Aug. 5, 2021, Pub. L. No. 117-32, 135 Stat. 322.

<sup>505</sup> *Id.* § 1(2). In the state Section Three proceedings against Marjorie Taylor Greene, *supra* notes 78-83 and accompanying text, the hearing officer cited this statute to conclude “Congress has characterized the Invasion as an insurrection.” *Rowan v. Greene*, No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot, at 9-10 (Georgia Office of State Administrative Hearings, May 6, 2022) (initial decision). The hearing officer found it unnecessary to decide for himself, however, “[w]hether the Invasion of January 6 amounted to an insurrection.” *Id.* at 18.

magnitude and symbolic importance of that insurrection against democracy: “The desecration of the U.S. Capitol, which is the temple of our American Democracy, and the violence targeting Congress are horrors that will forever stain our Nation’s history.”<sup>506</sup> The impeachment charges brought against President Trump as a result of January 6 were equally explicit in concluding that the events of January 6 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.<sup>507</sup> 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.<sup>508</sup>

Finally, there is an additional possibility that we should see the events of January 6, 2021 as just one part of a broader “rebellion” against constitutional government, much like secession—actions seeking unlawfully to *displace* or *replace* the authority of lawful constitutional government and substitute a constitutionally unauthorized governmental authority in its stead.

We acknowledge that applying the term “rebellion” to the events of 2020–2021 goes beyond the Civil War era dictionaries. The attempt to overturn the 2020 election was neither an “*open and avowed renunciation of the authority of the government,*” as Webster would have it, nor (outside of the insurrection of January 6) “*the taking up [of] arms*” or “*forcible opposition*” as Bouvier would have it.<sup>509</sup> It is not a perfect fit.

Nonetheless, consider the argument that the term “rebellion” could be used more broadly to describe a coup d’état seeking to overthrow the constitutional order—including a so-called “bloodless” coup d’état (where no force is used) and a successful “self-coup” of the bloodless variety<sup>510</sup> (where

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<sup>506</sup> Act of Aug. 5, 2021, Pub. L. No. 117-32, 135 Stat. 322, § 1(5).

<sup>507</sup> H.R. Res. 24, 117th Cong. (2021).

<sup>508</sup> For what it is worth, other scholars have also agreed that January 6th was an insurrection. See Magliocca, *Foreground*, *supra* note 72, at 1067 n.44; Vlahoplus, *supra* note 495, at 1; Farah Peterson, *Our Constitutionalism of Force*, 122 COLUM. L. REV. 1539, 1621-25 (2022); see also Hemel, *How-to Guide*, *supra* note 5; Mark A. Graber, *Treason, Insurrection, and Disqualification: From the Fugitive Slave Act of 1850 to Jan. 6, 2021*, LAWFARE (Sep. 26, 2022), <https://www.lawfaremedia.org/article/treason-insurrection-and-disqualification-fugitive-slave-act-1850-jan-6-2021> [https://perma.cc/6G26-UKZV].

<sup>509</sup> See *supra* Section IV.A.2.

<sup>510</sup> See generally Daniel J. Hemel, *Self-Coup and the Constitution*, 37 CONST. COMMENT. 315 (2022).

the existing unlawful regime commands such force that it need not be used). Consider the following chain of logical steps: (1) A military coup d'état upending lawful government by use of force surely qualifies, constitutionally, as a "rebellion." It is literally an effort to unlawfully overthrow constitutional government, by force; (2) It follows that a military coup d'état upending lawful government by *show or threat* of force should be treated the same way, even though force was not *used*; (3) A military coup d'état by the *existing* regime—a "self-coup," would seem, legally, to be the same thing—in such a case the regime does not *seize* power, by show or threat of force, it *retains* power by show or threat of force but is logically identical to situations #1 and #2; (4) A "bloodless" self-coup against the lawful regime, where no force is used because none is needed, should be treated the same as #3—indeed, it seems fair to say that situation #4 is merely an instance of situation #3. (5) The same self-coup attempt, but that styles itself as not renouncing but instead as restoring or maintaining, the constitutional regime—but that in truth seeks to overthrow or defeat that regime—logically should be treated the same as #4. If one accepts this chain of reasoning, one might then fairly conclude that the entirety of the course of conduct attempting dishonestly and unlawfully to overthrow the 2020–2021 election constituted a "rebellion," even though this might stretch somewhat the dictionary definitions of the term.<sup>511</sup>

Calling the events of 2020 and 2021 "insurrection" or potentially even "rebellion" might seem to some exaggerated or hyperbolic. It is not. It is simply being legally precise and not shying away from difficult or upsetting consequences that flow from legal precision. We believe it is important to call the events of 2020 and 2021 by their true legal names, their *right* names, unshielded by artful euphemism.<sup>512</sup>

## 2. The Question of Participation: "Engaged in" and "Aid or Comfort"

This brings us to the rubber-hits-the-road question: *Who all, by virtue of their personal, voluntary conduct, can be said to have "engaged in" insurrection or*

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<sup>511</sup> In similar fashion, we note that—at least at first—the purported "*secession*" of a state from the Union was *not* universally acknowledged to be itself an act constituting "rebellion" as a legal matter. It too did not fit perfectly the standard dictionary definition (unless and until force was used or threatened). But the logic of the matter led Lincoln—and Congress, and the Supreme Court—to conclude that secession, in practical and legal terms, *was* a species of "rebellion" and legally to be treated as such. *See supra* Section IV.A.4. As set forth in the text, the same logic suggests that conduct tantamount to an attempted coup d'état (including attempting to maintain a defeated incumbent president in office, dishonestly and unlawfully) may fairly be characterized, legally, as "insurrection or rebellion."

<sup>512</sup> For the sake of completeness, we add that we think the events of 2020–2021 probably do *not* rise to the level of "treason" or "levying war" against the United States, though of course it is possible that further investigation will reveal truly treasonous conduct that is not yet on the public record.

*rebellion in connection with the efforts to overthrow the result of the presidential election of 2020 and unlawfully maintain Donald Trump in office as President of the United States? Additionally, perhaps, who might be said to have provided “aid or comfort” to those insurrectionists and rebels?*

As detailed at great—perhaps excruciating—length above, “engaged in” under Section Three is properly understood to embrace a broad range of willful participatory conduct. This includes, certainly, deliberate acts in the nature of planning, promoting, encouraging, counseling, supporting, materially assisting, advancing, or facilitating activity or plots that can fairly be characterized, legally, as “insurrection” or “rebellion.” And, as noted, in certain circumstances it might well include *inaction* supporting insurrection. Finally, giving “aid or comfort” arguably expands the range of acts of participation, support, and encouragement that qualify as triggering Section Three’s disqualification.<sup>513</sup>

Who, then, engaged in such behavior?

a. *General Principles Concerning Culpable Participation*

Some applications of Section Three are factually straightforward. Others might involve potentially more difficult questions of fact and proof concerning the degree and nature of an individual’s voluntary and intentional participation in (i) the overall plot and concrete efforts to overthrow the election and install Trump as president re-elect; (ii) the assembly, instigation, and incitement of a mob to attack the Capitol on January 6, 2021 to prevent certification of the election outcome; or (iii) the willful failure to take action to suppress the attack on Congress while it was in progress.

As discussed in Section II.B, above, judgments concerning the application of the legal standards of Section Three to specific individuals may and must be made by a variety of public actors—all those whose responsibilities call for application of the Constitution’s criteria for eligibility to hold office. The ultimate judgment will rest with different actors and institutions in different circumstances: sometimes by state election officials; sometimes by presidential electors; sometimes by state and federal executive branch officials; sometimes by the respective houses of Congress or by state legislatures. In many cases, the judgment ultimately will fall to state and federal courts, including the U.S. Supreme Court. Everybody in such positions is bound to apply Section Three faithfully and enforce its commands rigorously.

That said, from our interpretation of Section Three’s broad sweep, it is clear that at least two purported factual defenses are simply immaterial.

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<sup>513</sup> See generally *supra* Section IV.A.

First, it is no defense that an individual might claim that his or her conduct does not constitute having engaged in or supported “insurrection” or “rebellion” because the election *was in fact stolen*—that is, that Trump in fact won the election—making it legitimate to “stop the steal.” The problem is that the premise is simply false. Decisionmakers can and should act on the well-settled factual understanding that Joe Biden won, and Donald Trump lost, the election of 2020.<sup>514</sup>

Second, it is likewise no defense that an individual *believed* (even if mistakenly) that the election had in fact been stolen, or believed that their insurrectionary conduct was somehow lawful. That one may have been deluded or deceived by disinformation does not excuse acts of insurrection or rebellion. And as the South’s secession and the resulting Civil War illustrate, a bogus and unsuccessful constitutional theory does not excuse them either. In other words, there is no *mistake-of-insurrection* defense to Section Three.<sup>515</sup> Acts intentionally done as part of what is *in fact* and *in law* insurrection or rebellion are covered, irrespective of an individual’s wrong subjective belief that no such insurrection or rebellion occurred, or the reasons for such wrong belief.<sup>516</sup>

b. *Section Three Disqualifies Donald Trump from Future Office*

The most politically explosive application of Section Three to the events of January 6, is at the same time the most straightforward. In our view, on the basis of the public record, 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 case for disqualification is strong. There is abundant evidence that Trump deliberately set out to overturn the result of the 2020 presidential

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<sup>514</sup> See January 6 Report, *supra* note 496; see also John Danforth, Benjamin Ginsburg, Thomas B. Griffith, David Hoppe, J. Michael Luttig, Michael W. McConnell, Theodore B. Olson & Gordon H. Smith, *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*, LOST, NOT STOLEN (July 2022), <https://lostnotstolen.org> [<https://perma.cc/G3JC-ADET>].

<sup>515</sup> This is consistent with principles of mens rea that distinguish knowledge of what one is doing from knowledge of the proper legal characterization of what one is doing. See, e.g., *Counterman v. Colorado*, 600 U.S. 66, 72 n.2 (2023).

<sup>516</sup> Now what if the shoe were on the other foot? What if Trump had somehow succeeded in unlawfully holding apparent office after January 20, 2021? Would comparable actions by Biden supporters have constituted “insurrection”? We think not. *The true facts matter*. A rebellion against lawful government is rebellion, but acts of counter-insurgency against an attempted coup d’etat are not.

election result, calling it “stolen”<sup>517</sup> and “rigged”;<sup>518</sup> that Trump (with the assistance of others) pursued numerous schemes to effectuate this objective; that among these were efforts to alter the vote counts of several states by force, by fraud, or by intended intimidation of state election officials,<sup>519</sup> to pressure or persuade state legislatures and/or courts unlawfully to overturn state election results,<sup>520</sup> to assemble and induce others to submit bogus slates of competing state electors,<sup>521</sup> to persuade or pressure Congress to refuse to count electors’ votes submitted by several states,<sup>522</sup> and finally, to pressure the Vice President unconstitutionally to overturn state election results in his role of presiding over the counting of electors’ votes.<sup>523</sup>

Leading up to January 6, Trump repeatedly solicited, suborned, and pressured Vice President Mike Pence to prevent the counting of the electoral votes in favor of President-elect Biden.<sup>524</sup> Not only that: Trump assembled a large crowd to march on the Capitol and intimidate Congress and the Vice President into complying with his wishes and thereby prevent the official counting of the votes of electors confirming Trump’s defeat. Trump had announced on Twitter a protest to be held on January 6, 2021: “Big protest in D.C. on January 6th. Be there, will be wild!”<sup>525</sup> According to testimony amassed by the House’s January 6th Commission, Trump’s supporters interpreted this as a call to arms, sometimes literally.<sup>526</sup>

Then there are the events of January 6 specifically.<sup>527</sup> When January 6 arrived, Trump delivered an incendiary address at the White House Ellipse to the crowd of supporters he had effectively summoned to oppose what he

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<sup>517</sup> *Remarks by President Trump on the Election*, NAT’L ARCHIVES (Nov. 5, 2020, 6:48 PM), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-election/> [<https://perma.cc/FU6G-LS2Z>].

<sup>518</sup> See *Donald J. Trump, Tweets of January 6, 2021*, THE AM. PRESIDENCY PROJECT [hereinafter “Trump Tweets”], <https://www.presidency.ucsb.edu/documents/tweets-january-6-2021> [<https://perma.cc/4S26-ZR9L>] (last visited Dec. 4, 2023); January 6 Report, *supra* note 496, at 606. And not that it matters, see *supra* Section IV.C.2.a, but it also appears that Trump knew that these accusations were false. See January 6 Report, *supra* note 496, at 100-01, 103-04, 203, 213, 789.

<sup>519</sup> January 6 Report, *supra* note 496, at 202-203, 263-265; see also *id.* at 223-31.

<sup>520</sup> *Id.* at 296-300.

<sup>521</sup> *Id.* at 341-354.

<sup>522</sup> *Id.* at 431.

<sup>523</sup> *Id.* at 441-458.

<sup>524</sup> *Id.*

<sup>525</sup> *Id.* at 499.

<sup>526</sup> *Id.* at 499-540.

<sup>527</sup> For the quotations in this paragraph, see *Transcript of Trump’s Speech at Rally Before US Capitol Riot*, ASSOCIATED PRESS (Jan. 13, 2021, 9:11 PM), <https://apnews.com/article/election-2020-joe-biden-donald-trumpcapitol-siege-media-e79eb5164613d6718e9f4502eb471f27> [<https://perma.cc/BEL6-VAYF>]. See also *id.* (“And again, most people would stand there at 9 o’clock in the evening and say, I want to thank you very much, and they go off to some other life. But I said something’s wrong here, something is really wrong, can have happened. And we fight. We fight like hell, and if you don’t fight like hell, you’re not going to have a country anymore.”).

had been calling the “steal” of the election. Trump reiterated his false claim that he had in fact won the election—“we won this election and we won it by a landslide”—but that the Democrats and the media had “stolen” the election and “rigged” a false outcome. “They rigged it like they’ve never rigged an election before,” he charged. “Make no mistake, this election was stolen from you, from me and from the country. . . . This [is] the most corrupt election in the history, maybe of the world.” The crowd was “gathered together in the heart of our nation’s capital for one very, very basic and simple reason: To save our democracy.” Trump called on the crowd to march on the Capitol. “Our country has had enough. We will not take it anymore and that’s what this is all about. . . . We will stop the steal.” He urged the assembled mass of thousands, some of whom Trump knew to be armed, to “fight like hell. And if you don’t fight like hell you’re not going to have a country anymore.”

Some might quibble that the speech is ambiguous.<sup>528</sup> Not all of Trump’s rambling address called literally for the crowd to “fight.” Some of his statements were ambiguous and at one point he remarked that the crowd would be marching “peacefully and patriotically.”<sup>529</sup> He never *directly* and literally called for attacking the Capitol or the Vice President. Much of what might be thought incitement to lawlessness was innuendo. Nonetheless, the general and specific message was that the election had been stolen; that a constitutional fraud of colossal proportions and cataclysmic consequence was in the process of being perpetrated on the nation; that the crowd needed to take “strong” and direct action to protect the country; and that *immediate* action was necessary to prevent Vice President Pence and Congress from ratifying the unconstitutional election of an illegitimate president and doing irreparable damage to the nation.

These ambiguities have given rise to a debate about whether Trump’s speech did or did not cross the strict incitement threshold of *Brandenburg v. Ohio*.<sup>530</sup> It could well be that it did cross the line: Trump had deliberately assembled the mob of supporters, steered them to action, knew that they were

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<sup>528</sup> See Michael Conklin, *Capitol Offense: Is Donald Trump Guilty of Inciting a Riot at the Capitol?*, 15 U. ST. THOMAS J.L. & PUB. POL’Y 483, 493-94 (2022); see also Alan Z. Rozenshtein & Jed Handelsman Shugerman, *January 6, Ambiguously Inciting Speech, and the Overt-Acts Rule*, 37 CONST. COMMENT. 275, 276-79 (2022).

<sup>529</sup> *Transcript of Trump’s Speech at Rally Before US Capitol Riot*, *supra* note 527.

<sup>530</sup> 395 U.S. 444, 447-48 (1969). Compare Conklin, *supra* note 528, at 493-95 (arguing that President Trump’s speech did not satisfy the *Brandenburg* test), with Alexander Tsesis, *Incitement to Insurrection and the First Amendment*, 57 WAKE FOREST L. REV. 971 (2022) (arguing that President Trump’s speech satisfies the *Brandenburg* test and is not constitutionally protected). See also Rozenshtein & Shugerman, *supra* note 528, at 277 n.4 (citing these and other sources and describing this disagreement).

ready to take immediate action, and directed them to take it.<sup>531</sup> But the most important thing is that the *Brandenburg* question is beside the point. Section Three of the Fourteenth Amendment does not enact the legal standard of *Brandenburg v. Ohio*. It enacts the standards of participation in and support for “insurrection or rebellion,” and it qualifies, modifies, or simply satisfies the First Amendment to the extent of any conflict between these constitutional principles.<sup>532</sup> First Amendment or no, the speech was part of Trump’s participation in and support for the insurrection.

Finally, as events unfolded and the violence began, Trump maintained silence—and indeed deliberate indifference bordering on tacit encouragement—for what had by that time clearly become a forcible insurrection. For three hours after learning that his supporters had attacked the Capitol, Trump took no action to urge them to leave, despite being begged to do so by his advisors and despite having a constitutional duty to take care that the laws be faithfully executed.<sup>533</sup> During this same period, while the insurrection was in progress and after the Capitol had been breached, he again condemned Vice President Pence for not “hav[ing] the courage to do what should have been done to protect our Country and our Constitution,”<sup>534</sup> a statement that the January 6th Commission concluded was “a statement that could only further enrage the mob” and that in fact apparently did so.<sup>535</sup> Once Trump finally *did*—after several hours and with great reluctance—direct his supporters to leave the Capitol, they quickly dispersed.<sup>536</sup>

This culpable inaction—failing to intervene to stop an insurrection in progress, and declining to act to arrest a violent uprising, despite having both the capacity and responsibility to intervene—is another crucial part of Trump’s responsibility for the January 6 insurrection. Section Three reaches

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531 As Rozenshtein and Shugerman also emphasize, “Trump’s speech was accompanied by several overt acts in furtherance of inciting an attack against the Capitol,” which they argue takes it outside of the *Brandenburg* framework for that reason. Rozenshtein & Shugerman, *supra* note 528, at 313.

532 See *supra* Section III.D (arguing that Section Three is not limited by the free speech principles of the First Amendment).

533 January 6 Report, *supra* note 496, at 577-606.

534 Trump Tweets, *supra* note 518.

535 January 6 Report, *supra* note 496, at 577.

536 Even as he urged peace in a video to the insurrectionists (“we can’t play into the hands of these people. We have to have peace”), he continued to express affection for them (“So go home. We love you. You’re very special.”) and to reiterate that the “election . . . was stolen from us.” Donald J. Trump, *Videotaped Remarks During the Insurrection at the United States Capitol* (Jan. 6, 2021), at <https://www.presidency.ucsb.edu/documents/videotaped-remarks-during-the-insurrection-the-united-states-capitol> [<https://perma.cc/44TT-DQ2Q>]. Later that night he tweeted: “These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!” Trump Tweets, *supra* note 518.

a broad range of conduct providing meaningful assistance to or support for acts of insurrection or rebellion performed by others, even quite passively.<sup>537</sup> Sitting by and doing nothing—declining to intervene to stop insurrectionary violence when one has both the duty and the ability to do so—might qualify. Additionally, and equally important, Trump’s deliberate inaction renders his January 6 speech much more incriminating in hindsight, because it makes it even less plausible (if it was ever plausible) that the crowd’s reaction was all a big mistake or misunderstanding.

Taking these events as a whole, and judging them under the standard of Section Three, it is unquestionably fair to say that Trump “engaged in” the January 6 insurrection through both his actions and his inaction. Officials—administrators, judges, legislators—whose responsibilities call upon them to apply Section Three properly and lawfully may, indeed must, take action within their powers to preclude Trump from holding future office.

Moreover, if one accepts the broader argument that the entire campaign to overthrow the results of the 2020 election was a form of constitutional rebellion,<sup>538</sup> then Trump’s complicity is even more obvious—as the leader, motive, force, and chief perpetrator of that rebellion. Indeed, it would not be going too far to say that Trump—having previously sworn a constitutionally required oath to preserve, protect, and defend the Constitution of the United States—knowingly attempted to execute what, had it succeeded, would have amounted to a political coup d’état against the Constitution and its system of elections and overthrow the results of the constitutional process, in order to maintain himself in office as President contrary to law. If that itself constitutes “rebellion” against the Constitution, Trump’s overall course of conduct disqualifies him under Section Three, even apart from the specific incitement to storm the Capitol on January 6.

The bottom line is that Donald Trump “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. If the public record is accurate, the case is not even close. He is no longer eligible to the office of Presidency, or any other state or federal office covered by the Constitution. All who are committed to the Constitution should take note and say so.

### c. *Beyond Trump*

Donald Trump is at the top of the list of Section Three disqualifications, but the list does not end with him. The public record to date shows many

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<sup>537</sup> Cf. *supra* notes 437–439 and accompanying text (describing the exclusion of Senator-elect Phillip Thomas).

<sup>538</sup> See *supra* notes 509–511 and accompanying text.

others who are or may be connected to either the January 6 insurrection or to a possible broader rebellion. These include government lawyers, executive branch officials, state officeholders, and even members of Congress. It is not for us to definitively say who all these may be—that, as we have said, is ultimately the responsibility and judgment of all those whose public duties call upon them to apply the Constitution’s provisions concerning officeholder qualifications. But to see why this responsibility is urgent, consider the following categories.

Consider first those who marched with—who rose up with—the January 6 mob itself. Some of these folks, such as Couy Griffin of New Mexico and Derrick Evans of West Virginia, have already been stripped of or resigned from their state offices, as Section Three contemplates.<sup>539</sup> They present the easiest case of “engag[ing] in . . . insurrection.” Open and shut.

But many more cases follow. Consider those who were not part of the uprising itself, but who provided planning, encouragement, assistance, or other material support to those who rose up on January 6. Recent proceedings against U.S. Representatives Biggs, Gosar, and Greene, for instance, raise this as a serious possibility.<sup>540</sup> Pennsylvania State Senator Doug Mastriano—who is also a retired military officer and recent gubernatorial candidate—is said to have transported busloads of people to what became the insurrection and “was near the Capitol during the attack.”<sup>541</sup> Former New York City Mayor Rudolph Giuliani worked extensively to overturn the election, and likewise riled the mob at the Ellipse on January 6.<sup>542</sup> Trump Chief of Staff (and former legislator) Mark Meadows planned and organized parts of the January 6 rally and apparently also “directed that [Giuliani] be allowed to speak” to the crowd.<sup>543</sup> These current and former officeholders are also subject to serious challenge under Section Three.

And if one entertains the argument that the entire course of conduct to overthrow the 2020 election was a broader rebellion,<sup>544</sup> the list just grows longer and longer. According to the public record: Former National Security Advisor General Michael Flynn proposed a plan to seize voting machines in

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<sup>539</sup> See *supra* notes 95–103, 140–142 and accompanying text.

<sup>540</sup> See *supra* notes 78–90 and accompanying text; January 6 Report, *supra* note 496, at 115–16, 464 (discussing Representatives Biggs and Gosar’s aid to efforts to overthrow the election).

<sup>541</sup> January 6 Report, *supra* note 496, at 294. Such a claim was brought against Mastriano in federal court but dismissed on jurisdictional grounds. See *supra* note 104.

<sup>542</sup> See January 6 Report, *supra* note 496, at 536, 577, 581, 593–594, 608; see also Rudolph Giuliani & John Eastman, *Speech to President Trump’s Supporters on January 6*, REV (Jan. 6, 2021), <https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat> [<https://perma.cc/D9HC-D4PL>] (calling for “trial by combat,” assuring the crowd that the election was stolen, and defending the legality of efforts to overturn the election).

<sup>543</sup> January 6 Report, *supra* note 496, at 533, 535–36.

<sup>544</sup> See *supra* notes 509–511 and accompanying text.

states contested by Trump.<sup>545</sup> Would-be Trump electors (some of whom held state political offices covered by Section Three) met on December 14 even in states where Biden's electors had been chosen, thus laying the groundwork for Trump's schemes.<sup>546</sup> Assistant Attorney General Jeffrey Clark sought to use the power and authority of the Department of Justice to fraudulently upend state election results.<sup>547</sup> At least one member of Congress pressed for the removal of more senior Department of Justice officials who opposed Clark's scheme, and lobbied for the appointment of Clark as Acting Attorney General, thus providing aid or comfort.<sup>548</sup> These officials, too, would be subject to challenge.

We could go on, but we have made the point: *All* persons who betrayed their earlier constitutional oaths by subsequently engaging in conduct (in any of a number of forms) directed at overthrowing the result of a lawful presidential election or supporting an attack on Congress and the Capitol should face serious inquiry under Section Three. If they try to hold, retain, re-obtain, or seek public office, their eligibility for such positions should be stringently scrutinized. That inquiry should be conducted by every relevant level of government, from state election officials, to the halls of Congress, to the courts throughout the country. In many cases we may not yet even know the full extent of the participation and support for acts of insurrection or rebellion in 2020–2021. But we must find out.

Taking Section Three seriously as part of our nation's operative, ongoing fundamental law means that such inquiries are constitutionally necessary. Indeed, they are constitutionally *required*. Taking Section Three seriously, as binding constitutional law, means faithfully ascertaining and fearlessly applying the objective, original meaning of its words and phrases, understood in their historical context, whether we like that meaning or not, and tirelessly following the logic of the text's meaning to its fair conclusions. The upshot of doing so, we think—the consequence of adhering to constitutional principle—may well be the disqualification from public office of a great many more individuals than is generally recognized. In many cases, the inquiry has not yet begun. It is past time to start the reckoning.

## CONCLUSION

Despite its long slumber, Section Three of the Fourteenth Amendment is alive and in force. It remains fully legally operative. It is constitutionally self-

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<sup>545</sup> See January 6 Report, *supra* note 496, at 222.

<sup>546</sup> See *id.* at 352–53. Several of these would-be electors previously held state and local offices, and so are covered by Section Three.

<sup>547</sup> See *id.* at 50.

<sup>548</sup> See *id.* at 50 (discussing actions of Pennsylvania U.S. Representative Scott Perry).

executing—that is, its command is automatically effective, directly enacted by the Constitution itself. And it is sweeping: It sweeps over earlier and inconsistent constitutional provisions. It sweeps in a broad range of conduct attacking the authority of the United States. And it sweeps in a broad category of former oath-swearing officeholders turned insurrectionists or aiders-and-comforters of insurrection or rebellion. It is enforceable by anybody whose duties provide occasion for judging legal eligibility for office. Indeed, each of these actors has a *duty* to faithfully apply Section Three. All possess legitimate constitutional interpretive authority to construe and apply this constitutional prohibition, many of them independent of other actors, including courts.

All of this has obvious, important, and immediate legal implications.

We the People should honor and vigorously enforce this important provision of our Constitution. It should not be allowed to become a dead letter from disuse. Its purpose, while inspired by specific historical events, is one of general and continuing importance. The idea that men and women who swore an oath to support the Constitution as government officials, but who betrayed that oath by engaging in or abetting acts of insurrection or rebellion against the United States, should be disqualified from important positions of government power in the future (unless forgiven by supermajorities of both houses of Congress) remains a valid, valuable, and we think vital precept. Disqualifying candidates and officials from office is not something to be done lightly, but Section Three was not enacted lightly. Section Three remains part of our Constitution, part of our nation's fundamental law. If we honor the Constitution, we must honor Section Three of the Fourteenth Amendment.

That means that those who possess the power and duty to apply and enforce Section Three have a constitutional responsibility to do so, fairly but vigorously. If state election boards or secretaries of state determine that a candidate for state elective office or a candidate seeking to represent that state in Congress is *constitutionally disqualified* from holding that office, those state authorities should exercise the state-law powers they possess to remove ineligible candidates from the ballot. If the House or Senate determines that a person elected to serve as a member of such body is *constitutionally disqualified* from holding such a position, they should expel or refuse to seat that person. And if a candidate for President, or an already-elected President, is *constitutionally disqualified* from office by Section Three, then that disqualification should be enforced by state election officials, by electors, by Congress through the impeachment process, and by the Vice-President, cabinet, and Congress in carrying out the Twenty-Fifth Amendment. In any and all these situations, and more, where the enforcement of Section Three's

constitutional disqualifications is properly presented to the judiciary in a case over which a court possesses jurisdiction, it is the constitutional duty, province, and responsibility of federal and state judges to faithfully apply and enforce Section Three according to its terms.

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. It is wrong to shrink on the pretext that some other officials may or should exercise *their* authority—as if one’s own constitutional obligations cease to exist if others fail to act. And it is wrong to shrink from observing and enforcing the Constitution’s commands on the premise that doing so might be unpopular in some quarters, or fuel political anger, resentment, opposition, or retaliation. The Constitution is not optional, and Section Three is not an optional part of the Constitution.

Importantly, it is also wrong to shrink from applying Section Three on the grounds of “democracy,” whether on the premise that Section Three should be ignored or narrowly construed because it limits who voters may choose, or on the premise that only the voters should enforce Section Three. It is true, as we have said, that limiting democratic choice is not something to be done lightly, but it is something the Constitution does, and for serious reasons.<sup>549</sup> The Constitution cannot be overruled or disregarded by ordinary election results. (And we note that there is particular irony in invoking democracy to shrink from applying Section Three to the insurrectionists of 2020–2021, who refused to abide by election results and instead sought to overthrow them.)<sup>550</sup>

Finally, we believe it would be wrong for courts to refuse to decide cases, otherwise lawfully within their jurisdiction, concerning Section Three on the pretense that such matters are “political questions.” Outside of certain exercises of power to exclude, expel, or impeach and try, committed to each House’s judgment, Section Three is enforceable by the judiciary *as well as* by other officials.<sup>551</sup> Section Three’s terms embody rules and standards, enforceable as any other constitutional provision is enforceable. There is no

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<sup>549</sup> See Magliocca, *Foreground*, *supra* note 72, at 1067–72 (arguing at length that “the democracy canon is a seductive but mistaken way of reading Section Three of the Fourteenth Amendment,” and that it “elevates a background constitutional principle in a way that is inconsistent with the text, purpose, and history of Section Three”).

<sup>550</sup> See William Baude, *The Real Enemies of Democracy*, 109 CAL. L. REV. 2407, 2418–20 (2021) (“The real enemies of democracy, at a more fundamental level, are those who try to ignore the rules of the game after they have already lost it. This past election, that means the real enemies of democracy were President Donald Trump and those who fought for him.”).

<sup>551</sup> See *supra* note 110.

freestanding judicial power to abstain from enforcing the Constitution whenever doing so might be difficult or controversial.

We think that if these constitutional duties are taken seriously, there is a list of candidates and officials who must face judgment under Section Three. Former president Donald Trump is at the top of that list, but he is not the end of it. As we have said, 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. 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. Our point is to emphasize Section Three's continuing force, and broad sweep.

At all events, if a President or former President of the United States; a current or former officer of the federal executive branch; a Member or former Member of Congress; a current or former state legislator or state executive official; or a current or former federal or state court judge, planned, supported, assisted, encouraged, endorsed, or aided in a material way those who engaged in the insurrection of January 6, or otherwise knowingly and willfully participated in a broader rebellion against the constitutional system, such persons are constitutionally disqualified from office. In such situations, Section Three's constitutional disqualifications can, should, and must be carried out.

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