Sweeping and Forcing the President into Section 3

A Response to William Baude and Michael Stokes Paulsen

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Does the full "sweep and force" of Section 3 of the Fourteenth Amendment disqualify Donald Trump from the presidency? In a new article, William Baude and Michael Stokes Paulsen argue that the answer is *yes* because "essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ." This sweeping conclusion is not accurate. Establishing the original public meaning of Section 3 is difficult because there is originalist and textualist evidence pointing in different directions. Our research is built on more than a decade of scholarship in areas that are, regrettably, neglected in modern courts and scholarship, but would have been well understood in the 1860s.

Our Article proceeds in five parts. Part I begins with a threshold question: *Is Section 3 of the Fourteenth Amendment self-executing?* Baude and Paulsen say the answer is *yes*, pointing to other provisions of the Constitution as models. Yet, the answer is not so clear. Constitutional provisions are not automatically self-executing, nor is there any presumption of self-execution for such provisions. We will illustrate our position with discussions of the Supreme Court's appellate jurisdiction, Article I qualifications, and more. Section 1 of the Fourteenth Amendment, which includes the Due Process and Equal Protection Clauses, can only be wielded as a *sword supporting affirmative relief* with federal enforcement legislation, such as Section 1983. But, even absent enforcement legislation, Section 1 of the Fourteenth Amendment can be wielded as a *shield* as a set of defenses. Section 1 is self-executing in the latter regard, but not the former. If Section 1 is a guide, then Section 3 cannot be used as a sword to disqualify Trump, absent federal enforcement legislation. Trump has not been disqualified pursuant to any federal enforcement legislation. If Section 3 requires federal enforcement legislation, then States cannot unilaterally remove Trump from the ballot.

Part II provides a careful study of *Griffin's Case*, a federal circuit court case decided by Chief Justice Salmon P. Chase in 1869. Chase stated expressly that Section 3 can only be enforced by Congress through federal legislation. Yet, Baude and Paulsen tar-and-feather *Griffin's Case*, and their article reads like an effort to discredit Chase. But their criticisms miss the mark. They fault Chase for not adhering to doctrines developed decades later, and they condemn Chase for breaching invented ethical standards. All things considered, *Griffin's Case* lies in the heartland of judicial thinking and scholarship. Baude and Paulsen misread *Griffin's Case*, misunderstood Chase, and misconstrued the holding. Chase's opinion was, and remains, reasonably probative evidence of the original public meaning of Section 3, and whether it is or is not self-executing.

Part III turns to another case that Chief Justice Chase presided over. This case also implicated Section 3: the treason indictment against Jefferson Davis. A version of the case, reported nearly a decade *after* it was decided, includes a sentence which suggests that Chase viewed Section 3 as self-executing. If so, the *Case of Jefferson Davis* (1868) would seem to be in tension with *Griffin's Case* (1869). However, this sentence was added to the report by a former

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confederate general who had apparently plotted to kidnap Abraham Lincoln. Plus, the general was subsequently the lawyer for the respondent, another former confederate, in *Griffin's Case*. The reporter's connection to the self-execution issue is some cause for concern. A contemporaneous report, published in 1869, does not include that sentence. Even taken on these terms, the two Chase opinions can be reconciled. Griffin was an applicant in a collateral challenge; he sought to use Section 3 as a sword, that is, *offensively as a cause of action supporting affirmative relief*, but he could not do so without enforcement legislation. By contrast, Davis sought to use Section 3 as a shield–as a defense in his criminal prosecution, and he could do so without enforcement legislation. Even under modern doctrine, *Griffin's Case* is not in tension with the *Case of Jefferson Davis*.

Part IV focuses on the conduct that can trigger a disqualification. The offense element of Section 3 has two prongs: (i) engaging in insurrection or rebellion against the United States, and (ii) giving aid or comfort to the enemies thereof. These elements are textually distinct, and they reflect longstanding aspects of domestic and international law. Yet, Baude and Paulsen conflate "engaged" in insurrection, a direct and substantive criminal law offense, with giving "aid or comfort" to enemies, which permits liability based on indirect and inchoate wrongs. And in the process, they constructed a new offense that does not appear in the text of Section 3: giving aid or comfort to insurrection. The text of Section 3's "engage" prong does not extend to wrongs and crimes that are inchoate or indirect. Nor does the "engage" prong extend to inaction—for example, failing to take action with regard to an insurrection or rebellion.

Part V considers another threshold question: was Trump ever subject to Section 3? President Trump was unique among all of his predecessors in that he did not hold any prior government position before he took the presidential oath of office on January 20, 2017. Section 3 of the Fourteenth Amendment could only disqualify Trump if the presidential oath he took on that date was as an "Officer[] of the United States." In 2021 we published an article concluding "that the President is not a Section 3 'officer of the United States.'" In their article, Baude and Paulsen summarily dismiss our position. But Baude and Paulsen disregard substantial evidence about the meaning of the phrase "Officers of the United States" in the Constitution of 1788. And they disregard the fact that the debates they cite from the 1860s in support of their position look back to debates from the early Republic. Instead of parsing the Constitution of 1788 and early debates, Baude and Paulsen focus on original intentions and consequentialism. These sorts of arguments are weak evidence of original public meaning and do not pass originalist muster. More importantly, Baude and Paulsen offer no complete or comprehensive theory to explain what other positions are included and excluded by the phrase "Officer of the United States." Without ever explaining what Section 3's "officer of the United States"-language means, they only seek to establish that the President falls in that category. In short, Baude and Paulsen punched a textualist ticket good for one ride on the Trump train.

The theoretical defects and other errors in Baude and Paulsen's article are not insubstantial, and they span multiple independent issues. And we see no sound basis for their article's startling conclusion: "In the end, essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ." We suggest that scholars, litigants, elections administrators, and judges allow Baude and Paulsen's article to percolate in the literature before placing too great a reliance on its novel claims.

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Introduction

In a recent article, Professor William Baude and Professor Michael Stokes Paulsen purport to set forth the "full sweep and force of Section Three" of the Fourteenth Amendment.[1] Baude and Paulsen make four primary arguments. First, they contend that Section 3 remains operational long after the American Civil War ended. Second, they argue that Section 3 is self-executing; as they view it, Section 3 may automatically remove covered officeholders and impose a disability on candidates' ballot access without the need for federal enforcement legislation, and perhaps, without any judicial proceedings. Third, they write that imposing such a disqualification does not run afoul of other provisions of the Constitution, such as prohibitions on retroactivity or the Free Speech Clause of the First Amendment. In their view, the later-in-time Section 3 modifies earlier provisions of the Constitution, as well as federal statutory law. Fourth, they interpret Section 3 to include "indirect participation" with an insurrection. Specifically, they contend that giving aid or comfort to an insurrection is sufficient to trigger a Section 3 disqualification. In this Article, we will disagree with their second, third, and fourth positions.

Baude and Paulsen conclude that Section 3 disqualifies former President Donald Trump from being re-elected as President. Indeed, Baude and Paulsen suggest that Trump is *already* disqualified from office, and States can prevent him from even appearing on the ballot. Baude and Paulsen unequivocally state, "In the end, essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ." This sweeping conclusion about "essentially *all* the evidence" pointing in the same direction is not accurate.

Our research in this area, which began long before Baude and Paulsen shared their article,[2] demonstrates that establishing the original public meaning of Section 3 is difficult. This research is built on more than a decade of scholarship in areas that are, regrettably, neglected in modern courts and scholarship, but would have been well understood in the 1860s. Attempts to use Section 3 to disqualify Trump, along the lines Baude and Paulsen suggest, is not a slam dunk, and is likely to backfire. Our views here are not new. We have been continuously publishing in this and related areas, separately and jointly, for over a decade.

Indeed, the Baude and Paulsen article, which purports to be an originalist tour-de-force, views today's pressing question through a distinctly modern lens. Our position is that they have not put forward a sufficiently complete theoretical work needed to understand the major facets of Section 3 in the abstract sense that extends beyond Donald Trump's case. Baude and Paulsen offer no theory of how Section 3 would extend beyond the controversy of the day. They don't tell us how to determine which other officers might be disqualified by Section 3, beyond the President. They don't tell us how to define an "enemy" for purposes of Section 3 outside the context of the Civil War, even though that term is essential to their atextualist analysis. They don't provide a framework to determine whether other provisions of the Constitution are self-executing, including the grant of appellate jurisdiction to the Supreme Court and the Article I qualification standards. They conflate "engaged" in insurrection, a direct and substantive criminal law offense, with giving "aid or comfort" to enemies, which permits liability based on indirect and inchoate wrongs. And

[1] William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. PENN. L. REV. (forth. circa 2023-2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751.

[2] We are grateful that Baude and Paulsen shared an earlier draft of their paper with us, and we provided some comments on their draft. Their sharing the early draft also enabled us to make this timely response.

they extract and rearrange distinct parts of Section 3 into a new Section 3 chimera: "giving aid or comfort to insurrection"—an offense which does not actually appear in Section 3's text.

They offer no principled explanation with regard to retroactivity, and they do not even recognize how *far* back Section 3 *could* sweep. They don't provide any grounded rule to explain which provisions of the Constitution and federal statutory law are repealed or limited by Section 3. To what extent should the courts peel back protections under the First Amendment and traditional free speech protections—could Congress enact seditious libel laws to enforce Section 3? What about the Judge of the Elections Clause—can courts review a House's decision to seat someone disqualified by Section 3? What about the Speech or Debate Clause—would a member be disqualified for opposing a declared war, thereby giving aid or comfort to enemies? And so on.

Beyond deficiencies with legal theory, significant errors recur throughout their article. They tar-and-feather a decision by Chief Justice Chase, *Griffin's Case* (1869), which, all things considered, lies in the heartland of judicial thinking and scholarship. Simply put, they have misread the caselaw. They criticize Chase's motives based on a single sentence in the *Case of Jefferson Davis* (1868)—a sentence which did not appear in the original report of the case and which was added to a later report by a former confederate general. They accuse Chase of judicial impropriety for discussing the views of his Supreme Court colleagues, even though three decades later the Supreme Court favorably quoted Chase's opinion on this exact point.

Baude and Paulsen's errors are not limited to Chase. They cite cases as evidence of Section 3's self-execution, which in fact invoked a state law to disqualify state officials. They rely on a source that the Supreme Court expressly rejected in *The Prize Cases* (1863), having already told us that *The Prize Cases* are part of the intellectual infrastructure from which Section 3 arose. They conflate the Treason Clause of the Constitution with a federal treason statute signed into law by President Lincoln. They don't even address the fact that Section 3 speaks to "holding" elected positions, and it says nothing at all about ballot access or any other remedies in regard to regulating elections. They state that secession movements necessarily violate Section 3—members of the Puerto Rican independence movement would disagree. And much, much more.

Moreover, Baude and Paulsen's article is replete with hyperbole. They describe Chief Justice Chase's (purported) position in the *Case of Jefferson Davis* (1868) as "bonkers." Indeed, Baude and Paulsen's hyperbole makes their position less convincing than it otherwise could be. The hyperbole distracts from the article's substance, and we acknowledge that there is much substance. That said: for Baude and Paulsen to be right about "essentially *all* the evidence," a great many other people—living and dead—must be dead-wrong about a great deal, which until 2020 very few thought controversial. We think humility counsels otherwise.

Baude and Paulsen's article places a bullseye on one person, and one person alone: Donald Trump. And to borrow from Justice Scalia's description of the independent counsel in *Morrison v. Olson*, with such a laser-focus, it is unsurprising they think they hit their target. But their laser-focus precluded them from seeing a wider universe of contrary evidence, which would have been readily visible had they approached Section 3 from a more abstract perspective apart from Trump. Their theoretical defects and substantive errors are endemic, and undermine the emphatic conclusion of the article: "In the end, essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ." This statement is not accurate. Most originalists are loath to suggest that questions rooted in century-old and centuries-old texts are so easy to resolve. But Baude and Paulsen reach an emphatic conclusion on contested and contestable ground.

Our Article proceeds in five parts. Part I begins with a threshold question: *Is Section 3 of the Fourteenth Amendment self-executing?* Baude and Paulsen say the answer is *yes*. But the answer is not so clear. Constitutional provisions are not automatically self-executing; nor is there any presumption that such provisions are self-executing. Is the Supreme Court's appellate jurisdiction self-executing? Chief Justice Ellsworth said *no*, and Chief Justice Marshall said *yes*. Today, it appears that the prevailing view is that Ellsworth was correct. Are the Article I qualifications for office—including the minimum age requirement—self executing? What about the quorum rule? These internal rules are generally "under-enforced," and when enforced, they are enforced in a discretionary manner. What about treaties? Treaties like constitutional provisions and statutes are also the supreme law of the land; yet, treaties are *not* presumptively self-executing.

What about Section 1 of the Fourteenth Amendment? Certainly that provision, which includes the Due Process and Equal Protection Clauses, is self-executing, right? In our American constitutional tradition there are two distinct senses of self-execution. First, as a *shield*—or *a defense*. And second, as a *sword*—or *a theory of liability* or *cause of action supporting affirmative relief*. The former is customarily asserted as a defense in an action brought by others; the latter is asserted offensively by an applicant seeking affirmative relief. Section 1 can only be wielded as a sword with federal enforcement legislation. But Section 1 can be wielded as a shield without legislation. Section 1 is self-executing as a set of defenses. The Supreme Court's leading Fourteenth Amendment cases reflect this dichotomy. Section 1 was used as a shield in *The Slaughter-House Cases*, *United States v. Cruikshank*, and *Plessy v. Ferguson*. Section 1 was used as a sword in *Bradwell v. Illinois*, and in countless other cases that invoke Section 1983 and its statutory antecedents. Moreover, a plaintiff asserting an *Ex parte Young* claim is actually asserting a defense as a *shield* in anticipation of a state lawsuit, prosecution, or other enforcement action. Baude and Paulsen fail to account for the two distinct senses of self-execution. It is these two senses of self-execution which reconcile Chief Justice Chase's two decisions, whose legal bona fides have only recently become controversial. In short, *Griffin's Case* and the *Case of Jefferson Davis* do not contradict one another.

Part II provides a careful study of *Griffin's Case*. This circuit court opinion was decided in May 1869. Salmon P. Chase, the Chief Justice of the United States, presided over the case. Chase stated expressly that Section 3 can only be enforced by Congress through federal legislation. One would think that this decision, issued within a year of the Fourteenth Amendment's ratification, by the Chief Justice of the United States, would be reasonably probative evidence of the original public meaning of Section 3, and whether it is or is not self-executing. But, according to Baude and Paulsen and some other recent commentators, such is not the case.

Baude and Paulsen go to some lengths to ridicule his opinion and their article reads like an effort to discredit Chase. But their criticisms miss the mark. They fault Chase for not adhering to doctrines developed decades later, and they condemn Chase for breaching invented ethical standards. Baude and Paulsen are wrong on the law. Worse still, Baude and Paulsen repeatedly deride Chase in hyperbolic terms. They say that Chase was trying to "knee-cap" the Fourteenth Amendment and compare his opinion to *Dred Scott*!

We think Baude and Paulsen misread *Griffin's Case*, misunderstood Chase, and misconstrued the holding. We encourage the reader to compare our treatment of *Griffin's Case* with that of Baude and Pauslen. The stark contrast will demonstrate that this "evidence concerning the original textual meaning of Section Three . . . points" against Baude and Paulsen's position. Rather, Chief Justice Chase's opinion was, and remains, reasonably probative evidence of the original public meaning of Section 3, and whether it is or is not self-executing.

Trump has not been disqualified pursuant to any federal enforcement legislation. Indeed, the Special Counsel did not even indict Trump, or anyone else involved with January 6, with charges of insurrection or rebellion, which could function as the criminal-law type predicates to Section 3 coverage.[3] If Chase was and remains correct, and Section 3 required and continues to require enforcement via federal legislation, then Trump cannot be disqualified in the manner Baude and Paulsen conclude.

Part III turns to another case that Chief Justice Chase presided over. This case also implicated Section 3: the treason case against Jefferson Davis. This proceeding, that is, *The Case of Jefferson Davis*, occurred in December 1868, several months before *Griffin's Case* was decided. The version of the case reported in *Federal Cases* (1894) includes this sentence: "THE CHIEF JUSTICE instructed the reporter to record him as having been of opinion on the disagreement, that the indictment [against Davis] should be quashed, and all further proceedings barred by the effect of [Section 3] the fourteenth amendment to the constitution of the United States." This sentence, on its face, seems to conflict with what Chase would write in *Griffin's Case* a few months later. Baude and Paulsen, and other scholars, have unquestionably accepted this statement as a report of what occurred in December 1868. Modern readers may take for granted that all reported versions of a case will be largely identical. But for much of Anglo-American legal history that assumption would have been wrong.

The *American Law Review*, published contemporaneously in 1869, offered an accounting of the trial, including detailed descriptions of arguments made by counsel for the defense and the government. But that publication did not include this particular sentence about Section 3. Indeed, we have found no contemporaneous public source confirming that Chase had adopted the view ascribed to him in the 1894 report of the case appearing in *Federal Cases*. To the contrary, we have found a contemporaneous source, a newspaper article, which states just the opposite of the position ascribed to Chase in the 1894 *Federal Cases* report. How did this sentence make its way into *Federal Cases*? That version of the case was first published in 1876 by Bradley T. Johnson, a former general in the (purported) confederate army. General Johnson had apparently plotted to kidnap Abraham Lincoln, and later, he admitted to making changes to Chase's reports without Chase's knowledge. Plus, General Johnson was the lawyer for the respondent, a former confederate, in *Griffin's Case*. The reporter's connection to the self-execution issue is some cause for concern.

Even taken on these terms, *Griffin's Case* can be reconciled with the *Case of Jefferson Davis*. Griffin was an applicant in a collateral challenge; he sought to use Section 3 as a sword, that is, *offensively as a cause of action supporting affirmative relief*, but he could not do so without enforcement legislation. By contrast, Davis sought to use Section 3 as a shield–as a defense in his criminal prosecution for treason, and he could do so without enforcement legislation. Finally, both opinions spoke to issues that were thought to be important by the public at the time they were issued (if not also for many years later). How is it that no one in the legal community (or elsewhere for all we know) noticed the inconsistency until circa 2020—about 150 years after-the-fact? Such a *no-one-noticed-until-me* argument is conceivable, but such a position calls for some explanation.

Part IV focuses on the conduct that can trigger a disqualification. The offense element of Section 3 has two prongs: (i) engaging in insurrection or rebellion against the United States, and (ii) giving aid or comfort to the enemies thereof. These elements are textually distinct, and they

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[3] We discussed this statute in Josh Blackman & Seth Barrett Tillman, *What Happens if the Biden Administration Prosecutes and Convicts Donald Trump of Violating 18 U.S.C. § 2383?* 2021 U. ILL. L. REV. ONLINE 190 (Apr. 30, 2021), https://ssrn.com/abstract=3837615.

reflect longstanding aspects of domestic and international law. One can only be an enemy during a war. (Baude and Paulsen do not even try to define the term "enemy" outside the context of the Civil War.) But, as they admit, not all insurrections are war. One can engage in insurrection without aiding an enemy. One who engages in insurrection without aiding an enemy is an offender, a criminal, or a felon. But absent a war, he is not an enemy. And one can aid an enemy without engaging in insurrection or rebellion. Yet, Baude and Paulsen conflate a direct criminal law offense (engaging in insurrection) with an indirect wrong (giving aid or comfort to enemies). And in the process, they constructed a new offense that does not appear in the text of Section 3: giving aid or comfort to insurrection. The text of Section 3's "engage" prong does not extend to wrongs and crimes that are inchoate or indirect. Baude and Paulsen's reconstruction of Section 3 is inconsistent with the provision's text. And it is only that expansive atextualist reconstruction of the text that could trigger Trump's disqualification, assuming his conduct stopped short of actually engaging in insurrection.

Part V considers another threshold question: was Trump ever subject to Section 3? President Trump was unique among all of his predecessors in that he did not hold any prior government position before he took the presidential oath of office on January 20, 2017. Section 3 of the Fourteenth Amendment could only disqualify Trump if the presidential oath he took on that date was as an "Officer[] of the United States." The President is an "Officer" and holds an "Office." That much is not disputed. But is the President an "Officer of the United States"? If the presidency is not an "Officer[] of the United States" for purposes of Section 3, then the "full sweep and force" of that provision could not touch Trump. In 2021 we published an article discussing whether the President is an "Officer[] of the United States" for purposes of Section 3.[4] We concluded "that the President is not a Section 3 'officer of the United States.'"

In their article, Baude and Paulsen summarily dismiss our position. Baude and Paulsen contend that our textualist approach is "hidden-meaning hermeneutics" that renders Section 3 "a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati." This sort of argumentation is, once again, misplaced hyperbole. Instead, Baude and Pauslen do not address the evidence we have put forward. And they left unrebutted several sources, from the period roughly contemporaneous with ratification, that support the position that the President is not an "Officer of the United States." To preempt an obvious, and predictable response, of course the President is an *officer* and holds an *office*. But that is not the relevant question. The relevant question is whether the President is an "Officer of the United States" as that phrase is used in Section 3. The Framers of the Constitution of 1788 and Section 3 used different "office"- and "officer"-language throughout the original Constitution and even within Section 3. We should endeavor to establish the meaning of the language they chose, and we do not assume that when they chose terms which were readily distinguishable from one another that such terms had identical meanings. The presumption ought to be that when different language is chosen, it was intended and understood as having different meanings. That presumption ought not be casually disregarded. Yet, Baude and Paulsen do precisely that: they assume that Section 3's "Office . . . . under the United States"-language and "officer of the United States"-language are coextensive and both reach the presidency.

Baude and Paulsen disregard substantial evidence about the meaning of the phrase "Officers of the United States" in the Constitution of 1788. And they disregard the fact that the debates they cite from the 1860s in support of their position look back to debates from the early

[4] Josh Blackman & Seth Barrett Tillman, *Is the President an 'officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment*, 15 NYU JOURNAL OF LAW & LIBERTY 1 (2021).

Republic. These early debates discussed the meaning of "office"- and "officer"-language in the Constitution of 1788. Instead of parsing the Constitution of 1788 and early debates, Baude and Paulsen focus on original intentions and consequentialism. These sorts of arguments are weak evidence of original public meaning and do not pass originalist muster. Baude and Paulsen ignore authorities ranging from Justice Story's scholarship to Chief Justice Roberts's opinions for the Supreme Court. Baude and Paulsen conclude, "In the end, essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ." Yet Baude and Paulsen simply look away from contrary evidence.

What is Baude and Paulsen's theory of what "Officer of the United States" meant in 1868? They are positively certain that language included the President—a conclusion that would address Donald Trump's eligibility for re-election, but not much else. But they do not explain what other positions are included and excluded by the constitutional text at issue here. We suggest that if ever a full-accounting of the meaning of "Officer of the United States" was needed, it would be in a case that could disqualify a leading presidential candidate. Without ever explaining what Section 3's "officer of the United States"-language means, they only seek to establish that the President falls in that category. In short, Baude and Paulsen punched a textualist ticket good for one ride on the Trump train. They tell us the President is an "Officer of the United States," but they will not tell us much else. If we are correct on this textual point, then Trump cannot be disqualified under Section 3. Before Trump can be swept or forced into Section 3, Baude and Paulsen must fully grapple with all originalist and textualist evidence.

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We close with a general observation about this new article. Baude and Paulsen make more than a few novel claims, which we have not seen in any of their prior published scholarship. Rather than cautiously approaching their first foray in this area, Baude and Paulsen make some claims with absolute certitude, and then go on to re-express their position in different terms, and then to hedge on the central question. A simple example will suffice. In one place, Baude and Paulsen write that "it is not at all clear that [Section 3] inflicts *punishment*."[5] And in another place, Baude and Paulsen write that Section 3 is an "offense, conviction, and *punishment* all rolled into one."[6] Baude and Paulsen fail to explain whether Section 3 does or does not inflict a punishment. As a result of these, and other tensions, their lengthy paper presents something of a moving target. They use charged language against long dead actors who, because they are dead, are in no position to defend themselves and their handiwork. Baude and Paulsen, disagree with many, and those who disagree with them are not merely characterized as wrong, but as inept, unethical, disloyal, or occultish. For these reasons, and others, we have considerable methodological differences with Baude and Paulsen. And given the seriousness of the central issues, and the speed with which it may race through the state and federal courts and executive bodies controlling ballot access, reasonable caution and care are in order. We suggest that scholars, litigants, elections administrators, and judges allow their article to percolate in the literature before placing too great a reliance on its novel claims.

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[5] Baude & Paulsen, *supra* note __, at 53.
[6] Baude & Paulsen, *supra* note __, at 20.

I. Two Senses of Self-Execution: Sword and Shield

Throughout their article, Baude and Paulsen state unequivocally that Section 3 of the Fourteenth Amendment is self-executing. They write that "disqualification requires no further legislation or other action, by anybody, to be operative." Rather, "[t]he disqualification simply *is*." We do not disagree that a provision of the Constitution *is*. If that were all Baude and Paulsen meant by self-execution, that "A=A" or "Section 3 *is* because Section 3 *is*," we would not disagree, and we think few would or should care. But that tautological statement does not resolve *what* the scope of Section 3 is, and more importantly, *how* it is enforced. These are the actual questions at stake when we discuss "self-execution."

In our American constitutional tradition there are two distinct senses of self-execution. First, as a *shield*—or *a defense*. And second, as a *sword*—or *a theory of liability* or *cause of action supporting affirmative relief*. The former is customarily asserted as a defense in an action brought by others; the latter is asserted offensively by an applicant seeking affirmative relief.

For example, when the government sues or prosecutes a person, the defendant can argue that the Constitution prohibits the government's action. In other words, the Constitution is raised *defensively*. In this first sense, the Constitution does not require any further legislation or action by Congress. In these circumstances, the Constitution is, as Baude and Paulsen write, "self-executing."

In the second sense, the Constitution is used *offensively–as a cause of action supporting affirmative relief*. For example, a person goes to court, and sues the government or its officers for damages in relation to a breach of contract or in response to a constitutional tort committed by government actors. As a general matter, to sue the federal government or its officers, a private individual litigant must invoke a federal statutory cause of action. It is not enough to merely allege some unconstitutional state action in the abstract.[7] Section 1983, including its statutory antecedents, i.e., Second Enforcement Act a/k/a Ku Klux Klan Act of 1871, is the primary modern statute that private individuals use to vindicate constitutional rights when suing state government officers.

Constitutional provisions are not automatically self-executing when used offensively by an applicant seeking affirmative relief. Nor is there any presumption that constitutional provisions are self-executing. Indeed, whether any particular provision is or is not self-executing is not obvious, and frequently, the issue cannot be resolved based solely on the provision's text. Consider Article III's grant of appellate jurisdiction to the Supreme Court. In an early decision, Chief Justice Marshall held that the Supreme Court would automatically enjoy all of the appellate jurisdiction

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[7] *See e.g.,* Armstrong v. Exceptional Child Center, 575 U.S. 320, 326 (2015) (rejecting the proposition that "the Supremacy Clause creates a cause of action for its violation" in the federal court's equitable jurisdiction); Trump v. Sierra Club, 140 S. Ct. 1 (2019) (stating that the federal government had "made a sufficient showing at this stage that the plaintiffs have no cause of action"); *see also* Josh Blackman & Seth Barrett Tillman, *The Unresolved Threshold Issues in the Emoluments Clauses Litigation: The President Has Three Bodies and There Is No Cause of Action for Ultra Vires Conduct*, 19 GEO. J. OF LAW & PUB. POL'Y 163, 214-15 (2022) ("The plaintiffs [in the Foreign Emoluments Clause litigation] cited *Armstrong*, but they failed to note that in this case the Supreme Court held that there was no equitable cause of action. Armstrong cuts against plaintiffs' free-floating claim to an equitable ultra vires cause of action." (citations omitted)). In any event, it is not clear how an equitable cause of action could be used to disqualify a candidate based on Section 3. To reinforce the point about the need for federal legislation, under the Court's "traditionally cautious approach to equitable powers," Congress is responsible for "any substantial expansion of past practice." *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 329 (1999).

granted by Article III if not cut back by a federal statute. But in even-earlier decisions, Chief Justice Ellsworth and Associate Justice Samuel Chase,[8] took the position that the grant of appellate jurisdiction was not self-executing. Rather, Congress had to affirmatively grant that jurisdiction by statute. Today, it appears that the Ellsworth-Chase view is the prevailing view. Still, with regard to Article III, there is no consensus that such self-execution is a default. Moreover, there is no presumption that treaties are self-executing.

Baude and Paulsen analogize between the qualifications in Article I (such as the age requirements) and the disqualifications in Section 3. They contend that the former are *clearly* self-executing, so the latter should be self-executing as well. Not so. Congress's internal proceedings follow parliamentary rules. These rules include, for example, qualifications and the quorum rules. These internal rules are generally "under-enforced," and when enforced, they are enforced in a discretionary manner. For example, the House and Senate have issued oaths to members who were below the Article I age requirement. And both Houses, in the absence of a member's objection, will routinely hold sessions and conduct business in the absence of a "quorum," that is, a majority of members actually being present. We do not think there is any consensus with regard to whether Article I's qualification requirements are self-executing. Nor are treaties presumptively self-executing.

Is Section 1 of the Fourteenth Amendment self-executing? Our answer is two-fold. Section 1 can only be wielded as a sword by an applicant seeking affirmative relief if there is federal enforcement legislation, such as Section 1983 (and its statutory antecedents). But Section 1 can be wielded as a shield without legislation. Section 1 is self-executing as a set of defenses. The Supreme Court's leading Fourteenth Amendment cases reflect this dichotomy. Section 1 was used as a shield in *The Slaughter-House Cases*, *United States v. Cruikshank*, and *Plessy v. Ferguson*. Section 1 was used as a sword in *Bradwell v. Illinois*, and in countless other cases that invoke Section 1983 and its statutory antecedents. Baude and Paulsen fail to account for the two senses of self-execution.

A. Is Article III's grant of appellate jurisdiction to the Supreme Court self-executing?

We think a good starting point to consider the question of whether Section 3 is self-executing in the courts and elsewhere, is to ask whether other constitutional provisions are self-executing. We examine Article III itself because it has been discussed continuously by courts and others during ratification and since. The canonical *Marbury v. Madison* was one such case.

The Constitution does not specify what lower federal courts, if any, Congress must create. And having created lower federal courts, what jurisdiction the lower federal courts possess, as general matter, is determined by Congress.[9]

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[8] Associate Justice Samuel Chase, from Maryland, was appointed to the Supreme Court by President Washington. Chase served on the Supreme Court from 1796 to 1811. *See Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx. Justice Samuel Chase of Maryland should not be confused with Chief Justice Salmon Chase, from Ohio, who was appointed to the Supreme Court by President Lincoln. Chief Justice Salmon Chase served on the Supreme Court from 1864 to 1873. *Id.*

[9] *See, e.g.*, Judiciary Act of 1789, https://avalon.law.yale.edu/18th_century/judiciary_act.asp; RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 20 (6th ed. 2009) ("The judiciary article of the Constitution was not self-executing, and the first Congress therefore faced the task of structuring a court system.").

The Supreme Court was different. Article III, Section 2, Clause 2 provided that the Supreme Court "shall have original Jurisdiction" in "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." Once the Supreme Court was established by statute, the widely accepted (albeit not universal) view is that the Court would have had all those heads of original jurisdiction, even in the absence of implementing legislation.[10] And *Marbury v. Madison* teaches that Congress cannot expand the Supreme Court's original jurisdiction.

What about the Supreme Court's appellate jurisdiction? Article III, Section 2, Clause 2 provides further, "In *all* the other cases before mentioned, the Supreme Court *shall* have *appellate jurisdiction*, both as to law and fact, with such exceptions, and under such regulations as the Congress *shall* make."[11] The language here is strong. It uses words like "shall" and "all." Much of what is stated here appears mandatory. But the text also provides that Congress can make "exceptions" and "regulations" to that appellate jurisdiction. Which way does the text cut? Stated in modern terms, was the Supreme Court's Article III appellate jurisdiction self-executing? In other words, if Congress merely established the Supreme Court, but did not grant *any* appellate jurisdiction, would the Supreme Court automatically enjoy all the appellate jurisdiction "granted" by Article III or none at all? Not surprisingly, the answer is unclear.

In an early decision, Chief Justice Marshall said *yes*. But in even-earlier decisions, Chief Justice Ellsworth and Justice Chase took the position that the answer was *no*. Today, it appears that the Ellsworth-Chase view is the prevailing view. These decisions did not use the language of self-executing or non-self-executing. Still, these decisions demonstrate that there is no deep well of consensus that constitutional provisions are automatically self-executing or even presumptively self-executing. There is no consensus that such self-execution is a default.

1. Chief Justice Marshall stated that Article III's grant of appellate jurisdiction for the Supreme Court was self-executing

There are two ways to understand Article III's "grant" of appellate jurisdiction. First, Article III's "grant" of appellate jurisdiction is an actual grant of jurisdiction. It might be described as a default. Once Congress establishes the Supreme Court, it enjoys all the appellate jurisdiction described in the provision, unless or until cut down by a congressional statute. Thus, no statute was required to put this provision into effect. Under this view, the provision could be characterized as self-executing.

An early proponent of this view was Chief Justice Marshall in *Durousseau v. United States*.[12] He stated: "The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial and by such other acts as have been passed on the subject."

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[10] Professor Akhil Amar has argued that Congress can grant the Supreme Court less than all the state-party based original jurisdiction provided for in Article III. *See* Akhil Amar, Marbury, *Section 13, and the Original Jurisdiction over the Supreme Court,* 56 U. CHI. L. REV. 443 (1989).

[11] *Id.* (emphases added).

[12] 10 U.S. 307, 314 (1810). *See* HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th ed. 2015) ("In *Durousseau* v. United States, 10 U.S. (6 Cranch) 307 (1810), the Court construed the Judiciary Act of 1789 as impliedly withdrawing the Supreme Court's appellate jurisdiction in every situation in which jurisdiction was not expressly conferred. As a result, the power to issue an extraordinary writ as an exercise of appellate jurisdiction, if outside the affirmative grant of authority by statute, may be deemed to have impliedly been precluded by Congress.").

In Marshall's view, Congress did not need to vest the Supreme Court with its appellate jurisdiction. Marshall's statement was also endorsed by Chief Justice Salmon Chase in *Ex Parte McCardle*, albeit in dicta.[13] But this Marshall-Chase view was and is not the only view.

2. Chief Justice Ellsworth and Justice Chase stated that Article III's grant of appellate jurisdiction for the Supreme Court was not self-executing

There is a second way to understand Article III's "grant" of appellate jurisdiction: as a jurisdictional ceiling. No appellate jurisdiction flows to the Supreme Court except if granted by Congress, and although Congress can grant less appellate jurisdiction than that described in the provision—or, perhaps, even none at all—it cannot grant more. Any actual appellate jurisdiction enjoyed by the Supreme Court requires a statute. If so, then this provision is not self-executing. The provision requires a congressional statute to put it into effect.

This view was articulated early on by Chief Justice Ellsworth in *Wiscart v. D'Auchy*.[14] Ellsworth stated:

> [T]he [Supreme Court's] appellate jurisdiction is, likewise, qualified; inasmuch as it is given 'with such exceptions, and under such regulations, as the Congress shall make.' Here then, is the ground, and the only ground, on which we can sustain an appeal. *If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction*; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of an *appellate jurisdiction*, is simply, whether Congress has established any rule for regulating its exercise? (emphases added).

Simply put, if Congress did not enact a statute granting the Supreme Court's appellate jurisdiction, then the Supreme Court would have lacked that appellate jurisdiction. In theory at least, had Congress never given the Supreme Court appellate jurisdiction, it would have only maintained its original jurisdiction. Chief Justice Ellsworth was hardly alone in reaching this conclusion. In *Turner v. Bank of North America*, Justice Chase put forth a similar view. Chase stated: "If congress has given the power to this court, we possess it, *not otherwise*: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal."[15]

Many courts have endorsed the Ellsworth-Chase view. In *Barry v. Mercein*, the Court cited *Wiscart*, and reasoned that "the Supreme Court have their appellate jurisdiction only in those cases in which it is affirmatively given by the acts of Congress, and no such appellate jurisdiction is given in this case."[16] In *Daniels v. Railroad Co.*, the Court explained that "it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed

[13] *Ex parte* McCardle, 74 U.S. 506, 513 (1868) ("It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction. The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here.").
[14] 3 U.S. 321, 327 (1796) (Ellsworth, C.J.).
[15] 4 U.S. 8 (1799) (emphasis added).
[16] Barry v. Mercein, 46 U.S. 103, 117 (1847).

by law. In these respects it is wholly the creature of legislation."[17] In *The Francis Wright*, the majority opinion quoted Justice Ellsworth's view from *Wiscart*, and noted that Ellsworth "spoke for the majority of the Court."[18] And so on.[19]

3. Particular constitutional provisions are not presumptively self-executing

Which view is correct as a matter of original public meaning? It is not obvious. What is the current view? The Congressional Research Service suggests that the Ellsworth-Chase view is the dominant one today.[20]

The question of whether or not Article III's appellate jurisdiction clause is self-executing is a matter of debate. In reaching their various conclusions and decisions, these Supreme Court Justices did not use the language of "self-executing" or "non-self-executing." The Justices did not exclusively rely on efforts to parse the words of the provision. They put no stock in the fact that Article III uses apparently mandatory language like "shall" and "all." Rather, the courts examined Article III's language, history, purpose, and other factors. We have seen no suggestion of anything like a general rule that constitutional provisions are or are not self-executing. We have seen no decision of the Court affirming a general rule that constitutional provisions are even presumptively self-executing. This background should inform our discussion of whether or not Section 3 is self-executing

B. Are Article I qualifications self-executing?

Baude and Paulsen make a constitutional analogy. They claim that the disqualification element of Section 3 is self-executing in the same sense as the qualification elements in Article I of the Constitution of 1788. This analogy does not support their position. Rules governing the internal organization and proceedings of Congress are parliamentary rules. These rules include qualifications and quorum rules. These rules are generally "under-enforced," and when enforced, they are enforced in a discretionary manner.

For example, the House and Senate have not uniformly disqualified members who were below the age requirements in Article I. And state legislators, who also swear an oath to the Constitution, have elected several types of (purportedly) underage senators: (1) senators who had not yet reached the age of thirty when elected; (2) senators who would not reach the age of thirty by the time the new Congress's constitutional term had begun; (3) senators who would not reach the age of thirty when Congress was scheduled (by statute) to meet; and (4) even senators who would not reach the age of thirty by the *end* of the term for which the senators they chose were elected! And, these members-elect have been seated. Moreover, voters have also elected candidates who did not meet the Article I qualifications, and these members-elect also have been seated. This history does not support Baude and Paulsen's view that virtually everyone under the

[17] 70 U.S. 250, 254 (1865).
[18] 105 U.S. 381, 384-85 (1881) (quoting Ellsworth's view from *Wiscart*)
[19] Rogers v. Watson, 46 F.2d 753 (7th Cir. 1931) (quoting Chase's view from *Turner*); *Ex parte* Lange, 85 U.S. 163 (1873) (Clifford, J., dissenting) ([I]it follows that the appellate jurisdiction conferred by the Constitution can only be exercised by this court in pursuance of an act of Congress." (citing *Wiscart*)).
[20] *See* CONGRESSIONAL RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION 1173-74 (2023) ("However, later cases have generally take the view that the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress." (quotation marks omitted)).

sun has an affirmative duty to disqualify candidates pursuant to Article I and, by analogy, under Section 3.

1. Parliamentary rules are enforced in a discretionary manner

When the Constitution puts forward a parliamentary rule, as a general matter, that rule is discretionary, and not mandatory. Such rules are best considered aspirational. Each house of Congress has the discretion to enforce its own practices pursuant to the "rules of its proceedings."

Consider a simple example. The Constitution requires that a "majority of each" house "shall constitute a Quorum to do Business." It is widely observed and widely known, for example, that the Constitution's majority quorum rule is not always enforced: each House will meet, debate, and pass orders, resolutions, and votes absent a majority of its members present, and each House's presiding officers, absent objections, will continuously presume the existence of a quorum once established.

Any enforcement of the Constitution's quorum provision depends on each chamber's rules, and the rules' application depends on the members and each chamber's presiding officers—but all such enforcement is discretionary and voluntary. The presiding officers and the members are not required to notice the absence of a quorum. As a general matter, this presumption of a continuously-present quorum is disturbed when a member makes an objection suggesting the absence of a quorum. At which point the roll is called. When these rules are enforced, it is because someone chooses to do so, not because the Constitution mandates that he must. Of course each House could modify its rules to require a quorum call before or after any business is transacted. But Congress has not adopted any such rule.

Some observers may see Congress's regular practice as an unconstitutional power grab by those in attendance. But the alternative view is that quorum rules are discretionary, and that waiver is *part* of the Constitution's quorum rule itself. This argument can be premised on practice or constitutional liquidation. Or, this argument can be premised on originalism. That is, the original public meaning of the Constitution's quorum language incorporated the concept that the rule is only at-play based on a member's objection and that even objections must conform to chamber rules. From either a practice-based or an originalist perspective, the rule is not "under-enforced" at all. Again, if waiver is part of the rule, then the rule is not "under-enforced."

The Constitution's parliamentary provisions, including its qualification provisions, follow chamber rules. These rules may take the form of statutes or single house rules. And these provisions are enforced by members and by the chambers' presiding officers. In what sense are these provisions self-executing? The Constitution does not affirmatively state how the quorum provision should be enforced. Rather, yesteryear's, as well as today's practices unfolded as they did because the Constitution's provisions were genealogical legal successors to prior rules in state constitutions, colonial assemblies, and other parliamentary chambers in the Westminster tradition. Did anyone think otherwise in 1265, 1689, 1788, or 1868? Did anyone believe a subject or citizen or any highly placed government official (outside the parliamentary chamber) had a legal right to vindicate a maximalist *enforce-at-all-costs* vision of these rules? We highly doubt it.

If you think otherwise, just try seeking a federal court order compelling a house of Congress to cease operations when a chamber lacks a quorum. Or, try seeking a federal court order declaring a statute unconstitutional or unenforceable based on its having been passed by a house of Congress which lacked a quorum. You will be stymied at every turn. Indeed, the D.C. Circuit rejected a

challenge brought by members to a COVID-era House rule that allowed for proxy voting.[21] Under this rule, members didn't even have to be physically present in the chamber to vote.[22] The plaintiffs argued that this rule violated the Quorum Clause.[23] The court, however, declined to reach the merits, finding that this case was barred by the Speech or Debate Clause.

We think caution is especially appropriate when dealing with parliamentary rules. These rules are not the usual province of the courts and today's legal scholarship; rather, they are enforced in political processes. Moreover, these rules are part of a mimetic legal tradition largely guided by observation, as opposed to written texts, and this tradition may seem foreign to those not steeped in it.

2. The House and Senate have not disqualified several members-elect who were below the age requirements in Article I

The Constitution requires that members of the House and Senate must attain the ages of twenty-five and thirty, respectively. Baude and Paulsen write that the age-disqualification under Article I is "automatic" and the "Constitution's rule is self-executing." Likewise, Mark Graber contends that "disqualification for insurrection is in legal principle no different from disqualification for being underage or not a citizen."[24] But it simply isn't the case that the age requirements in the Constitution are self-executing in the sense that Baude and Paulsen describe. All execution requires rules, and even rules can be waived by majority action.

An under-age member-elect who arrives on Capitol Hill is not automatically denied a seat. Rather, enforcement of the age requirements of Article I are discretionary, and not mandatory. A member-elect who shows up lacking some qualification risks being lawfully excluded. And those who elect such persons take that risk too. The fact that some activity poses a risk does not, without more, make it illegal or unconstitutional. To put it another way, no one has an affirmative duty to investigate a member-elect's qualifications. And if a member or member-elect discovers that some other member-elect lacks a prescribed qualification, nothing in the text of the Constitution imposes any specific affirmative duty on the member to share that information with his fellow members. Nor is there any affirmative obligation to launch objections to the member-elect's becoming a member. Moreover, even if a house holds a vote to exclude, nothing in the Constitution mandates that other members attend the chamber when that specific vote is held. And even if a member is in attendance, the Constitution's text does not squarely compel anyone to vote anything other than present on the motion to exclude.

History supports this understanding of congressional practice. William Claiborne of Tennessee, who was born in 1775, was elected to and then began serving his two-year House term in 1797.[25] He was only 22 years old. The House did not disqualify him. Claiborne was re-elected

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[21] McCarthy v. Pelosi, 5 F.4th 34, 37 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022).

[22] *Id.* at 37 ("Any Member 'whose presence is recorded by a designated proxy,' or whose vote is cast by a proxy, 'shall be counted for the purpose of establishing a quorum.'" (quoting H.R. 965 (May 15, 2020))).

[23] Opening Brief of Plaintiffs-Appellants at 40, McCarthy v. Pelosi (D.C. Cir. Aug 31, 2020) ("Because H. Res. 965 specifically authorizes absent Members to be counted toward the quorum requirement, it is unconstitutional."), https://perma.cc/X6HU-UF5F.

[24] Mark Graber, *Damn the Torpedoes: Disqualifying Donald Trump*, BALKINIZATION (Aug. 26, 2023), https://balkin.blogspot.com/2023/08/damn-torpedoes-disqualifying-donald.html.

[25] *The Youngest Representative in House History, William Charles Cole Claiborne*, UNITED STATES HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1800-1850/The-youngest-Representative-in-House-history,-William-Charles-Cole-Claiborne/.

in 1799, when he was still not yet twenty-five. It was only some time during his second term that he finally reached the age of twenty-five.

Other examples abound. In 1806, Henry Clay of Kentucky was elected to the Senate by his state legislature.[26] He took the oath, and he began serving while he was still twenty-nine years old. In 1816, the Senate administered the oath to Armistead Mason of Virginia, who was elected by the state legislature to a Senate term to fill a vacancy.[27] The unexpired term would stretch about a year. At the time of Mason's election, he was twenty-eight years old. His elected term ended in March 1817, and he was still several months shy of his thirtieth birthday when his term ended. In 1818, the Senate administered the oath to John Henry Eaton of Tennessee.[28] At the time, Eaton was only twenty-eight years old. According to the Senate Historical Office, "Apparently no one asked John Eaton how old he was."

To further prove the point that the age qualifications are not self-executing, consider Rush Holt of West Virginia. In 1934, Holt defeated incumbent Senator Henry Hatfield, an incumbent. Holt was elected to the Senate at the age of twenty-nine. Holt pledged to wait until after his thirtieth birthday before taking the oath. Hatfield, Holt's defeated opponent, filed a petition with the Senate, contending that Holt did not meet the minimum age requirement. The Senate dismissed Hatfield's petition on the grounds that "the age requirement applies at the time of oath-taking rather than the time of election, or the time the term [to which the candidate is elected] begins."[29] Hatfield could not force his colleagues to declare Holt disqualified and his seat vacant. And we think Hatfield would have been unsuccessful had he tried to seek relief through judicial means in state or federal court.

Any analogy between the qualifications in Article I and the disqualification standard in Section 3 breaks down for another reason. The Judge of the Elections Clause imposes a judicial-like duty on each house as a whole. And by implication, that duty may extend to individual members who pass on the qualifications of other members or members-elect. In this role, individual members may serve in something like a judicial capacity. What happens if there is a member who objects to seating a member-elect based on the latter's failing to meet the Article I's qualifications? In such a proceeding, it is reasonable to interpret the Constitution to mean that members *should* vote to allow a qualified member to be seated, and concomitantly, that the members *should* vote not to seat (temporarily or permanently) a member-elect lacking some constitutional qualification (at least until the qualifications are met).[30] But the "force" of "should" here is weak, as the Constitution imposes no affirmative duty on the members to show up and vote in any particular proceeding. If members have any such duty as described here, that duty does not follow from the vagaries of Article I's twin qualifications clauses—for Representatives and Senators. Rather, that duty follows, if it follows at all, from the Judge of the Elections Clause.[31]

However, Section 3 has no similar analogue to the Judge of the Elections Clause. Section 3 does not explain who is to determine who is subject to disqualification, *other than Congress in Section 5*. And the text of Section 3 does not expressly burden Congress or anyone else with a judicial duty in resolving any Section 3 controversy. Any duty imposed by Section 5 to enforce

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[26] *Henry Clay: A Featured Biography*, UNITED STATES SENATE, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Clay.htm.
[27] *Youngest Senator*, UNITED STATES SENATE, https://www.senate.gov/artandhistory/history/minute/Youngest_Senator.htm.
[28] *Id.*
[29] *Id.*
[30] Powell v. McCormack, 395 U.S. 486 (1969); U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).
[31] U.S. CONST. art. 1, § 5, cl. 1.

Section 3 falls entirely in the sound discretion of Congress. If Section 3 is a traditional qualification, then Congress may very well have a power to act on Section 3 in regard to *its* members-elect. (Baude and Paulsen acknowledge this point.[32]) But Section 3 and the Constitution are otherwise silent as to who or what institutions are to enforce Section 3 in regard to other positions, including the presidency. Silent, except for Section 5 and the Necessary and Proper Clause which would impose that duty on Congress, by implication, not on the States.

None of what we have described above should be controversial. Yet, Baude and Paulsen write that the age-disqualification under Article I is "automatic" and the "Constitution's rule is self-executing." Representative Claiborne and Senators Clay, Mason, and Eaton might have differed with Baude and Paulsen on that point. For each of these members, and for the voters and state legislators who elected them, the member-elect was seated immediately, or after a delay. That delay could have been due to a chamber's not taking action. Or, a chamber may decide to allow a member to delay taking his seat until he reached Article I's prescribed age. Nothing here is automatic or self-executing. Each rule is subject to customary parliamentary controls allowing for waiver, and each rule is enforced, if enforced at all, as a matter of discretion. These rules mimic: *Don't ask, don't tell*. That's how they are "enforced." By contrast, according to Baude and Paulsen, a great swathe of government officials, state and federal, have an affirmative duty to go out and enforce Section 3. If Section 3 is modeled on Article I's Qualifications Clauses, the result Baude and Paulsen prescribe does not follow.

Indeed, under Baude and Paulsen's approach, Section 3 modified the Free Speech Clause and prohibitions against retroactivity. Why wouldn't Section 3 also modify the Judge of the Elections Clause? Going forward, each Chamber may no longer have the sole power to determine whether a member-elect is subject to disqualification under Section 3. Rather, other constitutional actors, including the courts, can ensure that Congress does not allow former insurrectionists to take the oath as members. We cannot predict with any clarity what the results of Baude and Paulsen's position is because they put forward no theory of constitutional change explaining what prior law (constitutional or statutory) is upset or changed by Section 3. We discuss Baude and Paulsen's lack of a theory of constitutional change below.

Baude and Paulsen are correct that no legislation would have been needed to "disqualify," in the abstract sense, the underage members discussed above. The Constitution imposed the obligation to meet a minimum age. But some legal process was needed to execute that legal obligation. For enforcement, Article I's qualification rules are implemented or operationalized by both statutes and chamber rules. In that practical sense, even Article I's qualification rules are not "self-executing." Below, we will discuss Chief Justice Chase's opinion in *Griffin's Cas*e. We think this *practical* understanding of qualifications is what Chase addressed in his decision. Where positions other than members of Congress are at issue, enforcement of Section 3 requires statutes, which can only be supplied by Congress.

[32] Baude & Paulsen, *supra* note __, at 29 ("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 has power to 'Judge of the Elections, Returns, and Qualifications' of 'its own Members.' Since one of those qualifications is non-disqualification under Section Three, each house can and must judge whether Section Three forbids the seating of a member.").

3. State legislatures, who were bound by the Supremacy Clause, elected senators who were below the age requirement in Article I

The history of enforcement of Article I qualifications for members does not support Baude and Paulsen's position. These provisions are not self-executing. Rather, the practice concerning these provisions suggests that Congress must take affirmative action to enforce Article I qualification requirements.

By contrast, Baude and Paulsen characterize Article I's qualifications rules as "binding rule[s] of constitutional law." What they do not make clear is that the binding force or bite of such rules is very limited. If Section 3 works in the same fashion as Article I's qualification rules, then Section 3 also has a very limited bite.

Let's assume that Baude and Paulsen are correct. Let's assume that if Congress is responsible for enforcing the qualifications in Article I, it follows that Congress is likewise responsible for enforcing the disqualification provisions in Section 3. After all, Section 5 gives the enforcement power to Congress, and no one else is expressly assigned any similar or coordinate power.

Yet, Baude and Paulsen argue that virtually everyone under the sun has an obligation to enforce Section 3. They write that this duty is imposed on "anybody who possesses legal authority (under relevant state or federal law) to decide whether somebody is eligible for office." Baude and Paulsen provide a list of individuals covered by this mandate:

> 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.

Once again, the analogy to Article I qualifications offers Baude and Paulsen little support. We discussed above how the legislatures of Kentucky, Tennessee, and Virginia elected Senators who had not yet reached the age of thirty, who would not be 30 at the start of their constitutional term, and even one who would not be 30 by the end of his constitutional term. Those state legislators swore an oath to the Constitution, and presumably, they too saw themselves bound by the Supremacy Clause. Yet, they elected Senators who failed to meet the constitutional requirements. Did they violate their oath? Could they have been sued in court for violating the self-executing requirements in Article I? We think the answer has to be *no* and *no*. And we doubt Baude and Paulsen would argue otherwise. But if we are in agreement on this point, then Baude and Paulsen need to consider qualifying their statements that qualifications in Article I or Section 3 impose some sort of urgent, strong, self-enforcing, and mandatory obligation on anyone who swears an oath to the Constitution.

We think this history demonstrates that enforcement of Article I qualification rules is, in a substantial sense, discretionary and voluntary. We think it highly unlikely that a federal court would second-guess a house's exclusion or non-exclusion decision on the grounds enumerated in Article I. (*Powell v. McCormack* involved an alleged exclusion of a member on grounds beyond those enumerated in Article I.) Yet Baude and Paulsen argue that enforcement of Section 3 is somehow obviously mandatory. We think this conclusion is in conflict with practice from centuries of parliamentary practice, in addition to congressional practice from the antebellum era, which should be entitled to some weight.

4. Voters elect candidates who are below the age requirement in Article I

Baude and Paulsen omitted one group from their list of positions of who should go out and actively seek to enforce Section 3. Did you catch it?

Voters.

Of course, Baude and Paulsen could respond: "Voters are not part of the government." But why should that matter? Or, they could respond that voters do not have a "job . . . to figure out whether someone is legally qualified to office." Is that so? In some States, for example, Florida, and perhaps many others, for voters to register, they must take an oath or affirmation to uphold the U.S. Constitution.[33] So do voters in Florida and elsewhere have an affirmative constitutional duty to enforce Section 3 via Florida state law procedures for objecting to candidates? If they fail in that duty, could the voters be sued or prosecuted? Would voting for a Section 3-covered candidate amount to giving "aid or comfort" to an enemy? (We'll come back to the "enemy" question later.) Moreover, at least some voters also serve in the government, and swear an oath to the Constitution. Do voters who hold public office have an obligation to abstain from voting for a candidate who does not meet constitutional qualifications?

The absence of voters from Baude and Paulsen's list is remarkable in another way. Candidate ballot access is largely a matter of state election law. Yet, Baude and Paulsen provide an extensive list of government officials, state and federal, who they urge to enforce Section 3 pursuant to extant election laws. But many of these government officials are not connected to proceedings related to ballot control or election law in any obvious way. Why is the President on the list? Why governors? Why are governors listed at all? (Stay tuned.)

Indeed, we know of no government official who has the power to strike a candidate from the ballot on his own authority. As a general matter, when a state election law administrator or administrative body or court strikes a candidate from the ballot, it is done in the context of a challenge or contest brought by a registered voter or by another candidate. So even if Section 3 can be enforced by state election administrators, it is not self-executing; rather, as a general matter, such enforcement requires state statutes putting into effect a whole scheme of state ballot law including objections and contests. Whether the Fourteenth Amendment permits state legislatures to enact, and election administrators to enforce, Section 3 absent a federal statute authorizing such state action is, part and parcel, of what we are debating.

It is certainly true that some state election law administrators have struck candidates from the ballot absent any voter challenge or candidate contest. This limited exception has been permitted by courts in cases where there is an obvious defect on the face of a candidate's ballot petition. Such defects include a missing document, a missing candidate's signature on his statement of candidacy, etc. And even then, a candidate can object after-the-fact. But where an evidentiary hearing is necessary, state election law administrators cannot act sua sponte. This would seem to be Baude and Paulsen's position in regard to Trump, as they do not affirm that the factual "evidence" in regard to alleged insurrection is conclusive; rather, they write: "*If* the public record is accurate, the *case* [against Trump] is not even close." So even Trump is entitled to some due process according to Baude and Paulsen.

[33] *See* Fl. Stat. 97.051; Fields v. Askew. 279 So. 2d 822 (Fla. 1973) (upholding statutory oath requirement), appeal dismissed mem., 414 U.S. 1148 (1974).

C. Is Section 1 of the Fourteenth Amendment self-executing?

The Fourteenth Amendment has five sections. Section 1 includes the Citizenship Clause, the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause. These provisions are generally understood to constrain state power and recognize certain individual rights. Section 2 reduces a State's representation in Congress when that State denies adult males the right to vote. Section 3, the subject of this Article, does not impose any restrictions on state power. Nor does it recognize any individual rights. Rather, this provision disqualifies certain people from holding certain public positions in certain circumstances. And only the Congress can remove those disqualifications. Section 4 provides that "public debt of the United States . . . shall not be questioned," and that the United States and the States shall not be liable for debts based on "insurrection or rebellion" or for the "emancipation of any slave." Section 4, like Section 3, does not recognize individual rights. Section 5 provides that Congress has the "power to enforce, by appropriate legislation, the provisions of this article"—that is, sections one through four.

All agree that Congress can enact legislation to enforce the Fourteenth Amendment. And, indeed Congress has long relied on this power to enact enforcement legislation. But what if Congress does not enact such legislation? The prevailing view is that Section 2, at least, can only be enforced through federal legislation.[34] There is some recent debate about whether the President can unilaterally invoke Section 4, in the absence of federal legislation, to raise the debt ceiling. But what is the effect of Section 1 of the Fourteenth Amendment, standing on its own? Stated differently, is Section 1 self-executing?

The question of whether Section 1 is self-executing has been argued to have some bearing on the question of whether Section 3 is self-executing. Some scholars contend that if Section 1 of the Fourteenth Amendment is self-executing, then it must be the case that Section 3 of the Fourteenth Amendment is likewise self-executing. (We think the enforcement of Sections 2 and 4 make the linkage between Sections 1 and 3 less than entirely clearcut.) Miles Lynch, for example, wrote that "[i]t would be inherently inconsistent to interpret" the language in Section 1 "as self-executing" but the language in Section 3 "as requiring enacting legislation."[35] Professor Michael Dorf explained that in light of the fact that the provisions in Section 1 are self-executing, including the Due Process Clause and Equal Protection Clauses, then Section 3 should likewise be viewed as self-executing.[36] Baude and Paulsen likewise contend that "We take it as obvious that Section One is self-executing."[37] They add, "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."[38] That may be so, but the better question is in what fashion *is* Section 1 self-executing?

The answer to the self-execution question is two-fold. Section 1 is not self-executing in court as *a set of causes of action providing affirmative relief* unless Congress provides for its enforcement. Section 1 can only be wielded as a *sword* with federal legislation. But Section 1 can

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[34] Section 2 was only enforced once, following the 1870 census, and not since. *See* Gerard Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774 (2018).

[35] Myles Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153 (2021).

[36] Michael C. Dorf, *What it means to say that Section 3 of the 14th Amendment is self-executing*, DORF ON LAW (Aug. 28, 2023), https://www.dorfonlaw.org/2023/08/what-it-means-to-say-that-section-3-of.html.

[37] Baude & Paulsen, *supra* note __, at 19.

[38] *Id.*

be wielded as a *shield* without federal legislation. Section 1 is self-executing as a set of defenses in court. The Supreme Court's leading Fourteenth Amendment cases reflect this dichotomy. Section 1 was used as a shield in *The Slaughter-House Cases*, *United States v. Cruikshank*, and *Plessy v. Ferguson*. Section 1 was used as a sword in *Bradwell v. Illinois*. Of course, the fact that a plaintiff or defendant sought to use Section 1 as a sword or shield does not mean that they prevailed on the merits. And plaintiffs have relied on Section 1983, and its historical antecedents in landmark cases like *Brown v. Board of Education*, *Roe v. Wade*, and *Obergefell v. Hodges*. These cases invoked federal enforcement legislation. These statutes provided the federal cause of action which made it possible to use the Fourteenth Amendment as a sword.

1. Section 1 and Treaties as a shield

Many of the Supreme Court's formative Fourteenth Amendment cases arose in a defensive posture. That is, defendants asserted that some state action would violate Section 1 of the Fourteenth Amendment. In other words, these defendants wielded Section 1 as a shield. There are many cases to choose from, but here we will focus on three. First, *The Slaughter-House Cases* arose from the Louisiana Attorney General's enforcement of a state law restricting the slaughtering of animals. As a defense, the defendants argued that the state law violated Section 1 of the Fourteenth Amendment. Second, *United States v. Cruikshank* arose from a motion to dismiss a criminal indictment on the grounds that the Fourteenth Amendment did not support the charges. (This case has some similarities with the *Case of Jefferson Davis*, which we will discuss below.) Third, *Plessy v. Ferguson* arose from a prosecution for violating a segregation law. In his defense, the defendant argued that the state law violated Section 1 of the Fourteenth Amendment. These landmark cases did not need to rely on enforcement legislation because Section 1 was used in a defensive posture.

a. The *Slaughter-House Cases*

The *Slaughter-House Cases* (1873) was the Supreme Court's first definitive interpretation of the Privileges or Immunities Clause. The 5-4 decision construed that provision to protect only a narrow set of federal rights. *Slaughter-House* arose from a suit instituted by the Louisiana Attorney General against the Live Stock Dealers' and Butchers' Association of New Orleans. Specifically, the Attorney General argued that the butchers were violating a local law that restricted where animals could be slaughtered. The Louisiana Supreme Court observed that "[i]n their answer the defendants deny the right of the Attorney General to bring this suit; and they allege that the act . . . is unconstitutional."[39] The key point is that in the *Slaughter-House Cases*, the defendants' Fourteenth Amendment, Section 1-related rights were asserted as defenses. The majority ruled against the defendant-butchers, finding that the Privileges or Immunities Clause did not protect any sort of right to pursue a calling. And, for those keeping score at home, in regard to which Justices supported a broad interpretation of the Fourteenth Amendment, Chief Justice Chase dissented in *Slaughter-House*. Here, at least, Chase did not "knee-cap" the Fourteenth Amendment.

[39] State *ex rel*. Belden v. Fagan, 22 La. Ann. 545 (1870).

b. ***United States v. Cruikshank***

United States v. Cruikshank (1876) arose from the Colfax Massacre.[40] More than one hundred freedmen were murdered by white militiamen. The United States indicted members of the gang, including William Cruikshank, for violating Section 6 of the Enforcement Act of 1870. That statute made it a crime to violate the "enjoyment of any right or privilege granted or secured . . . by the Constitution." The United States argued that the lynch mob violated the rights of the freedmen to peaceably assemble and bear arms. The case turned, then, on whether those rights were rights secured by the Constitution. Those rights were secured in the First and Second Amendments. But under the rule in *Barron v. Baltimore*, the provisions of the Bill of Rights only constrained the federal government. In *Cruikshank*, the United States argued that the Fourteenth Amendment also protected the rights of peaceable assembly and the right to bear arms against wrongful invasion by individual conduct. And, the United States further argued that Congress had the power to enact laws, and here did enact such a law, that prohibited individual defendants from depriving others of rights protected by the Fourteenth Amendment.

After the defendants were convicted, the defendants moved to dismiss the indictment through a "motion in arrest of judgment." Cruikshank argued that the Fourteenth Amendment did not protect the rights which the government sought to protect. Therefore, he contended, an indictment premised on violating these rights was deficient.[41] In other words, because these rights were not protected by Section 1, they were not protected by the Enforcement Act. Here, Cruikshank favored a narrow construction of the Fourteenth Amendment as a means to narrow the scope of the Enforcement Act. In contrast with the butchers in *Slaughter-House*, Cruikshank advanced a reading of Section 1 that did not protect individual rights—that is, the right of the freedmen to peaceably assemble and bear arms. But Cruikshank's reading favored *his own* individual liberty. It is perhaps unsettling to frame the case in this fashion, but criminal defendants routinely mount their defenses in these terms: the defendant argued that he had the liberty to engage in the harmful acts he did, because the federal government had no license to criminalize his actions. His argument resembles that of Alfonso Lopez, who argued that he had the right to carry a gun into a school zone precisely because Congress lacked the power to criminalize his actions. Lopez used a narrow construction of the Commerce Clause as a shield against his indictment. Likewise, Cruikshank used a narrow construction of Section 1 as a shield against his indictment. (Later, we will discuss how Jefferson Davis wielded Section 3 in a similar fashion as a shield against his treason indictment.)

In the federal circuit court, the opinions of the judges were divided, and the case was certified to the Supreme Court. On appeal, the Supreme Court agreed with Cruikshank. Chief Justice Waite wrote for the Court that the rights of peaceable assembly and the right to bear arms were rights that applied *only* against the federal government. In the Court's view, the Fourteenth Amendment did not disturb the rule in *Barron v. Baltimore*. Stated differently, the Fourteenth Amendment did not prohibit private individuals from violating these rights. Waite explained that the Fourteenth Amendment did not "add any thing to the rights which one citizen has under the Constitution against another." Therefore, the Enforcement Act, which enforced federal law,

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[40] 92 U.S. 542 (1876).

[41] United States v. Cruikshank, 92 U.S. 542, 546 (1875) ("The parties thus convicted moved in arrest of judgment on the following grounds:——1. Because the matters and things set forth and charged in the several counts, one to sixteen inclusive, do not constitute offences against the laws of the United States, and do not come within the purview, true intent, and meaning of the act of Congress, approved 31st May, 1870, entitled 'An Act to enforce the right of citizens of the United States,' &c."). Cruikshank raised other defenses that are not relevant here.

including Section 1, did not prohibit private individuals from violating these rights. In short, the United States, pursuant to the Enforcement Act, could not prosecute defendants for depriving people of these federal rights.[42] Under the federal constitution, and the Enforcement Act, Cruikshank had the freedom to take the actions he did.

In short, Cruikshank successfully wielded the Fourteenth Amendment as a shield, and advanced that argument on direct appeal to the Supreme Court.

c. *Plessy v. Ferguson*

The posture of *Plessy v. Ferguson* (1896) was far simpler. The landmark separate-but-equal challenge arose when Homer Plessy was arrested for riding in the segregated train car. (John J. Ferguson was actually the Louisiana judge who presided over Plessy's trial.) The Louisiana Supreme Court upheld Plessy's conviction. Plessy then "prayed for a writ of error from [the Supreme Court of the United States], which was allowed by the chief justice of the supreme court of Louisiana."[43] Plessy argued that the segregation law violated the Fourteenth Amendment. Here, Plessy raised Section 1 as a shield.[44] As all know, the Court rejected Plessy's claim.

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Section 1 of the Fourteenth Amendment is self-executing, when used as a defense, with regard to state officers who took state action against the private individual defendants. Such private individuals could raise the Fourteenth Amendment as a defense, just as private individuals could raise rights in the Bill of Rights as a defense against actions taken by federal officers. Using the Constitution as a defense was and remains part-and-parcel of everyday judicial review. For example, *Lawrence v. Texas* arose from a criminal prosecution for the violation of a state sodomy law. The defendants raised Section 1 of the Fourteenth Amendment as a shield to the prosecution.[45] And they would prevail on the merits.

d. Treaties as a shield

According to the Supremacy Clause, treaties, along with the Constitution itself, are the "supreme Law of the Land."[46] Treaties, however, are not presumptively self-executing. Rather, the

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[42] *Id.* at 552-53 (1875) ("The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. . . . [the Second Amendment] has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln*, 11 Pet. 139, the 'powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States.").

[43] Plessy v. Ferguson, 163 U.S. 537, 540 (1896).

[44] *Ex parte* Plessy, 11 So. 948, 948 (1892), aff'd sub nom. Plessy v. Ferguson, 163 U.S. 537 (1896) ("He alleges that he is being prosecuted for a violation of Act No. 111 of 1890; that said act is unconstitutional; that his plea of its unconstitutionality has been presented to, and overruled by, the respondent judge.").

[45] Lawrence v. Texas, 539 U.S. 558, 563 (2003) ("The petitioners exercised their right to a trial de novo in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution.").

[46] U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

Supreme Court "has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law."[47] In *Medellin v. Texas*, Chief Justice Roberts's majority opinion observed that "[t]he label 'self-executing' has on occasion been used to convey different meanings."[48] (Indeed, Roberts' position is also and especially correct in the context of the Fourteenth Amendment.) Self-executing does not mean that a treaty simply *is*. Instead, self-execution means "that the treaty has automatic domestic effect as federal law upon ratification."[49] A treaty that is "non-self-executing" can only have "domestic effect" if there is federal enforcement legislation.[50]

In *Medellin*, a criminal defendant raised as a defense to a state murder charge an "international law obligation," which "flow[ed] from treaties" the United States had ratified.[51] In other words, the defendant sought to use supreme federal law as a *shield* against allegedly unlawful state action. Above, we explained that the Fourteenth Amendment can be raised as a defense, even in the absence of enforcement legislation. But in *Medellin*, the Court held that the relevant treaty was not-self-executing, and therefore could not even be raised as a shield without federal enforcement legislation. With regard to treaties, the concept of self-execution is more stringent: a non-self-executing treaty, without implementing legislation, cannot be wielded even as a shield.

Bond v. United States presented a different case. There, the federal government prosecuted a person for violating a statute that implemented a non-self-executing international agreement.[52] The defendant raised the Tenth Amendment as a defense. In effect, she argued that the prosecution violated the separation of powers. The Supreme Court ruled that Bond had standing to raise this provision as a shield to her conviction.[53] There was no occasion to consider whether Bond had a cause of action to raise the Tenth Amendment as a sword, since the case arose in a defensive posture.

Professor Dorf observed, "Section 3 is self-executing in the exact same way that a self-executing treaty is."[54] But that observation presumes the correct analogy is to a self-executing treaty, rather than to a non-self-executing treaty, like the obligations at issue in *Medellin* and in *Bond*. We contend just the opposite is true: Section 3 more closely resembles the *presumptive* non-executing treaty. With treaties, as with the Fourteenth Amendment, there is no presumption of self-execution.

2. Section 1 as a sword

Today, many Fourteenth Amendment cases are litigated offensively. Plaintiffs generally rely on Section 1983, which traces its roots to the Second Enforcement Act a/k/a Ku Klux Klan Act of 1871. However, these plaintiffs cannot invoke the Fourteenth Amendment as a sword

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[47] Medellin v. Texas, 552 U.S. 491, 504 (2008).
[48] *Id.* at n.2.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 504.
[52] Bond v. United States, 572 U.S. 844, 850-51 (2014) ("Although the Convention is a binding international agreement, it is 'not self-executing.' . . . Congress gave the Convention domestic effect in 1998 when it passed the Chemical Weapons Convention Implementation Act.").
[53] Bond v. United States, 564 U.S. 211, 220 (2011) ("The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines.").
[54] Michael C. Dorf, *What it means to say that Section 3 of the 14th Amendment is self-executing*, DORF ON LAW (Aug. 28, 2023), https://www.dorfonlaw.org/2023/08/what-it-means-to-say-that-section-3-of.html.

without federal enforcement legislation. One of the Supreme Court's formative cases, in which the Fourteenth Amendment was raised as a sword, was *Bradwell v. Illinois*. One or more federal statutes would have provided Bradwell with a cause of action to challenge the deprivation of her rights secured by the Constitution. *Ex Parte Young* is consistent with this principle. A plaintiff asserting an *Ex parte Young* claim is actually asserting a defense in anticipation of a state lawsuit, prosecution, or other enforcement action. Finally, in *Bivens*, the Supreme Court recognized an implied cause of action with regard to the Fourth Amendment, but this remedy has since been narrowly construed, and not expanded beyond Fourth Amendment rights to other provisions of the Bill of Rights.

a. Section 1983

In modern times, significant Fourteenth Amendment cases reach the Court in an offensive posture, often in the context of a pre-enforcement review--that is, a challenge that begins before the statute even goes into effect. In *Whole Woman's Health v. Jackson* (2021), the Supreme Court observed that "pre-enforcement review under" Section 1983 "was not prominent until the mid-20th century." During the Civil Rights Movement, groups like the NAACP brought suits in an *offensive posture* to challenge state policies. These offensive posture suits, however, did not rely on the Fourteenth Amendment, standing on its own. They invoked the legal antecedents of 42 U.S.C. § 1983, which includes the Second Enforcement Act a/k/a Ku Klux Klan Act of 1871. A recent amicus brief filed in *Jackson* by the Lawyer's Committee for Civil Rights under Law observed that Section 1983 "has been used to vindicate a broad array of federal rights, including in some of [the] Court's landmark civil rights rulings."[55] The organization explained that "it is no surprise that many of this Court's landmark rulings enforcing constitutional rights were the result of successful challenges under Section 1983." These cases include *Shelley v. Kraemer* (1948), *Brown v. Board of Education* (1954), *Obergefell v. Hodges* (2015), and others. Norma McCorvey, better known as Jane Roe, invoked Section 1983.[56] The list goes on and on. All of these *offensive* cases invoked federal enforcement legislation. None relied on any notion that the Fourteenth Amendment was self-executing, in the sense that it provided private individuals with a free-standing cause of action which could be raised absent federal legislation.

b. *Bradwell v. Illinois*

Some of the earliest Fourteenth Amendment cases invoked Section 1 as a sword. In these cases, parties invoked federal enforcement legislation to challenge state laws as violating Section 1. Consider *Bradwell v. Illinois*. Myra Bradwell, a married woman in Illinois, petitioned the Illinois Supreme Court for a law license.[57] However, the Illinois Supreme Court denied Bradwell's application based on the court's interpretation of state law. That decision was rendered during the September 1869 term of the Illinois Supreme Court.[58] Circa September 1870, Bradwell appealed

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[55] Brief for the Lawyers' Committee for Civil Rights Under Law and 11 Civil Rights Organizations as Amici Curiae Supporting Petitioners at 4, Whole Woman's Health v. Jackson (Sup. Ct. No. 21-463), https://www.supremecourt.gov/DocketPDF/21/21-463/197883/20211027165950602_Brief.pdf.
[56] Roe v. Wade, 314 F. Supp. 1217, 1219 n.1 (N.D. Tex. 1970).
[57] Bradwell's briefs are reproduced in the *Chicago Legal News*, which she edited. 2 CHI. LEGAL NEWS 145 (1870), https://perma.cc/5YNQ-J3ER.
[58] *In re* Bradwell, 55 Ill. 535, 535 (1869), aff'd sub nom. *Bradwell v. People of State of Illinois*, 83 U.S. 130 (1873).

the case to the United States Supreme Court.[59] The transcript of record before the Supreme Court was dated September 30, 1870. Senator Matthew H. Carpenter of Wisconsin argued on behalf of Bradwell in January 1872.[60] The Supreme Court's decision in *Bradwell* was announced on or about April 15, 1873.[61] The *Slaughter-House Cases* was announced on April 14, 1873. (The reason why we specify the dates will become clear shortly.)

In *Bradwell*, the Court's 8-1 decision held that the Fourteenth Amendment did not protect the right of a woman to obtain a law license. Once again, Chief Justice Chase was in dissent, as he was the only Justice willing to support this broad reading of the newly-ratified amendment. (Even a brief study of Chase's jurisprudence further undermines Baude and Paulsen's claim that Chase was trying to undermine the Fourteenth Amendment.)

Justice Miller's opinion for the Court stated that "[t]he [Illinois Supreme] court having overruled [Bradwell's] claims of right founded on the clauses of the Federal Constitution before referred to, those propositions may be considered as properly before this court."[62] But the opinion of the Court does not cite a precise basis on which jurisdiction was premised. Justice Miller observed, "The record in this case is not very perfect." He was right. Bradwell's lawyer, Senator Carpenter, stated that that denial from the bar was a judicial act, "and that such proceedings are subject to review on writ of error or appeal, as the case may be."[63] The Court's opinion begins on Page 138 of the report. Earlier, page 133 of the reported decision states, "Mrs. Brad-well [sic] brought the case here as within the twenty-fifth section of the Judiciary Act, or the recent act of February 5th, 1867, amendatory thereto."[64] We are not certain who wrote this sentence. The writ of error, which is signed by the Clerk of the Supreme Court, alludes to the language in both statutes.[65] Bradwell's brief makes no reference to either statute.[66] Even in the face of an unclear record, we are reasonably confident that the Court would have had to rely on one or more of these statutes to resolve the case. And our view is supported by the record, likely entered by the clerk, that made its way into the *United States Reports*.

The first statute referenced, Section 25 of the Judiciary Act of 1789, provided the Supreme Court with jurisdiction to review "an authority exercised under any State, on the ground of their being repugnant to the constitution . . . upon a writ of error."[67] The second statute referenced, the Act of February 5, 1867, provided the federal courts with authority to "grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution."

Like the Judiciary Act of 1789, the 1867 act was enacted *prior* to the ratification of the Fourteenth Amendment. But in the wake of ratification, the 1867 Act would provide the federal courts with jurisdiction to review violations of the newly-ratified Fourteenth Amendment. (Indeed, Griffin would invoke this same statute to collaterally attack his conviction in state court.[68]) Here,

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[59] D.C. EVENING STAR at 3 (Sept. 26, 1870).
[60] D.C. DAILY MORN CHRONICLE at 1 (Jan 20 1872).
[61] D.C. EVENING STAR at 1 (April 16 1873); D.C. Evening Star at 2 (May 9, 1873).
[62] Bradwell v. People of State of Illinois, 83 U.S. 130, 138 (1873). A scanned copy of the *U.S. Reports*, without any notations provided by West, can be found at https://perma.cc/N9HP-8Z3X.
[63] Bradwell v. Illinois, Transcript of Record (Sept. 30, 1870), https://perma.cc/QP5F-JF2V.
[64] *Bradwell*, 83 U.S. at 133.
[65] Transcript of Record, *supra* note __, at 14.
[66] *Bradwell v. Illinois*, Argument for Plaintiff in Error, https://perma.cc/8AWS-C8JZ.
[67] 1 Stat. 73, 85-86.
[68] Griffin's Case (*In re* Griffin), 11 F. Cas. 7, 12 (C.C.D. Va. 1869) ("That the act of February 5th, [1867] under which this proceeding is brought, authorizes this court to inquire into the authority by which the petitioner is deprived of his liberty, and to determine whether that authority is exercised in contravention of the constitution of the United States, and in such case to grant the prayer of the petitioner.").

Bradwell could have wielded the federal habeas statute as a sword to challenge the Illinois Supreme Court's denial of her law license. Her argument failed on the merits, but federal legislation still provided her with a vehicle to present the argument.

There was another statute that was relevant. In 1871—after Bradwell's appeal was filed but before the case was argued—Congress enacted the Second Enforcement Act.[69] This statute would have expressly provided Bradwell with a cause of action to challenge the deprivation of her rights secured by the Constitution. Bradwell may have relied upon this statute mid-litigation as a sword, although the record is not clear on this point.

c. *Ex Parte Young*

Ex parte Young permits plaintiffs to assert constitutional rights *offensively*, even absent any express enforcement legislation. Some cases will state that a plaintiff making an *Ex parte Young*-type claim is asserting a constitutional right *offensively*. As a formalism, it is true that *Ex parte Young* allows a plaintiff to assert a constitutional right as a plaintiff or applicant. The right *is* asserted offensively. Nevertheless, these types of claims are consistent with the sword-and-shield framework we describe. Why? A plaintiff asserting an *Ex parte Young* claim is actually asserting a defense in anticipation of a state lawsuit, prosecution, or other enforcement action. The *Ex parte Young* claim acts as a bar against government wrongdoing. As a general matter, such relief compels state government officers to *stop* what they have been or will be doing. But such a claim cannot support a direct claim seeking *affirmative relief.*

Rather, *Ex parte Young* limits the remedy which such a plaintiff can seek to *prospective negative injunctions* directing state government officers to stop ongoing, imminent, or future constitutional rights violations. An *Ex parte Young* claim seeks *negative relief*; it is there to *stop* the state government's enforcement action, lawsuit, or prosecution. In other words, if a plaintiff or applicant seeks to assert a constitutional right *offensively as a cause of action supporting affirmative relief*, then *Ex parte Young* will not rescue his lawsuit, and federal enforcement legislation is still needed.

Judge Sutton described *Ex parte Young* in terms of the sword-and-shield framework:

> Private parties who act in compliance with federal law may use *Ex parte Young* as a *shield against the enforcement of contrary (and thus preempted) state laws.* That makes sense, because an existing cause of action for that relief exists: an equitable anti-suit injunction. As classically understood, anti-suit injunctions permit potential defendants in legal actions to raise in equity a defense available at law. That's what happened in *Ex parte Young*: Several railroad companies asserted in equity the Fourteenth Amendment's Due Process Clause as a defense against future indictment for violating Minnesota's mandatory railroad rates. But matters differ when litigants wield *Ex parte Young* as a *cause-of-action-creating sword*. In that setting—today's setting—the State is not threatening to sue anyone, precluding an anti-suit injunction from doing the work. [In those circumstances,] [w]hat is required is that Congress create[] a cause of action for injunctive relief in the statute or otherwise made § 1983

[69] 16 Stat. 433–440.

> available. This follows from the longstanding notion that courts of equity cannot create a remedy in violation of law, or even without the authority of law.[70]

We agree with Judge Sutton.

d. *Bivens*

Of course, *Bivens* (1971), a very modern judicial creation, is an exception to this framework. *Bivens* allows private individuals to assert Fourth Amendment claims against federal officers. Since 1971, the Supreme Court has not systematically expanded this singular exception to other federal rights, even those in the Bill of Rights. And those precedents demonstrate that constitutional provisions are not automatically, or even presumptively, self-executing. In any event, we have substantial doubts that *Bivens*, although considered by some to be normatively desirable, could be defended as a matter of original public meaning.

In *Griffin's Case*, Chief Justice Chase held that the Fourteenth Amendment was not self-executing and that only a congressional statute could put it into effect (as a sword). *Bivens* and related case law suggested that *the federal courts* have an independent role to create remedies for violations of federal constitutional rights--even absent federal legislation. But we are not aware of any coordinate body of case law or scholarship suggesting that States have a role akin to Congress and *the federal courts* for remedying federal constitutional rights violations in a similar fashion.[71]

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Professor Mark Graber wrote that a guest essay that Blackman and Tillman had published in the *New York Times* was "grossly misleading" with regard to whether the Fourteenth Amendment is self-executing.[72] Graber wrote, "Contemporary justices, both conservative and liberal, aggressively wield the Fourteenth Amendment today [as did Justices from an earlier era]. Judicial conservatives do not ask permission from Congress when declaring bans on guns or affirmative action unconstitutional." But they do ask for permission. In *Brown v. Board of Education*, *District of Columbia v. Heller*, *Students for Fair Admission v. UNC*, and countless other cases in an *offensive posture*, the Court declared laws unconstitutional where Congress provided enforcement legislation, such as Section 1983. But no such cause of action was needed in Fourteenth Amendment cases that arose in defensive postures. Again, the meaning of self-execution *depends*.

With the Constitution, there is no presumption of self-execution. This concept applies in different fashions to the jurisdictional grants in Article III, the qualifications in Article I, the provisions of the Bill of Rights, and the Fourteenth Amendment. It is a gross oversimplification to simply say the Constitution is self-executing and, then, call it a day. This background provides a

[70] Michigan Corrections Organization v. Michigan Dept. of Corrections, 774 F.3d 895, 906 (6th Cir. 2014) (Sutton, J.) (internal citation omitted) (emphasis added).

[71] See Walter E. Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 HARV. L. REV. 1532 (1972).

[72] Mark Graber, *Legislative Primacy and the Fourteenth Amendment*, BALKINIZATION (Apr. 22, 2022), https://balkin.blogspot.com/2022/04/legislative-primacy-and-fourteenth.html. Our *New York Times* guest essay entirely relied on Chief Justice Chase's ruling in *Griffin's Case*. Given that *Griffin's Case* has never been overruled, we could see how Professor Graber might write that, on originalist grounds, that is, apart from judicial precedent, we somehow erred. But his decision to characterize our opinion editorial's substance and conclusions as "grossly misleading" is part-and-parcel of the hyperbole which has taken over wide swathes of legal discourse—even among academics, and perhaps, especially among academics. What sources we rely on in our publications is a choice.

segue to a central focus in the Section 3 debate: Chief Justice Salmon Chases' federal circuit court opinion in *Griffin's Case*. Chase stated that Section 3, at least in the context of that case, was not self-executing. His conclusion is consistent with the understanding of self-execution we sketched above.

II. Chief Justice Chase's Decision in *Griffin's Case*

In 1869, Chief Justice Salmon P. Chase presided over *Griffin's Case* in the federal Circuit Court for the District of Virginia. Griffin had been convicted of a crime, and that case was presided over by Judge Sheffey, a state court judge. Sheffey had previously served in the (purported) confederate Virginia legislature. Griffin brought a collateral attack in federal court on the prior state court proceedings. Griffin argued that Judge Sheffey was disqualified pursuant to Section 3. Neither the procedural posture, nor the holding were simple. But most relevant for our purposes was Chase's view with regard to self-execution. He wrote "that legislation by Congress is necessary to give effect to" Section 3 of the 14th Amendment, and "only" Congress can enact that legislation. Chief Justice Chase added that the removal of disqualified officeholders "can only be provided for by Congress." Congress must create the procedure that would determine if a defendant violated Section 3, and that procedure would effectuate removal. One would think that this statement, issued within a year of the Fourteenth Amendment's ratification, by the Chief Justice of the United States, would be reasonably probative evidence of the original public meaning of Section 3, and whether it is or is not self-executing. But, according to Baude and Paulsen and some other recent commentators, such is not the case.

Baude and Paulsen's discussion of *Griffin's Case* ridicules Chase's opinion and their article reads like an effort to discredit Chase. They charge that Chase issued a "half-advisory opinion," which suggests that he lacked jurisdiction. They fault Chase for not adhering to the constitutional avoidance doctrine. They challenge his application of traditional habeas law. They argue that different strands of Chase's opinion are contradictory. They allege that Chase violated judicial norms in announcing the views of his colleagues on the Supreme Court. They suggest that Chase's opinion was motivated by his political ambitions. They compare Chase's opinion with *Dred Scott*!

Each of these criticisms misses the mark. First, Chase's analysis about the self-execution issue was not expressed in jurisdictional terms. Rather, Chase had jurisdiction based on the federal habeas statute that Griffin invoked. Second, there was nothing "advisory" about Chase's opinion. The case presented several complex issues, and Chase offered alternative rationales. But with regard to the self-execution issue, Chase only decided upon an issue which was properly before him. Chase's rationales supported his final order. Third, the constitutional avoidance doctrine, as we know it today, was only formally announced in the twentieth century. A critique of *Griffin's Case* based on the constitutional avoidance doctrine is unfair and unfounded because it is historically anachronistic. Fourth, Chase ruled that a habeas petitioner's claim based on the trial judge's being only a de facto officer cannot succeed. Baude and Paulsen cite no contemporaneous precedents undermining Chase's understanding of traditional federal habeas law. Fifth, the alternative rationales that Chase advanced were not contradictory. Sixth, Chase did not violate any judicial norms by indicating how his colleagues viewed a mere abstract legal issue unconnected to the specific facts and parties he was addressing in *Griffin's Case*. To prove the point, in 1899, a

unanimous Supreme Court decision favorably cited Chase's reference to how his colleagues in 1869 approached federal habeas law. Baude and Paulsen do not even cite that 1899 decision.

Chief Justice Chase's opinion was, and remains, reasonably probative evidence of the original public meaning of Section 3, and whether it is or is not self-executing.

A. What did *Griffin's Case* actually decide and not decide?

Prior to the Civil War, Judge Hugh W. Sheffey of Virginia had held a Section 3-triggering public position, and so, he had taken an oath to support the Constitution of the United States. Afterwards, he served as a member of the (purported) confederate Virginia legislature. Following the war, Sheffey was appointed as a state court judge by the recognized government of Virginia. Sheffey's original appointment predated ratification of the Fourteenth Amendment; thus, the lawfulness of his original appointment, at the time it was made, was not in doubt. After the Fourteenth Amendment went into effect, Judge Sheffey presided over the trial and conviction of Mr. Caesar Griffin, a black man, for shooting with an intent to kill.

Subsequently, Griffin collaterally challenged his state court conviction in federal court. He sought habeas corpus relief from a federal court in regard to his prior state court conviction. Griffin invoked the Habeas Corpus Act of 1867.[73] More specifically, in terms of relief, Griffin, who was represented by counsel, did not call for Sheffey's removal per Section 3. Why Griffin did not call for Sheffey's removal is not entirely clear: it may have been a good strategic choice—or a tactical error, particularly because Section 3's language only offers one express remedy: a disability against certain persons holding certain state and federal positions. Instead, Griffin argued that Section 3 disqualified Sheffey from having served as judge in his criminal trial, and so his (Griffin's) sentence should be vacated. In the Virginia federal district court decision rendered by Judge Underwood, Griffin prevailed.

The state appealed. And the appeal was heard in the federal Circuit Court for the District of Virginia by Chief Justice Salmon P. Chase. Chase was Chief Justice Taney's successor and a Lincoln appointee. (We had written about this decision in a *New York Times* guest essay.[74])

Chase decided three primary issues. Each of these issues were capable of resolving the case before the court, and therefore, it was within judicial norms for Chase to resolve each of these issues. First, there was the question of whether Section 3 required federal enforcement legislation. No such legislation had yet been enacted. If Section 3 required such enforcement legislation, then Sheffey remained in his position as judge. But if Section 3 did not require enforcement legislation, then Sheffey was disqualified from serving as the judge at the time Griffin was convicted, and if so, that would put Griffin's conviction in doubt.

Stated plainly, if Section 3 was not self-executing, Sheffey had been lawfully appointed because he had been appointed by the lawful, recognized Virginia government prior to enactment of the Fourteenth Amendment, and he had not been removed by the enactment of the Fourteenth Amendment. In these circumstances, Griffin could not prevail. Griffin's claim was raised directly under the Fourteenth Amendment.

Second, there was the question of the so-called De Facto Officer doctrine. In modern times, the Supreme Court has explained that, in certain circumstances, the "de facto officer doctrine . . .

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[73] 14 Stat. 385, https://uslaw.link/citation/stat/14/385.

[74] Josh Blackman and S.B. Tilman, *Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene*, THE NEW YORK TIMES (Apr. 20, 2022), https://www.nytimes.com/2022/04/20/opinion/madison-cawthorn-marjorie-taylor-green-section-3.html.

confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment to office is deficient."[75] Under the De Facto Officer doctrine, even if Sheffey was not a judge de jure (i.e., a judge according to law) his public acts would still be upheld as a judge de facto (i.e., a judge in fact). And, as a de facto judge, the sentence handed down by Judge Sheffey would still be enforced. If Sheffey was a judge de jure, the sentence was valid. If Sheffey was a judge de facto, then the sentence would still be treated as valid. In either scenario, Griffin loses. To be clear, the De Facto Officer doctrine was raised in opposition to Griffin's Fourteenth Amendment claim. Griffin opposed the application of the doctrine. In other words, even assuming Griffin could raise a claim directly under the Fourteenth Amendment, if the De Facto Officer doctrine was applicable, then the sentence would remain valid.

The third legal issue turned on the federal habeas statute. Federal courts, then and now, do not have the power to remedy all possible defects in state court criminal proceedings. Chase's authority as circuit justice sitting on the federal circuit court was constrained by the federal habeas statute. (Indeed, at the time, the Supreme Court was *stripped* of its appellate jurisdiction to review habeas decisions.) For reasons Chase develops and which we explain below, Chase ruled against Griffin on his habeas claim.

To sum up, Chase ruled in the alternative. According to Chase, Sheffey was a judge de jure, and so Sheffey's sentence was lawful. Chase suggested that if Section 3 were self-executing, and if he had found that Sheffey was a mere judge de facto, Griffin's sentence would be upheld under the De Facto Officer doctrine. And, finally, Chase held that habeas law does not provide any relief based on allegations, true or not, that the trial court judge was a mere judge de facto.

Chase ruled against Griffin on all three points. In a sense, this is not all that surprising: the evidentiary burden of persuasion and proof fell squarely on Griffin, the applicant. And no one made any argument that Griffin was a victim of prejudice and unfair procedures or that Griffin was actually innocent.

What was the precise basis of Chase's ruling? Stated differently, what did Chase decide, and what did Chase not decide? In candor, Chase discussed *all* three of these issues. And Chase's decision to write about all three issues has created some confusion more than 150 years later. But the fact that some are confused now, does not show that any were confused in 1869. Indeed, Baude and Paulsen point to *no* contemporaneous critiques of Chase's decision. That's a tell.

Chase spent the bulk of his decision discussing whether Section 3 was self-executing. Towards the end of the opinion, Chase reasoned "that legislation by Congress is necessary to give effect to" Section 3 of the 14th Amendment — and that "only" Congress can enact that legislation. Chase added that the removal of disqualified officeholders "can only be provided for by Congress." Congress must create the procedure that would determine if a defendant had violated Section 3. Section 5 of the 14th Amendment emphasizes this principle: Congress, it states, "shall have the power to enforce, by appropriate legislation, the provisions of this article."

But is this analysis about self-execution the holding of the case? The answer to this question turns on a careful reading of the final four paragraphs of the decision. We reproduce each paragraph, and provide headings and commentary to describe each of them.

> [1] [*Chase on 14th Amendment Self-Execution*]
> After the most careful consideration, therefore, I find myself constrained to the conclusion that Hugh W. Sheffey had not been removed from the office

[75] Nguyen v. United States, 539 U.S. 69, 77 (2003) (quoting Ryder v. United States, 515 U.S. 177, 180 (1995)).

> 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. 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.

Prior to these four paragraphs, that is, prior to Paragraph [1], above, Chase had largely developed his position that Section 3 is not self-executing—in the sense that it cannot be used as a sword or offensively to remove a Section 3-covered official. The first of these last four paragraphs, that is, the paragraph above, concludes that discussion. This paragraph and the one which immediately follows also bring up an alternative rationale for Chase's ruling: the De Facto Officer doctrine.

> [2] [*Chase on Elected Federal Officials*]
> Instructive argument and illustration of this branch of the case might be derived from an examination of those provisions of the constitution ordaining that no person shall be a representative or senator, or president, or vicepresident [sic], unless having certain pre-prescribed [?] qualifications. These provisions, as well as those which ordain that no senator or representative shall, during his term of service, be appointed to any office under the United States, under certain circumstances, and that no person holding any such office shall, while holding such office, be a member of either house, operate on the capacity to take office. The *election* or *appointment* itself is prohibited and invalidated; and yet no instance is believed to exist where a person has been actually *elected*, and has actually taken the office, notwithstanding the prohibition, and his acts, while exercising its functions, have been held invalid. (emphasis added)

The second paragraph distinguishes the legal position of elected federal officials from appointed officers, such as Sheffey—the state judge at issue in *Griffin's Case.* In other words, although the De Facto Officer doctrine supports his ruling, which extends to an *appointed state officer*, Chase, in a guarded and cautious approach, points out that precedents associated with *elected federal officials* are not entirely on-point. For example, what would happen to the votes cast by a member of the House who was below the age of twenty-five, or a Senator who was below the age of thirty? (We discussed several such members above.) Chase suggests that the actions of these elected officials would not be held invalid.

> [3] [*Chase on Habeas Corpus*]
> But it is unnecessary to pursue the examination [in the second paragraph above]. The cases cited by counsel cover the whole ground, both of principle and authority. 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.

The third paragraph explains that a habeas claim cannot succeed based on the argument that the adjudicator is a mere de facto officer. In other words, even if a "judge" was not a judge de jure, but rather was only a judge de facto, the prisoner still could not receive relief under the habeas statute.

> [4] [*Chase's Order*]
> It follows that the order of the district judge must be reversed, and that the petitioner must be remanded to the custody of the sheriff of Rockbridge county.

The fourth and last paragraph is Chase's final order. In that final order, Chase reversed Judge Underwood's final order in the federal district court proceedings below. Underwood had granted Griffin habeas relief; Chase reversed that decision, thereby authorizing the sheriff to take Griffin into custody.

Now that we have laid out what *Griffin's Case* decided, and did not decide, we turn to what Baude and Paulsen thought *Griffin's Case* decided and did not decide.

B. Baude and Paulsen misstate the grounds of decision in *Griffin's Case*

Our description of *Griffin's Case* above reflects a case that might have been rightly decided or might have been wrongly decided—we think it was rightly decided. But either way, it was and remains in the mainstream of judicial thought. Baude and Paulse view the case very differently.

Baude and Paulsen wrote: "*In re Griffin* should be hooted down the pages of history, purged from our constitutional understanding of Section Three."[76] Many will know, but we believe more than a few will not, that the underscored language was Senator Charles Sumner's condign judgment against the late Chief Justice Taney—expressed on the occasion of congressional debate on a bill to pay for a Taney bust for public display.[77] Baude and Paulsen believe *Griffin's Case* was wrongly decided. Fair enough. But why do Baude and Paulsen resurrect such charged language against a federal circuit court decision and, in effect, its author, who wrote that decision? What purpose does this sort of language serve? And why not use normal quotation marks and concomitantly give credit to their source under prevailing academic norms? No doubt Chase, like Taney, like any of us, had his faults. Few of us are perfect. And no doubt Chase's handiwork in *Griffin's Case* is not a perfect opinion. Few written decisions are. We do not criticize Baude and Paulsen for a lack of charity towards Chase. Our concern is more that putting aside dispassionate language, and failing to adhere to public reason, will tend to distort the authors' sense of fair play and the readers' accurate understanding of the substantive legal issues. It is these ideals which we believe to be the goals of scholarship, and we assume that Baude and Paulsen agree with us.

Baude and Paulsen do not simply write that *Griffin's Case* was wrongly decided. They call it "appalling" and then worse. Despite these criticisms, Baude and Paulsen recognize, quite properly, that *Griffin's Case* had more than one line of argument supporting its holding. Again,

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[76] Baude & Paulsen, *supra* note __, at 6 (underscore added).
[77] Charles Noble Gregory, *A Great Judicial Character*, 18 YALE L.J. 10, 21 (1908).

the three possible lines of argument concern (i) whether Section 3 was self-executing, (ii) whether Sheffey's ruling was insulated by the De Facto Officer doctrine, and (iii) whether federal habeas law provided Griffin with a remedy. Chase discussed all three of these issues. And Baude and Paulsen take great exception with Chase's approach. We disagree. Our view is that Chase decided this fairly complex case in a decision well within the bounds of judicial norms, in 1869 and today.

Here, we pose five primary questions and criticisms in regard to how Baude and Paulsen characterize Chase's opinion in *Griffin's Case*. Specifically, what did Baude and Paulsen think *Griffin's Case* decided and did not decide?

1. Were Baude and Paulsen complaining about Chase's jurisdiction?

In regard to the last sentence of Paragraph [1], Baude and Paulsen state: "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. [Chase] 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 . . . ."[78] Baude and Paulsen's complaint here is under-explained. What precisely is a "*half-dictum*" opinion? What precisely is a "*half-advisory* opinion"? Indeed, based on our research, we are not sure that these terms have been used in a reported case or other legal scholarship to criticize a judicial decision.[79] Judges frequently put forward alternative rationales for their ruling. The federal courts are prohibited from issuing advisory opinions; indeed, such opinions lack subject matter jurisdiction. We don't even know which half of the opinion would be advisory. Are Baude and Paulsen complaining that Chase lacked subject matter jurisdiction? In any event, Chase's announcement that his first line of reasoning (Paragraph [1]) supported his ruling did not preclude his announcing additional rationales.

Of course, Chief Justice Taney's *Dred Scott* opinion has been criticized because having reached a conclusion based on an absence of federal jurisdiction, Taney went on to opine on other legal issues where (by Taney's own admission) the Court lacked judicial power. By contrast, Chase's first line of reasoning was that Section 3 was not self-executing, but Chase does not express that rationale in jurisdictional terms. Indeed, even if Chase's position on self-execution should be characterized as jurisdictional, Chase still had jurisdiction in relation to Griffin's statutory habeas claim.

2. Were Baude and Paulsen complaining that Chase's decision was dicta or an advisory opinion?

Again, Baude and Paulsen do not explain what precisely their objection is. They also characterize the alternative holdings as dictum. As a formal matter, whenever alternative rationales are presented in a judicial decision, each rationale can be fairly characterized as dicta. Why? Because no individual rationale was strictly necessary to its holding.[80] But dicta of that sort is not a fair ground to criticize an opinion. In order to criticize an opinion for dicta, one must show that

[78] Baude & Paulsen, *supra* note __, at 45 (emphases added).

[79] A search on Westlaw revealed zero hits for the term "half-advisory opinion." We found only one hit for "half-dictum" and it was positive. *See* Stover v. United States, 332 F.2d 204, 206 (9th Cir. 1964) ("But we cannot call it pure dicta. If it was *half dicta*, we believe it good dicta." (emphasis added)).

[80] Blackman wrote about the difference between holding and dictum in an early paper. Josh Blackman, *Much Ado About Dictum; or, How to Evade Precedent Without Really Trying: The Distinction between Holding and Dictum* (Dec. 22, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1318389.

the adjudicator reached out to *adjudicate* (or, better, pre-*adjudicate*) facts and legal issues not properly before the court. Here, the issue of whether or not Section 3 was self-executing was before the court. Thus, *contra* Baude and Paulsen, Chase's alternative rationales were neither dicta (of the sort we should criticize) nor an "advisory opinion." In adjudicating this issue, i.e., the self-execution issue, Chase only decided upon an issue which was properly before him, and his reasoning on this issue supported a concrete judicial order, as opposed to merely putting forward abstract legal views. So nothing is an "advisory opinion."

3. Were Baude and Paulsen complaining that Chase violated the constitutional avoidance doctrine?

Again, Baude and Paulsen do not explain what precisely is their objection to Paragraph [1]. One might guess that their objection is that Chase failed to adhere to the doctrine of constitutional avoidance: that is, where a federal court can reach a decision on narrow statutory or other non-constitutional grounds (e.g., the habeas argument in Paragraph [3]), the court should avoid reaching and deciding the case on constitutional grounds. *If* this is the ground of Baude and Paulsen's objection, and they do not say clearly that it is, then we think it is somewhat misplaced.

The Supreme Court has developed multiple doctrines counseling avoidance and abstention for the federal courts. Each carries its own jurisprudential history. The constitutional avoidance doctrine is now settled law, but it appears it was only formally announced in the twentieth century. Some well known cases which make use of that doctrine include: *Rescue Army v. Mun. Ct. of L.A.*[81] and, of course, Justice Brandeis' concurrence in *Ashwander v. Tenn. Valley Auth.*[82]. Its earliest recognizable, formal invocation, we suspect, was *Siler v. Louisville & Nashville R. Co.*[83] And even in *Siler*, the Court announced it as a rule of practice or a default, which should be adhered to, but could be "departed from" for "important reasons." We suggest that a critique of *Griffin's Case* based on the constitutional avoidance doctrine is unfair and unfounded because it is historically anachronistic.

Still, even if Baude and Paulsen could point to pre-*Siler* cases applying the constitutional avoidance doctrine, in *Griffin's Case*, there were "important reasons" not to adhere to that doctrine. What reasons? The Fourteenth Amendment was ratified in 1868. *Griffin's Case* was decided in 1869. Now, imagine a counterfactual. Imagine that Chase had ruled narrowly, and he had only announced his narrow habeas-based ruling in Paragraph [3]. Imagine further that Chase had refrained from announcing his broader Paragraph [1] views—i.e., Section 3 requires enforcement legislation. If Chase had taken this alternate path, that very same substantial (perhaps, momentous) issue would likely arise in a different posture, maybe as much as a year or two later, in federal trial court proceedings, federal circuit court proceedings, and on direct review or a certificate of division up to the Supreme Court. In these circumstances, what would be the upshot if the Supreme Court agreed with Chase's self-execution position? If the lower courts disagreed with Chase's position and removed officials covered via the Fourteenth Amendment, then Supreme Court review would return those officials to office—not just returned, but returned as "Lost Cause" heroes. Alternatively, had the lower courts enforced Chase's (unannounced) position, then those who the amendment ultimately sought to displace would be left in positions of political power. So

[81] 331 U.S. 549, 568 (1947).
[82] 297 U.S. 288, 346 (1936) (Brandeis, J., with Stone, Roberts, and Cardozo, JJ.).
[83] 213 U.S. 175 (1909). *See* CONGRESSIONAL RESEARCH SERVICE, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW (Sept. 2, 2014), https://perma.cc/K4SH-DDKH.

time would have been lost. And it is not just time which would have been lost, but also the opportunity to displace all Section 3-covered officials might be lost too. Chase's decision gave guidance to other lower federal courts how to rule in similar cases. And Chase's decision gave guidance to a loyal, Unionist Congress to act *now* (actually, *then*) to enact enforcement legislation while they continued to hold ⅔ majorities in both houses.

It is not unheard of for federal judges to send signals to other judges, and indeed, to Congress through judicial decisions. To use a contemporaneous example, in 1871, Circuit Justice Joseph Bradley wrote to District Judge William Wood, encouraging him to hold that Congress had the power to enforce the provisions of the First Amendment through the newly-enacted Enforcement Act of 1870.[84] (This issue would arise later in *United States v. Cruikshank* (1876).)

We think Chase's decision reflects a respectful constitutional dialogue between the courts and Congress. And this dialogue may have been reciprocated, with the enactment of the Enforcement Act of 1870. About one year after *Griffin's Case*, Congress's Enforcement Act of 1870 created a quo warranto mechanism whereby federal prosecutors could remove office-holders who were disqualified by Section 3. Had Chase not written his opinion that addressed self-execution, Congress may not have thought or chosen to take that step. Moreover, Chase's self-execution position was one he put forward with humility. In putting it forward, Chase was only speaking for himself, and not his Supreme Court colleagues. (Again, Chase's reference in *Griffin's Case* to his colleagues concerned the habeas corpus statute, not the self-execution question.) If Congress believed that the Fourteenth Amendment was, in fact, self-executing, then Congress could choose to do nothing and put the nation's fate in the hands of any five of the eight Justices then in office in May 1869.[85] If Congress, agreed with Chase or just sought not to chance the issue being decided wrongly by the lower federal courts and the Supreme Court as it then stood, then Congress could pass a statute to allay all concerns. Baude and Paulsen see Chase as a wrongdoer, or, at least, wrongheaded. But we do not.

Baude and Paulsen accuse Chase of "knee-capping the Fourteenth Amendment." We think that hyperbole gets the situation exactly backwards. We think the better view is that Chase was, in fact, reinforcing the Fourteenth Amendment. Had Chase ruled only on the more narrow habeas grounds, and then only a year or two later, in another case on direct review, put the nation on notice that the Fourteenth Amendment was not self-executing, Chase would have been setting back the effort to disqualify Section 3-covered persons, that is, many former confederates. By signaling that enforcement legislation was needed, Chase was helping to carry the provision into prompt execution. Had Chase declined to address the self-execution issue, would Baude and Paulsen really be saying (today) that Chase was a modest judge who favored the passive virtues and judicial minimalism? Perhaps, they and others might. But we doubt it. We doubt it because Chase could have, but did not, reach out to address the precise legal position of Section 3-covered judges and other officers, who unlike Sheffey, received their appointments *after* the Fourteenth Amendment was ratified. Chase addressed the facts and law relevant to the case before him: no more, no less. Yet, today's critics give him no credit for his issuing an opinion limited to the facts before him.

The more important point is that the consequences of Chase's having taken the particular alternative minimalist approach supported by Baude and Paulsen leave us wondering if Baude and Paulsen, as well as Chase's contemporaries and subsequent commentators, would have concluded that such a minimalist approach was naively unaware of the underlying political drama, lacked

[84] RANDY BARNETT & JOSH BLACKMAN, CONSTITUTIONAL LAW: CASES IN CONTEXT 756 (4th ed. 2021).
[85] *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx.

transparency, and would have been perceived, not as "knee-capping the Fourteenth Amendment,"[86] but as a sucker-punch to the national gut.

4. Chase ruled that a habeas petitioner's claim based on the trial judge's being only a de facto officer cannot succeed. Baude and Paulsen say otherwise. Who was/is right?

In Paragraph [3], Chase cites multiple state cases for the proposition 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." To be clear, here, Chase did not say that the De Facto Officer doctrine was correct *in all procedural contexts*; he merely held that a claim grounded in a trial judge's being a judge de facto and not a judge de jure cannot succeed in a *habeas posture*. Here, Chase's analysis was limited to the posture of the case: a collateral attack. He was not addressing how that claim might have been resolved on direct appeal. Chase offered a legal interpretation of the scope of the pre-modern habeas remedy.

Baude and Paulsen challenge Chase's position on this issue, but they do not actually directly state that Chase was wrong. Baude and Paulsen do not state that Chase mischaracterized the cases Chase had cited as authority, nor do Baude and Paulsen affirm that there were, at that time, other streams of habeas case law permitting a challenge to a criminal conviction on the grounds that the trial judge was a mere judge de facto. Instead, Baude and Paulsen argue:

> 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." On this possibility, maybe the de facto officer doctrine was a defense to claims like habeas—the procedural vehicle in *Griffin's Case*—because habeas was a collateral attack. 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. On this possibility, Judge Sheffey's acts were inherently void, and thus everything he did fell outside of his court's jurisdiction. The de facto officer arguments in *Griffin's Case*—and thus the correct legal fate of Caesar Griffin—turn on these technicalities. Indeed, these technicalities were argued by the parties and they were the main subject of Judge Underwood's opinion below.[87]

So Baude and Paulsen suggest Chase could have taken another route based upon Sheffey's purported "fundamental inability to exercise power." But once again, Baude and Paulsen's challenge is anachronistic. They cite no ninteteenth century authority or pre-nineteenth century authority from any state in the Union or from any federal court, or from any court in the common law world contrary to Chase's position. We suggest that Chase's position, in 1869, was the widely (if not universally) held one. For example, Owen Dixon, later Chief Justice of Australia, in an

[86] Baude & Paulsen, *supra* note __, at 49.
[87] Baude & Paulsen, *supra* note __, at 48 (footnotes omitted).

academic paper[88] wrote: "Higginbotham C.J. [of the Supreme Court of Victoria] distinguishes between objections to the jurisdiction of a Court and objections to the validity of its constitution [that is, its membership]. *In re Armstrong* [1878], 4 [Victoria Law Reports] (L.) 101 the fact that a Chairman of General Sessions was invalidly appointed was held no ground for a habeas for a prisoner convicted before him."

Of course, Judge Underwood's district court opinion took a contrary view, but Baude and Paulsen do not defend Underwood's opinion and its reasoning. Maybe for good reason? Underwood, like Chase, and many others–were among the colorful figures who arose during the Civil War and Reconstruction.[89] Underwood was appointed by Lincoln in 1863 to the federal district court. Underwood was elected to the U.S. Senate by the loyal Virginia legislature, but the U.S. Senate refused to seat him.[90]

Baude and Paulsen cite a 1963 unsigned law review note as authority for their position.[91] That note affirms that *Ex parte Ward*, an 1899 U.S. Supreme Court decision, stood for the position that a collateral attack in habeas proceedings on the validity of a judge's presidential appointment was disallowed even though based on constitutional grounds.[92] (We'll come back to *Ex parte Ward* in Part II.B.6.b below.)

Baude and Paulsen point to some pre-*Griffin's Case* authority, such as *Hayburn's Case*,[93] to support the legal narrative that Chase's use of the De Facto Officer was a choice, and not the steady application of established law. We do not find Baude and Paulsen's discussion convincing. Those cases did not involve attacking a particular judge's right to hold the position due to a disqualification, but rather involved a generic attack on the power assigned to the judge. Specifically, in those cases, the power was alleged to belong to the sovereign or to another branch, or that the judicial position itself was unconstitutional irrespective of who held it. Griffin's position, by contrast, was an attack on the particular judge's right to hold his position. No one disputes that Sheffey's judicial office was constitutional. And no one disputes that a non-Section 3-covered individual could have lawfully adjudicated Griffin's trial. So this line of cases, put forward by Baude and Paulsen, has no ready application to *Griffin's Case.* Recently Judge Murphy explained: "[H]istory refutes the theory that the Constitution of its own force compels courts to treat as 'void' any action taken by officers whose exercise of an office does not comport with a constitutional command. That view would treat the de facto officer doctrine *itself* as unconstitutional. Yet it formed part of the legal backdrop against which the founders enacted the Constitution."[94]

The student note cited by Baude and Paulsen discusses modern counter-authority supporting Baude and Paulsen's position that a disqualified judge has a "fundamental inability to exercise power," and so a decision by such a judge could be set aside in habeas proceedings.

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[88] Owen Dixon, *De Facto Officers*, 1 RES JUDICATAE 285 (1938), http://classic.austlii.edu.au/au/journals/ResJud/1938/71.html.

[89] *John C. Underwood (1809-1873)*, ENCYCLOPEDIA VIRGINIA, VIRGINIA HUMANITIES, https://encyclopediavirginia.org/entries/underwood-john-c-1809-1873/.

[90] 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 384 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V1/pdf/GPO-HPREC-HINDS-V1.pdf.

[91] *The "De Facto" Officer Doctrin*e, 63 COLUM. L. REV. 909 (1963), https://www.jstor.org/stable/1120535.

[92] 173 U.S. 452 (1899).

[93] 2 U.S. (2 Dall.) 409 (1792).

[94] Calcutt v. Federal Deposit Insurance Corporation, 37 F.4th 293 (6th Cir. 2022) (Murphy, J., dissenting) (citing Baude and *Griffin's Case*, and fully expounding on the scope and history of the De Facto Officer doctrine), *rev'd on other grounds* (U.S. 2023).

However, that line of authority first appears many decades after *Griffin's Case* was decided.[95] Again, we, at least, would not fault Chase for not being a clairvoyant, nor would be fault him for adhering to established habeas law. It is not convincing to suggest that Chase should have departed from established law based on a line of cases from a half-century later. All of these criticisms seem unduly harsh. Moreover, much (perhaps all) of the modern line of authority Baude and Paulsen rely on for this point relates to federal habeas proceedings "reviewing" underlying federal court convictions over federal charges where the alleged constitutional defect involved a challenge based on federal separation of powers. For example, in *United States v. Allocco*, the President's power to recess appoint a federal judge was at issue, as was the issue of when the Senate was in recess for a constitutionally valid presidential appointment.[96] It is very unclear how that stream of authority could help Griffin, who was convicted in state court proceedings involving a state judge on state charges.

Still, even if we cannot impose on Chase the obligation to be a clairvoyant, we can ask if Chase was in some meaningful sense wrong on the narrow habeas issue. Was he? Think about it this way. Some people have thought, and some continue to think, that the Due Process Clause of the Fourteenth Amendment encompasses an actual cornucopia of rights. Some do not. It is a matter of legitimate disagreement and debate. One reason some people do not see the cornucopia is that there is no specific language in the Fourteenth Amendment announcing what rights are created by the Due Process Clause and what the boundaries of those rights are. The same is true for habeas corpus. Baude and Paulsen's article teaches that constitutional amendments change prior constitutional law. We do not disagree. But there is nothing in Section 3 about habeas corpus.

To put it another way, and leaving aside for now the issue of whether authorizing federal legislation is necessary to enforce Section 3, we note that Section 3 imposes a disability on some persons in some circumstances. Section 3 says that certain persons in certain circumstances shall not hold certain government positions. Section 3 does *not* say, using any express language, what should happen if notwithstanding Section 3's limitations, a Section 3-covered person is elected to, appointed to, or holds a position contrary to law. Likewise, if a state judge holds a position contrary to Section 3, can a state court criminal conviction be attacked collaterally in federal habeas proceedings? Nothing in the text of Section 3 answers that question with anything approaching clarity.

Again, nothing in the text of Section 3 upsets prior understandings of the scope of the habeas remedy. So even if Section 3 upset some prior law (which it undoubtedly did) was there any good reason for Chase to think background habeas law had been changed by Section 3? In this situation, is it any surprise that Chase looked to Congress to provide guidance for applying Section 3 on both direct review and in regard to collateral habeas proceedings? No, it is no surprise at all. Moreover, it was on this limited habeas point that Chase point to his colleagues' expressing agreement with his position.

Finally, in 1870, Congress expressly created a procedure through which those holding Section 3-covered positions could be removed from their positions by federal prosecutors.[97] This mechanism was not available when Griffin was convicted. Specifically, a federal, but not a state, prosecutor can seek a writ of quo warranto to remove an incumbent officer from office. This language authorizes a single traditional remedy: a writ of quo warranto. Congress did not create a remedy that would allow the States to remove a federal official from his elected or appointed

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[95] Johnson v. Manhattan Ry., 61 F.2d 934 (2d Cir. 1932), *aff'd*, 289 U.S. 479 (1933).
[96] 305 F.2d 704 (2d Cir. 1962).
[97] The Second Enforcement Act, 16 Stat. 433, 438.

position. Nor did Congress create a more limited remedy allowing the States to remove a candidate for a federal elected position from the ballot. Here, the writ of quo warranto remedy, on the motion of a federal prosecutor, and *only* a federal prosecutor, permits a federal court, and *only* a federal court, to determine whether a specific person has the legal right to hold an office. (Professor Samuel Bray explained this writ during the kerfuffle over who was the actual director of the CFPB.[98])

We draw two general conclusions from this Enforcement Act. First, Congress did not grant the States any role to enforce Section 3. This task was given to federal prosecutors. Indeed, the state courts had no role to play in this matter. Section 8 of the Enforcement Act stated that the federal courts had *exclusive* jurisdiction over claims brought under the Enforcement Act. That's a tell too.

Second, Congress included Section 14 in the Enforcement Act *after* Chase's decision. It is reasonable to presume that Congress was aware of *Griffin*'s *Case*. Congress could have responded to *Griffin's Case* by enacting a statute saying that Section 3 was self-executing. And Congress could have given the States a role in these or analogous removal or election processes. But instead, Section 14 expressly delegates Section 3-enforcement to a federal prosecutor—and critically, only the federal courts (and not state courts) play a role in that process. Moreover, as recounted in a recent biography, Chase was close to the Congress that drafted and ratified the Fourteenth Amendment, and later enacted the Enforcement Act.[99] That is some reason to believe that Chase's views were consistent with those in Congress. Indeed, as we will discuss later, *Griffin's Case* may be understood as a signal to the Reconstruction Congress about what measures would pass muster both before him, amongst his Supreme Court colleagues, and the lower federal and loyal state judiciaries.

There are more than a few Reconstruction Era cases touching on Section 3. Some recent scholarship has cited these cases in support of the position that officeholders were purportedly removed absent implementing legislation.[100] One such case is *United States v. Powell*.[101] *Powell* was a prosecution brought under Section 15 of the 1870 Act. It was bought, not to enforce abstract Section 3 qualifications absent authorizing legislation, but to enforce a concrete federal criminal statute. So there was federal statutory authority. Moreover, the prosecution came with all the constitutional protections (then) normally associated with federal criminal protections–procedural and substantive.

5. Baude and Paulsen argue that Chase was wrong about retroactivity

Section 3 was ratified in the wake of the Civil War. At a minimum, this provision was designed, ultimately, to disqualify from office certain people who had sworn an oath to the Constitution, and went rebel. Section 3 would impose a *future* disqualification based on *past* conduct. But Section 3 may also impose a *past* disqualification based on *past* conduct. The language of Section 3 can be read in both ways. Baude and Paulsen do not recognize how far back retroactivity can go. Indeed, without a clear theory of retroactivity, Section 3 could sweep to past

[98] Samuel Bray, *English or Mulvaney at the CFPB? Time for quo warranto!*, VOLOKH CONSPIRACY (Nov. 25, 2017), https://reason.com/volokh/2017/11/25/english-or-mulvaney-at-the-cfp/.
[99] *See* WALTER STAHR, SALMON P. CHASE: LINCOLN'S VITAL RIVAL (2022).
[100] Roger Parloff, *After the Cawthorn Ruling, Can Trump Be Saved From Section 3 of the 14th Amendment?*, LAWFARE (Jun. 7, 2022),
https://www.lawfaremedia.org/article/after-cawthorn-ruling-can-trump-be-saved-section-3-14th-amendment.
[101] 27 F. Cas. 605 (1871) (Bond, J.).

conflicts, including the Mexican-American War, and apply to conduct from prior to Section 3's ratification *even* where the officeholder's term of office ended prior to Section 3's ratification. In *Griffin's Case*, Chief Justice Chase understood these risks, and addressed them in a candid fashion. His opinion laid out a roadmap to understand retroactivity and with regard to the De Facto Officer doctrine. Chase's roadmap had two other important implications. First, Chase explained that because Section 3 was not self-executing, only a federal statute could put it into effect. Second, a state statute would not suffice. The idea that the Fourteenth Amendment, absent express federal statutory authorization, allowed the States to operationalize Section 3 only makes sense if state governments could be trusted. But the Fourteenth Amendment and enforcement legislation were enacted precisely because state institutions, state officials, and state courts were *not* considered trustworthy by the national government. Indeed, the idea that Section 3 permitted States, via ballot control, to limit voter and candidate participation for federal positions and to do so absent express federal authorization seems (at least to us) novel and very unlikely.

a. Section 3 operates retroactively and prospectively

Section 3 might be thought to operate in two ways: retroactively and prospectively.

Under one view, Section 3 might impose a retroactive disability on covered persons in their current positions. In other words, covered persons who hold positions contrary to Section 3 would be removed from their positions by some process. If they were appointed after the Fourteenth Amendment was ratified, the effective date of their removal is backdated to the date of their appointment. If they were appointed before the enactment of Section 3, the effective date of their removal is backdated to the date on which the Fourteenth Amendment was ratified. In such circumstances, the covered person's prior acts might be determined to be void (or, possibly, voidable), and the covered person may face personal liability for the public acts he had taken during the period where he acted absent good authority. Indeed, the de jure government might sue the covered person for restitution: that is, the return of any compensation or other emoluments paid while holding office.

Under the second view, Section 3 might impose a disability on covered persons against their holding a position in the future. And if a covered person holds such a position contrary to Section 3, some legal process would effectuate removal, but such a removal is not backdated. Here, the covered person's removal takes effect at the conclusion of some legal process. Because the removal is not backdated, we do not think there would be any likely occasions for the De Facto Officer doctrine to apply. Concomitantly, such a person would not face any personal liability for the public acts he had taken during the period in which he held his position. In other words, a covered person's public acts prior to his removal would be upheld because prior to removal the covered person held his position de jure, and not de facto.

Both alternatives above have an element of retrospectivity–both would impose a burden based on conduct that had been completed prior to the enactment of the Fourteenth Amendment. Both alternatives are consistent with the Fourteenth Amendment, as both, in some fashion, effectuate removal of covered persons. But the first alternative more greatly offends ex post facto principles and retrospectivity norms.

Section 3 does not explain which of these two choices to apply. And Griffin did not actually move to have Sheffey removed. Given these facts, is it any wonder that Chase believed that these issues, as well as other Section 3-related policy choices were for Congress to decide?

b. Disqualifying Jefferson Davis, Alexander Stephens, and West Hughes Humphreys

Consider a hypothetical. A person took an oath to the Constitution as a member of Congress. After his terms concluded, he went rebel. Did this former-member of Congress violate his oath of office? Baude and Paulsen state the answer is unequivocally *yes*.

> [E]ven 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 . . . .[102]

Baude and Paulsen offer one example by name to illustrate this oath-breaking: Alexander Hamilton Stephens of Georgia.[103] Before the Civil War, Stephens had served eight terms in the U.S. House of Representatives from 1843 through 1859.[104] In November 1861, he began serving as vice president of the (purported) confederacy.[105] At that time, Stephens was no longer serving a term in the United States Congress. Baude and Paulsen assume that Stephens "violated" his oath to the United States when he became vice president.[106] But this assumption is tenuous.

The pre-Civil War oath Stephens took while serving in Congress was basically the same one members had taken since 1789, and it is basically the same one taken today. It states: "I, A.B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States." The words are forward-looking. And if you think these words last unto eternity, then that oath bound Stephens in 1861, and ever-after. If so, then Baude and Paulsen would be correct to assert that Stephens violated his oath when he became vice president of the (purported) confederacy.

But there is another view: oaths of office last as long as the holder (lawfully) remains in his position. Thus, when an elected term lawfully ends, the holder's oath no longer has force. We think this view is the overwhelmingly predominant view. This has been Congress's understanding since 1791. In 1791, some members of the House returned for a second consecutive two-year term. If forward-looking oaths last unto eternity, then a returned House member would have no cause to take his oath again. But the practice has always been to mandate oaths for *all* House members at the start of *any* two-year term. Likewise, new oaths were taken by senate members who were returned to the Senate by the voters, or prior to the Seventeenth Amendment, by the state legislatures. Moreover, President George Washington took a new oath of office when his second term began. To this day, members of Congress have to take current oaths without regard to prior oaths that they may have taken in prior terms, or for service in regard to the other chamber, or without regard to having held some other government position which required the same oath. The same is true for second term presidents and a variety of other and lesser positions we are all familiar

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[102] Baude & Paulsen, *supra* note __, at 4 (emphasis added).
[103] Baude & Paulsen, *supra* note __, at 4 (quoting AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 377 (2005)).
[104] *Alexander Stephens (1812-1883)*, NEW GEORGIA ENCYCLOPEDIA, https://www.georgiaencyclopedia.org/articles/government-politics/alexander-stephens-1812-1883/
[105] *Alexander* Stephens, AMERICAN BATTLEFIELD TRUST, https://www.battlefields.org/learn/biographies/alexander-stephens.
[106] *See also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 377 ("Suspicion of the South's good faith ran especially high in the mid-1860s because a large percentage of Southern leaders had in fact treasonably betrayed their antebellum Article VI oaths to uphold the federal Constitution.").

with. Federal district court judges who are elevated to the federal circuit court, or elevated to the United States Supreme Court, also take a new oath of office. When one swears as a witness to tell the truth, the whole truth, and nothing but the truth in court, does that oath of truthfulness extend beyond that trial, and into, for example, a subsequent trial with different parties? Could one be held in contempt of court for lying a few months later in an entirely different proceeding? We think the answers to these questions are *no*.

In 1861, at the time Stephens was elected to the (purported) confederate congress, and then to the position of vice president of the (purported) confederacy, Stephens was not a member of the U.S. Congress. His last term had already ended in 1859. So did Stephens violate his oath? It is a matter reasonable people can dispute. But Baude and Paulsen are wrong to state the answer is unequivocally *yes*.

Why does this question matter? Under the prevailing view, a person like Stephens could not be accused of violating his constitutional oath from before the Civil War. Part of Section 3's achievement was to eliminate the need to consider that issue. Section 3 reached back and disqualified certain people who had taken a constitutional oath for covered positions, even if they were no longer holding that covered position when they committed a Section 3-related offense. Stephens could have been disqualified pursuant to Section 3. Section 3 took off the table any consideration that a covered person violated his oath or committed perjury when he took it. This facet of Section 3 thus reduced the moral opprobrium attached to any finding of Section 3 liability. Chase also alluded to this point in *Griffin's Case*. Chase stated: "[O]ne of the objects of . . . [S]ection [3] was to provide for the security of the nation and of individuals, by the exclusion of a class of citizens from office . . . ."[107] This is not the tone of a discussion relating to an odious crime.

That analysis goes some distance towards resolving any issue concerning Section 3's coverage of the (purported) vice president of the (purported) confederacy. What about the confederacy's (purported) president? A Section 3 disqualification would not turn on whether Senator Jefferson Davis was still in office when he went rebel.[108] Davis could have been disqualified pursuant to Section 3 based on his oath *before* he went rebel.[109]

We offer one more example to illustrate the point about retroactivity. Baude and Paulsen affirm that any wrong for which a person should be disqualified for under Section 3 would also be an impeachable offense.[110] With this affirmation, we might expect scores of impeachments and disqualifications of then-current, or perhaps even former,[111] "officers of the United States," who

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[107] 11 Fed. Cas. 7, 25–26.

[108] *Jefferson Davis' Farewell Address (Jan. 21, 1861)*, THE PAPERS OF JEFFERSON DAVIS, https://jeffersondavis.rice.edu/archives/documents/jefferson-davis-farewell-address; *see also* *Jefferson Davis's Farewell, United States Senate*, https://www.senate.gov/artandhistory/history/minute/Jefferson_Davis_Farewell.htm. We assume that Davis's farewell address was a lawful resignation, but Section 3 liability does not hinge on this issue.

[109] Lest there be any doubt, our position is that former U.S. Senators and Representatives who took their Article VI oath and then went rebel were all squarely covered by Section 3. *See* Blackman & Tillman, *supra* NYUJLL note __, at 35. That said, enforcement requires a statute.

[110] Baude & Paulsen, *supra* note __, at 124 ("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." (emphasis added)); *Id.* at 29 n. 90 ("An officeholder who has engaged in insurrection or rebellion or given aid and 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." (emphasis added)).

[111] Baude wrote that the Senate can try an impeachment of a former "officer of the United States. Will Baude, *Does the Chief Justice Preside over an Ex-President's Impeachment Trial?*, VOLOKH CONSPIRACY (Jan. 15, 2021),

gave aid and comfort to the confederacy. Yet only one person was impeached in regard to Civil War wrongdoing. Who was it?

It was not Jefferson Davis or Alexander Stephens, who both had served in the United States Congress. It was West Hughes Humphreys. Who was he? In 1861, hundreds, if not thousands, of elected and appointed, federal and state, officials and officers in seceding States went rebel, and then took positions in the rebel national and state governments. More than a dozen United States judges in seceding States became judges in the (purported) confederate courts. Humphreys was one such judge.[112] He was impeached, convicted, and disqualified for supporting the (purported) confederate government.[113] Humphreys remains one of only three defendants in U.S. history to have been disqualified by the Senate.

Why did Congress impeach *only* him? Why did Congress focus like a laser beam on him alone among former U.S. officials, officers, and judges? Unlike the other judges, Humphreys, for whatever reason, failed or chose not to resign from his Union position *before* taking his confederate one.[114] Humphreys *violated* his Article VI oath, and he was held accountable for it.

However, the case was less clear for others who were out of office when they went rebel, or who actively and lawfully resigned their Union positions prior to going rebel. They presented a more difficult case precisely because it was not clear if they violated their oaths. As an aspirational matter, one could say that Humphreys and all these other judges violated their oaths, but as a legal matter, other than Humphreys, the others who had resigned prior to going rebel probably did not. (The House may have also concluded, *contra* Baude, that a former official, e.g., one who had resigned, could not be impeached and disqualified, but it was still possible to impeach Humphreys precisely because he had not resigned.)

Section 3 avoided this issue: it covered people who had previously taken an oath, but were no longer in office. Such persons could still be subject to future disqualification. Moreover, Section 3 pinned liability on those persons who had taken prior oaths to uphold the U.S. Constitution, without conditioning liability on their having violated that oath or having committed perjury when taking it.

We do not doubt that Baude and Paulsen can find records of many in the 1860s who would have characterized Stephens and others similarly situated just as they (Baude and Paulsen) do: people who had violated their oaths. But the fact that *none* of these people were impeached provides some evidence against their position. Moreover, these scattered statements, untethered to actual enforcement actions taken, are simply evidence of original intent and expectations. In interpreting Section 3, our goal ought to be to *understand* Section 3's words and the parliamentary and legal history of oath-taking which it incorporated.

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https://reason.com/volokh/2021/01/15/does-the-chief-justice-preside-over-an-ex-presidents-impeachment-trial/. *See generally* Brian Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. OF L. & POLITICS 1 (2001).

[112] Amy H. Sturgis, *West H. Humphreys*, TENNESSEE ENCYCLOPEDIA, , HTTPS://TENNESSEEENCYCLOPEDIA.NET/ENTRIES/WEST-H-HUMPHREYS/; Kaitlin E. O'Brien in Collaboration with Professor Ian Binnington, 'West H. Humphreys: A Civil War Impeachment,' Powerpoint Presentation, https://sitesmedia.s3.amazonaws.com/history/files/2013/11/Kaitlin-E.-O%E2%80%99Brien-work-with-Ian-Binnington-summer-2013.pdf.

[113] III HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2385-97 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/html/GPO-HPREC-HINDS-V3-23.htm, https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf; *id*. § 2390 (reproducing articles of impeachment, and Article I expressly alleging that Humphreys violated his oath).

[114] *See* O'Brien, *supra* note __.

These debates about Stephens, Davis, and Humphreys raises an even deeper question: how far back could Section 3 reach?

c. How far back would a retroactive Section 3 reach?

There is another possibility in regard to retroactivity. This view might even more greatly offend our intuitions rooted in fair play and due process—so hang on.

Section 3 makes three temporal references. First, Section 3 applies to a person "having *previously* taken an oath" in a covered position. We think this language would squarely include a person who swore such an oath *before* and *after* the Fourteenth Amendment was ratified. Indeed, the hook to disqualify most rebels was that they had previously sworn an oath to the Constitution before the Civil War began. Second, a Section 3 disqualification is triggered if a person "*shall* have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." Baude and Paulsen emphatically contend that this provision was not restricted to the Civil War. Under their reading, the word "shall" refers to conduct both *before* and *after* the Fourteenth Amendment was ratified. Again, the hook to disqualify rebels was that they engaged in insurrection. But, Baude and Paulsen contend, this provision was by no means limited to the Civil War.

These first two temporal references should not be controversial. But the third temporal problem is not so clear. The disqualification element of Section 3 begins, "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," if he is subject to a Section 3 disqualification. What does "shall" mean here?

If "shall" only has a *prospective* meaning, then the disqualification element would read "No person *shall* [after this amendment is ratified] be a Senator or Representative in Congress, [etc] …." Under this reading, the amendment was prospective in regard to its effects, but allowed for retrospectivity in relation to the elements establishing the disability. This reading of Section 3's first "shall" would not raise any unique concerns regarding retrospectivity. But that is not the only reading.

In the offense element of Section 3, Baude and Paulsen contend that the word *shall* refers to a period of time both *before* and *after* the Civil War. That is, Section 3 was not limited to disqualifying confederates rebels, but will apply to future insurrections as well. What if "shall" has the same meaning in the disqualification element of Section 3 as it does in the offense element? What if the Fourteenth Amendment retroactively disqualified people prior to 1868, who had engaged in an insurrection before 1868? The Fourteenth Amendment could be read in this fashion: "No person *shall* [ever] be a Senator or Representative in Congress, [etc] …." Under this reading, the amendment allows for retrospectivity in regard to all its elements, including the elements establishing liability and the disability created.

Your first response might be, *there is no way the Framers of the Fourteenth Amendment would have intended this result*. This response falls for the fallacy of original intentions. (More on that later.[115]) The original public meaning of a constitutional text does not always neatly map onto the intentions of those who framed the document. Sometimes constitutional text leads to unanticipated consequences. Look no further than debates over the Eleventh Amendment. Baude and Paulsen do not concede this point; rather, they have emphatically embraced it.

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[115] *See infra* Part V.E.

Your second reaction might be, *so what?* Why would it matter if a person, who left office before the Fourteenth Amendment was ratified, was retroactively disqualified from office after the Fourteenth Amendment was ratified? He was already out of office, so who cares? Yet this question resembles the question presented in *Griffin's Case*: What happens to the actions of a person who was disqualified by virtue of Section 3? Are those actions invalid, or are those actions saved by something akin to the De Facto Officer doctrine? We suggest that these questions were on Chief Justice Chase's mind—and he alluded to this situation in his opinion.

Chase offered a hypothetical. "Now, let it be supposed that some of the persons, described in the third section, during the war with Mexico, gave aid and comfort to the enemies of their country . . . ."[116] He then asked, "Is it a reasonable construction of the amendment which will make it annul every official act of such an officer?"[117] Baude and Paulsen dismiss this statement, as part of a "parade of horribles [that] assumes, without argument, the correctness of his own apparent policy prejudices." They add a dismissive parenthetical "(so?)," as if to ask *So what?* This hyperbole is poorly placed. Many modern readers may have misunderstood the relevance of Chase's reference to the Mexican-American War. But the legal issues arising from that war would have been well known to Chase's generation.

In 1868, in addition to Chief Justice Chase, there were all sorts of Republicans, former Republicans, and others who supported the Fourteenth Amendment. Some of them were former Whig Party members, former Unionist Party members, former Free Soil Party members, former American Party members (a/k/a Know Nothing Party members), not to mention many other members of many other smaller long-forgotten parties and independents. Abraham Lincoln was one such person, and Lincoln had opposed President Polk's war: the Mexican-American War. And that may be the primary reason he was a one-term Congressman.

Lincoln actively opposed a *declared war* between *belligerents which recognized one another internationally*. It was not messy—it was not like the Civil War. Mexico was an "enemy" nation of the United States. Was Lincoln's speech in public and private proscribed under Section 3?[118] Did he give aid and comfort to an enemy of the United States? Baude and Paulsen develop all sorts of precedents in regard to speech; they have very general views on the subject. But they put forward no grounded, clear rule of law to decide how far Section 3 could limit First Amendment rights and free speech principles during war time. What they are sure about is that Section 3 overturns prior constitutional law, including prohibitions on retroactivity. Under Baude and Paulsen's view, there are substantive questions to be asked and answered: Does Section 3 repeal, at least in part, the Free Speech Clause of the First Amendment and then extant free speech norms? Did Section 3 disqualify those who had opposed a declared war? Could Section 3 have retroactively disqualified those who were convicted of violating the Alien & Sedition Act—if any were still alive? Did Section 3 repeal, at least in part, the Speech or Debate Clause? Did Section 3 repeal, at least in part, the Judge of the Elections Clause?[119] Baude and Paulsen have no theory to

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[116] *Griffin's Case,* 11 Fed. Cas. at 25.
[117] *Id.*
[118] *Document #38 Abraham Lincoln on the Mexican-American War (1846-48), Speech delivered in the House of Representatives, January 12, 1848*, BROWN UNIVERSITY LIBRARY, https://library.brown.edu/create/modernlatinamerica/chapters/chapter-14-the-united-states-and-latin-america/primary-documents-w-accompanying-discussion-questions/abraham-lincoln-on-the-mexican-american-war-1846-48/.
[119] *See supra* Part I.B.2 (noting that under Baude and Paulsen's view of the impact of Section 3, each house may no longer be the "sole" judge of its own elections,).

explain how prior provisions of the constitution were modified by Section 3. (We will address this question below.)

Had Lincoln survived until 1868, would he have been a Section 3-covered person? Would his conduct during the Mexican-American War have disqualified him from holding future office? Baude and Paulsen's theory leave us with no clear answers. Of course, he was dead by 1868, so neither then nor now could he be disqualified in the sense of being actively removed. But the analysis does not stop there. The rabbit hole goes deeper. In the same sense that we can ask if Judge Sheffey was actually a judge for *Griffin's Case*, we can also ask: If Lincoln were a Section 3-covered person, was he *ever* President? And if his actions brought him under the aegis of Section 3, what becomes the status of his official acts?

Now you might respond: Of course, Lincoln was President. Two elections and a universe of public records confirm that. But it is not quite that easy. Baude and Paulsen explain that later constitutional amendments are superior to prior constitutional provisions, and *a fortiori*, it follows that later amendments certainly can upset legal conclusions established under prior law. As to retrospectivity: if you will allow the position-triggering element, the oath, and the offense element to be evaluated for pre-1868 conduct, why not also allow the disqualification to reflect holding positions prior to 1868? What is the principled grounds (if any) for the distinction? Indeed, textualists would favor a reading where the same word, used twice in the same sentence, has the same meaning. In Section 3, "shall" is such a word. And that meaning would include *both* the period before and after 1868. But it is not the text that distinguishes the two readings. Rather, it is the sense that one reading more greatly offends our dearly held moral intuitions about fair-play and justice. As to retrospectivity, that ship had already sailed in *Calder v. Bull* (1798), when the Supreme Court limited the scope of the Ex Post Facto Clause to criminal proceedings. That ship reached port when the Senate in 1837 retrieved the 1834 *Senate Journal* and proceeded to expunge the prior Senate's censure of President Jackson.[120] Indeed, we suggest anyone favoring late impeachment should be untroubled by the retrospectivity possibilities and concerns we raise here.[121]

Is it really that implausible to think that Section 3 could apply retroactively to a person who was already out of office? Retrospective law-making is an American tradition. Consider the case of Senator Hiram Revels, who was the first black person elected to the United States Senate.[122] His Senate term began in 1870. At the time, did he meet the requirements of being a citizen for seven years? After all, stretching from 1857 to 1863, *Dred Scott* was still the law of the land, and the Fourteenth Amendment was only ratified in 1868. Some senators argued that Revels was not qualified. But the Senate administered the oath to Revels, in effect retroactively applying Section

[120] Senate Reverses a Presidential Censure (January 16, 1837), UNITED STATES SENATE, https://www.senate.gov/about/origins-foundations/parties-leadership/senate-reverses-a-presidential-censure.htm.

[121] See Michael Stokes Paulsen, *The Constitutional and Moral Imperative of Immediate Impeachment*, THE BULWARK, https://www.thebulwark.com/the-constitutional-and-moral-imperative-of-immediate-impeachment/ ("There is a fair argument that the Constitution would permit impeachment, conviction and disqualification from future office even of a former president, in order to impose the punishment of disqualification."); Will Baude, *Does the Chief Justice Preside over an Ex-President's Impeachment Trial?*, VOLOKH CONSPIRACY (Jan. 15, 2021), https://reason.com/volokh/2021/01/15/does-the-chief-justice-preside-over-an-ex-presidents-impeachment-trial/ ("President Trump has been impeached, and the trial seems unlikely to begin until he is no longer the President. There is some dispute about whether the Senate can try an impeachment of an ex-official. But it has done so in the past, most famously in the case of ex-Secretary of War William Belknap, and for reasons adequately covered by others I think that is proper.").

[122] *Senate Stories | Hiram Revels: First African American Senator*, SENATE HISTORICAL OFFICE (Feb. 25, 2020), https://www.senate.gov/artandhistory/senate-stories/First-African-American-Senator.htm.

1 of the Fourteenth Amendment 's citizenship provision. Prior to 1868, Revels might not have experienced life as an American citizen for seven years. Under *Dred Scott* (1857), he was not a citizen. But the Fourteenth Amendment changed all that. Section 1 apparently retroactively made Revels a citizen for the time period he had experienced life as a non-citizen. And the Senate seated Revels.

So what follows? Here we pose a hypothetical: If Lincoln was never President, and if some strong version of the De Facto Officer does not apply, it means all the bills that were presented to him, were not presented to a President, and all the bills he signed in the last ten days prior to the end of Congress's adjournment were not signed by a President. Every one of those latter bills were a pocket veto. One such bill was the Treason Act of 1862.[123] That's the statute that Jefferson Davis was tried under.

So you see, Chase had some good reason, in *Griffin's Case*, to distinguish the position of elected officials from others covered under Section 3.[124] He had good reason to consider the De Facto Officer doctrine. He had good reason to flag the Mexican-American War. He also had good reason to flag these issues to the public and Congress. Baude and Paulsen characterize Chase's opinion in *Griffin's Case* as a "power grab."[125] It was anything but that. Chase left it to Congress to define the scope of Section 3's retroactivity and to define the limits of how far the De Facto Officer doctrine should apply. He put Congress on notice that it could, if it so chose, distinguish elected officials and appointed officers, and that the scope of the habeas remedy was one for them to decide, and until they do so, he would apply settled law. If this is not judicial humility, then what is? All these issues were difficult to resolve. Humility, and not hyperbole, is the order of the day–for Chase, as well as for those of us who would second-guess his judgments.

d. A theory for how constitutional amendments modify or repeal earlier provisions of the Constitution

It is well known that certain constitutional amendments modify or even repeal earlier provisions of the Constitution. These changes can be made expressly. For example, the Twenty-First Amendment stated clearly that "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." Prohibition was repealed, though the States were granted some constitutional authority to regulate "intoxicating liquors." Likewise, the Eleventh Amendment restricted the "judicial power" of the federal courts that had been originally granted by Article III—though exactly what that amendment accomplished remains debated to this day. The Twelfth Amendment modified the process by which the President and Vice President are elected. And the Seventeenth Amendment provided for the direct election of Senators. Other amendments modify earlier provisions of the Constitution without an express statement. For example, in the Three-Fifth Clause, the phrase "other Persons" referred to slaves. The Thirteenth Amendment abolished slavery. As a result, the Three-Fifth Clause no longer operated. This repeal was clear, even if not express.

Other amendments are expressly prospective. The Seventeenth Amendment, which provided for the popular election of senators, would not affect the terms of senators *already* elected by state legislatures: "This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution." Similarly. prohibition

[123] Baude and Paulsen cite the Second Confiscation Act at some length. We discuss this statute *infra* in Part IV.B.
[124] *See infra* Part II.5.g (where we talk about this issue).
[125] Baude & Paulsen, *supra* note __, at 47.

under the Eighteenth Amendment was expressly prospective; it would only go into effect "one year from the ratification of this article." The Twentieth Amendment, which changed when the President's term began, and also when Congress assembled, was also expressly prospective. That amendment would "take effect on the 15th day of October following the ratification of this article." The Twenty-Second Amendment imposed a two-term limit for the presidency. But the amendment included fairly intricate rules to ensure it was not applied retroactively: "But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term."

For the Eleventh, Twelfth, Thirteenth, Seventeenth, and Twenty-First Amendments, it was fairly obvious which earlier-in-time provisions were being amended. But what about Section 3 of the Fourteenth Amendment? Which (if any) earlier-in-time provisions of the Constitution were modified?

Baude and Paulsen tell us that "Section Three of the Fourteenth Amendment modifies or qualifies what otherwise might have been thought the dictates of the First Amendment." Stated differently, in the absence of Section 3, it would violate the First Amendment to disqualify a person from certain positions for engaging in protected speech. But with Section 3, the argument goes, a person could be disqualified for engaging in otherwise protected speech, notwithstanding the First Amendment. This is a robust and sweeping claim. Section 3 says nothing-at-all about modifying the First Amendment. Yet for Baude and Paulsen's argument to work, Section 3 would have had to *sub silentio* modify the freedom of speech. But how was it modified? And what are the contours of Baude and Paulsen's theory? They offer nothing close to a generally-applicable theory that would extend beyond Trump's case.

Consider the example of Congressman Clement Vallandigham of Ohio. Vallandigham, a Democrat, served in Congress from 1858 to 1863. He was a prominent critic of President Lincoln's prosecution of the Civil War.[126] In 1863, after his last term as a Representative had ended, he gave a fiery anti-war speech. He was later charged by a military commission with "publicly expressing . . . his sympathies with those in arms against the Government of the United States."[127] The charge was akin to Section 3's "giving aid and comfort to enemies"-language. Vallandigham claimed that his speech was protected by the First Amendment. Yet, he was still convicted. The case made its way to the Supreme Court. However, the Supreme Court held that it lacked the authority to hear his appeal from the military tribunal.[128] Thus, the Court had no occasion to consider the First Amendment issue. Today, the widely held view is that Vallandigham's speech should have been protected by the First Amendment. For example, Chief Justice Rehnquist questioned the decision to "arrest[] and try[] Vallandigham, who had simply expressed views strongly critical of the administration."[129]

Could Vallandigham have been disqualified pursuant to Section 3, for giving aid and comfort to confederates and the confederacy–actual wartime enemies? Stated differently, would the First Amendment prohibit the use of Section 3, based on Vallandigham's speech? Or, did Section 3, enacted in 1868, retroactively repeal the Free Speech Clause and its protections, that

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[126] *Representative Clement Vallandigham of Ohio*, UNITED STATES HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1800-1850/Representative-Clement-Vallandigham-of-Ohio/.

[127] *Id.*

[128] *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864).

[129] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 73 (1998).

Vallandigham otherwise would have enjoyed when he gave his speech in 1863? Baude and Paulsen do not tell us. They are non-committal. They state: "It is conceivable (though we do not prejudge the point) that [Congressman] 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."[130] Which is it? Why are they non-committal? We very much appreciate a cautious approach. Our problem is that Baude and Paulsen have engaged with the issue, but they do not answer it, and they put forward no rule which could provide us with an answer. Instead, they reproduce case histories and illustrate how they were resolved by the courts or by Congress. But they do not explain which precedents ought to be followed and why.

Baude and Paulsen assert that their view on the interplay between Section 3 and prior constitutional provisions is not just plausible, but emphatically correct. Indeed, they affirm: "essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction." If they want to represent that they understand Section 3's original public meaning, then they should be able to articulate how Section 3 would be applied to one of the most prominent anti-war critics who had served in Congress. Did Vallandigham face liability under Section 3 for his speech or actions or both? If they can't resolve the status of Vallandigham's speech and conduct during the 1860s in light of Section 3—an issue that the Nation and the Reconstruction Congresses were familiar with—how can Baude and Paulsen provide guidance resolving the status of Trump's 2021 speech and other conduct in light of Section 3? If you cannot resolve the former, how is it possible to resolve the latter?

Baude and Paulsen should also be able to discuss whether Abraham Lincoln could have been disqualified for his opposition to the Mexican-American War for his conduct and speeches during the time he served in the House.[131] Did Section 3 retroactively repeal, in any way, the traditional protections of the Speech or Debate Clause? Baude and Paulsen state that "Section Three can be easily harmonized with other parts of the Constitution, such as Article I's Speech or Debate Clause," but we do not see where they ever explain how they arrived at the conclusion.[132] Indeed, the phrase "Speech or Debate" appears nowhere else in their article. Members of Congress, including Jefferson Davis and Clement Vallandigham, gave speeches on their chamber's floor supporting or tending to support the (purported) confederacy.[133] Thus, it is likely that this sort of conduct would have been on the minds of those who framed and sought to understand Section 3 in 1868. Yet, Baude and Paulsen provide no concrete answers.

Let's state the issue more clearly through a series of hypotheticals. Imagine that the United States finds itself in a declared war against a recognized belligerent foreign nation. Which of the following acts, if any, singly or collectively, by a member of Congress would trigger disqualification under Section 3:

1. Voting against a declaration of war;
2. Speaking against continuing the war on the floor;
3. Voicing the view that the war is unjust and illegal on and off the floor;
4. Voicing the view that those who fight and support the war are sinful, deserving of G-d's wrath, and the moral opprobrium of neighbors, and that who oppose the war (even unlawfully) deserve G-d's bounty, praise, and the good will of neighbors;

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130 Baude & Paulsen, *supra* note __, at 60.
131 *See supra* Part II.B.5.c.
132 Baude & Paulsen, *supra* note __, at 52.
133 *See supra* II.B.5.b.

5. Condemning those who fight in the war and those who do not seek to lawfully escape any duty to fight;
6. Repeating all these views in public and private, communications with the member's constituents, the public, and the media;
7. Voting against funding the armed forces in relation to prosecuting the war;
8. Voting against providing funding to the Justice Department in relation to prosecuting deserters;
9. Asking the public to vote against the administration and all other elected officials who support the war;
10. Urging like-minded voters to coordinate their opposition to the war "by all legal means";
11. Promising that if a majority of like-thinking members and a candidate for President should prevail at the next election, the new administration would use the government and its resources to pardon those who had already violated the law in opposing the government's war policies;
12. Promising that the new, like-thinking administration would seek to punish those who had promoted and prosecuted the war, for any legal violation they had committed, no matter how inconsequential and even if those violations were not connected, in any way, to war itself.

Careful readers should see historical analogs in at least some of the hypotheticals above. Would any or all of the hypotheticals above permit Section 3 sanctions against the member? If Baude and Paulsen cannot clarify what their position is in regard to these Vallandigham-lite and Vallandigham-like hypotheticals above and how they arrived at that position, then they do not have a theory of constitutional change or a fully fleshed-out theory of the scope of Section 3. We think they need both.

e. Retroactivity in Griffin's Case

Chase raised concerns about retroactivity in his *Griffin's Case* opinion. The prior two sections illustrate a few of the implications of Section 3-related retroactivity. Baude and Paulsen's response is that the Fourteenth Amendment changed prior law, and that it was so understood as breaking with past retrospectivity principles. Of course, Baude and Paulsen are correct on this narrow point. Chase and Congress and the country also knew that Section 3 imposed a retroactive burden of some sort. But what sort? Chase still needed to know what *particular* retroactive burdens the Fourteenth Amendment imposed.

Again, Chase reasoned that if Section 3 is applied retroactively, absent authorizing legislation, then covered persons' subsequent official acts may be void or, at least, otherwise in doubt. The reliance interests which would be upset, both private and public, would be significant and that such retrospective liability is not consistent with traditional ex post facto and retrospectivity principles. All this counsels against imposing a retroactive disability. On the other hand, Chase also states, as a potential alternative basis for his holding, that Sheffey's public acts are saved under the De Facto Officer doctrine. If the latter position based on the De Facto Officer doctrine is correct, then the feared undesirable consequences associated with imposing retroactive liability are muted. Baude and Paulsen see Chase as having issued two inconsistent positions.

Now consider how the Congress and loyal public opinion may have understood Chase's opinion. If Chase was *wrong* about the Fourteenth Amendment being non-self-executing, could

and should Congress have relied on the Supreme Court and the loyal federal judiciary to correct Chase's mistake?

No appeal to the Supreme Court was possible in *Griffin's Case*. Chase would have the last word in that particular litigation. Why? Because of the Act of March 27, 1868.[134] This statute was a set of jurisdictional and other reforms, famously discussed in *Ex parte McCardle* (1868), which sought to restrict Supreme Court appellate review in order to insulate from Supreme Court review what is, and what was sometimes called, Radical Reconstruction. But there would be other circuit justices in other circuits who might rule differently from Chase. The optics of that potential circuit split would be bad–as the resulting rights accruing to Section 3-covered persons would vary circuit by circuit. Likewise, if the Congress took this approach, and risked one or more circuit splits, they would be leaving Chase's decision intact in Virginia: the former capital of the former (purported) confederacy. Such a circuit split would have created significant problems across the Nation. Congress could also take the approach that even if no direct appeal was possible in *Griffin's Case*, the decision could be overruled in a subsequent Supreme Court case arising under the Court's remaining appellate jurisdiction or, possibly, under its original jurisdiction. But if Congress trusted the Court's members, then it would not have passed the Act of March 27, 1868. And, of course, waiting for the same issue to reach the Supreme Court might be undesirable: as it left Section 3's ultimate objective in limbo until such a case should be decided in accord with Congress's Section 3-related objective.

To put it another way, Congress responded to *Griffin's Case* by passing substantive enforcement legislation: just as Chase thought Congress needed to do.[135] The Enforcement Act of 1870 was passed about a year after Chase issued his *Griffin's Case* opinion. Admittedly, individual members might have had any number of reasons to pass this legislation. But the key reason we suggest was not that its members feared Chase was *wrong* on the self-execution issue, but that they feared, as a legal matter, Chase was *correct*. What do we mean by correct? Correct in the sense that Congress's members feared that (at least) four other of the eight Supreme Court Justices (in office in May 1870) agreed with Chase, along with a substantial number of judges on the inferior courts.[136] Indeed, at this juncture, when the Enforcement Act of 1870 was enacted, the Supreme Court included: 5 Lincoln appointees (including Chief Justice Chase), 2 Grant appointees, as well as Grier–the author of the majority opinion in *The Prize Cases* (decided Mar. 10, 1863). Surely no one can impugn the loyalty of these men. If, in fact, so many judges and Justices agreed with Chase, is not that some good reason to think that Chase's position was in the heart of the mainstream of legal thinking for his day? Is not that some reason to think his position credible, if not creditable?

Baude and Paulsen see Chase's opinion in *Griffin's Case* as "weird[]"—an incoherent outlier, aggressively deciding issues not properly before the court, and making arguments in tension with itself. We see something else–an opinion within the mainstream, in dialogue with the Congress and the loyal populace. But most of all, we see Chase's opinion as a constitutional roadmap.

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[134] 15 Stat. 44.
[135] *See, e.g.*, Enforcement Act of 1870 (a/k/a Civil Rights Act of 1870; a/k/a First Ku Klux Klan Act; a/k/a Force Act), 16 Stat. 140 (May 31, 1870).
[136] *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx.

f. Chase's roadmap to understand Section 3 and retroactivity

Going forward, we will assume that a retroactive disability could only be imposed starting either when the person took his position or when the Fourteenth Amendment was enacted–whichever is later–but not beforehand.

In other words, this is our understanding of how Chase saw Section 3: If the disability is imposed prospectively, then the applicability of the De Facto Officer doctrine need not be reached. But if the disability is imposed retroactively, then the De Facto Officer doctrine is the default rule, but Congress is free to upset that default rule. Likewise, even if Congress displaces the De Facto Officer doctrine, that is not enough reason to expand the reach of the habeas remedy–which has its own jurisprudential history apart from the De Facto Officer doctrine. The default rule for the habeas remedy is that it does not reach claims based upon the illegality of the composition of the trial court. But here too, Congress is free to upset that default rule.

Chase's opinion referenced legislation that operated prospectively. In February 1869, both houses of Congress approved a joint "resolution respecting the provisional Governments of Virginia and Texas."[137] (A joint resolution is a statute.) The joint resolution provided, in part:

> That the persons now holding civil offices in the provisional governments of Virginia and Texas, who cannot take and subscribe the oath presented by the act entitled "An Act to prescribe an oath of office, and for other purposes," approved July 2, 1862, shall, on the passage of this resolution, be removed therefrom.[138]

In other words, under the February 1869 statute, if a person was currently holding a "civil office[]" in Virginia and Texas could not take the Ironclad Oath,[139] then they would be removed from office. Chase reasoned that the officeholders who were unable to take the Ironclad Oath would likely be subject to the disqualification element of Section 3. Stated differently, those subject to disqualification pursuant to Section 3 would be removed pursuant to the February 1869 act. From this statute, Chase drew an inference: Congress did not regard officeholders in Virginia, who were *already* subject to disqualification under Section 3 of the Fourteenth Amendment, which had been ratified in 1868, "as having been *already* removed from office." If Section 3 had been self-executing, a Section 3-covered person would already have been removed from office, and the February 1869 joint resolution would have been unnecessary. Chase added that this joint resolution further supports his conclusion that Section 3 did not "effect[] an immediate removal of the officers." Indeed, Chase found "strong confirmation" for his position in this joint resolution. In short, subsequent legislation would be necessary to remove Section 3-covered persons from office.

Professor Magliocca has expressed the view that the reason Chase may have taken the position that congressional enforcement mechanisms may have been necessary in *Griffin's Case* was that during Reconstruction, Virginia was not a properly reconstructed State, and so, the State was not in a position to make statutes to enforce Section 3. In that situation, only Congress could do so. In correspondence, Professor Magliocca identifies the key features of Reconstruction as a lack of representation in Congress and military governance. (The authors thank Professor

[137] 15 Stat. 344, https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=015/llsl015.db&recNum=377.
[138] *Id.*
[139] 12 Stat. 502, https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=533; Margaret Wood, *Oath of Office*, LIBRARY OF CONGRESS BLOG (Jan. 6, 2015), https://blogs.loc.gov/law/2015/01/oath-of-office/.

Magliocca for his willingness to clarify his position in private correspondence. Such cooperation among scholars who disagree with one another has become all too rare.)

Still, Magliocca does not say that elections were not held at that time for state positions. He does not say that the state legislature was not meeting or was disabled from making laws—including election laws–even if subject to review by federal military authorities. More importantly, he does not tie the disabilities Virginia faced during this period to any inability to make state election law that might recognizably enforce Section 3. In 1869, the precise legal status of Virginia was murky: was it reconstructed or unreconstructed? Chase said "It is unnecessary to discuss here the question whether the government of Virginia, which seems to have been not provisional, but permanent, when transferred from Alexandria to Richmond, became provisional under the subsequent legislation of congress." We suggest that Chase did not tie his conclusion to the precise status of Virginia at this time.

g. Enforcement by the States

Chase's roadmap had two other important implications. First, Chase explained that because Section 3 was not self-executing, only a statute could put it into effect. But not just any statute: federal or state. It had to be a federal statute. Second, a state statute would not suffice. In Chase's view, a state statute could not operationalize Section 3–at least not absent congressional authorization. He wrote that Section 3 would be made "operative" by the "legislation of congress in its ordinary course." Chase explained that specific proceedings "are indispensable" to "ensure effective results" under Section 3, and these proceedings "can only be provided for by congress." Chase expressly tied his analysis to Section 5 of the Fourteenth Amendment, which "gives to congress absolute control of the whole operation of the amendment."

Congress understood how to assign a role to the States to implement Section 3. For example, on June 25, 1868, about two weeks before the Fourteenth Amendment was ratified on July 9, 1868,[140] Congress enacted a statute that set conditions for the readmission of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to representation in Congress.[141] Section 3 of this Act provides, in part:

> . . . no person prohibited from holding office under the United States or under any State, by section three of the proposed amendment to the Constitution of the United States, known as article fourteen, shall be deemed eligible to any office in either of said States, unless relieved from disability as provided by said amendment . . . ..

Through this statute, Congress required the States to deem ineligible those individuals who were disqualified from holding "any office in either of said States." (We think this phrase only concerns state positions in "said states" and not federal positions.) This statute demonstrates that Congress understood how to assign the States a role to enforce Section 3. And this statute was self-executing upon its enactment.

Of course, even in the absence of federal legislation, a state could pass a statute and mirror Section 3's "qualifications," and any such state statutory "qualifications" could extend to its own

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[140] *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NATIONAL ARCHIVES, https://www.archives.gov/milestone-documents/14th-amendment.

[141] 40 Cong. Ch. 70, 15 Stat. 73 (1868), https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=015/llsl015.db&recNum=106.

officials and officers (subject to federal constitutional constraints). This is a power states had before, during, and even after the enactment of the Fourteenth Amendment *for state positions*.[142] But absent congressional authorization, a state statute (even one mirroring Section 3's "qualifications") could not apply to federal officials and officers. Chase read Section 5 as giving Congress a monopoly over enforcement of Section 3.

Two state cases which have been discussed[143] are: *Worthy v. Barrett*,[144] and *In re Tate*.[145] The latter relies entirely upon the former case. *Worthy* was a case heard in state court, involving a state position, county sheriff, and it was adjudicated under state law. The state statute incorporated by reference Section 3 of the Fourteenth Amendment. The cause of action was a state cause of action, not a federal one. Judge Reade stated:

> *Our statute* provides that "no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Article XIV, shall qualify under this act or hold office in this State." Acts of 1868 ch. 1. sec. 8.
>
> The Fourteenth Article of the Amendments to the Constitution of the United States, sec. 3, is as follows . . . .[146]

Thus, Section 3 furnishes the categories for which disqualification would apply. But Section 3 was not applied directly. Actually excluding a person from office still required a state statute supplying a cause of action. A state legislature can supply such a statute for a *state* position because a state always has authority to do so (subject to a few federal constitutional limitations). But there is no such coordinate authority for a *state* legislature to supply a statute which would remove a person from a federal position or deny that person a line on the state ballot for a *federal* elective position—at least, there is no such authority absent a *federal* authorizing statute. We are not aware of any such case, where absent federal authorizing legislation, a candidate for a federal elective position was denied a position on the state ballot[147] based on purported Section 3 disqualification.

Baude and Paulsen characterize *Worthy* as standing for the proposition that "a state sheriff was disqualified under Section 3."[148] But that's not correct. *Worthy* stood for the proposition that a state officer could be disqualified under a state statute that incorporated or mirrored Section 3's terms. Section 3 was not self-executing, it required a statute, and here the statute was applied to state officers–not any federal positions. Again, Baude and Paulsen's characterization of *Worthy* is not correct.

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[142] *See also* U.S. Term Limits v. Thornton, 514 U.S. 779, 805 (1995) ("In short, as the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself. The Tenth Amendment thus provides no basis for concluding that the States possess reserved power to add qualifications to those that are fixed in the Constitution." (emphasis added)).

[143] Baude & Paulsen, *supra* note __, at 101; Roger Parloff, *After the Cawthorn Ruling, Can Trump Be Saved From Section 3 of the 14th Amendment?*, LAWFARE (Jun. 7, 2022), https://www.lawfaremedia.org/article/after-cawthorn-ruling-can-trump-be-saved-section-3-14th-amendment.

[144] 63 N.C. 199 (1869) (Reade, J.).

[145] 63 N.C. 308 (1869) (Reade, J.).

[146] *Worthy*, 63 N.C. at 200 (emphasis added).

[147] The secret, written paper ballot was implemented at different times in different states. When we speak about keeping a candidate off the ballot, we are also speaking about instructions to elections officials not to count and tabulate "votes" cast for purportedly disqualified candidates and/or not to grant a certificate of election to a candidate with the greatest number of "votes" because that candidate has been purportedly disqualified. Even if there is no physical, mechanical, or electrical "ballot," judges of election and elections administrators control many other aspects of election administration that, in effect, can exclude a candidate.

[148] Baude & Paulsen, *supra* note __, at 101.

To make the point a different way, the Fourteenth Amendment was in some ways a constitutional revolution. It expanded federal power vis-a-vis traditional state power. It did so because the experience of the Civil War and early Reconstruction showed that state institutions failed and that the Nation's hopes and aspirations rested, not with the traditional legal system as a whole, federal and state, but with the national government. In short, the States and state governments could *not* be trusted.

The Fourteenth Amendment and contemporaneous federal Reconstruction legislation, both that which implemented the Fourteenth Amendment and other Reconstruction legislation, were enacted precisely because state institutions, state officials, and state courts were *not* considered trustworthy by the national government. The idea was to make federal institutional authority paramount. Indeed, the very sort of powers that Baude and Paulsen believe could be used by state authorities, absent federal authorizing legislation implementing Section 3, could have been used by former confederates (and their sympathizers) to disqualify freedmen and other loyal persons in former confederate states from holding elective positions.[149] Nor would judicial review solve this problem. Southern state judges were not known for remaining staunchly unionist during the Civil War and Reconstruction. In our view, the idea that the Fourteenth Amendment automatically entrusted state institutions with an independent enforcement power over Section 3 or the Fourteenth Amendment is flatly ahistorical.

The idea that the Fourteenth Amendment, absent express federal statutory authorization, allowed the States to operationalize Section 3 only makes sense if state governments could be trusted. But the whole point of the Fourteenth Amendment was that they could not be trusted. Ask yourself: in 1868, who could have believed that Section 3 was a grant of power to the States? Our argument here is not that allowing States to enforce Section 3 against federal officials and officers risked "abuse" (which it certainly did), but that any argument that Section 3 was a grant of power to state institutions was not one, which in 1868, was likely to be understood to arise in connection with the Fourteenth Amendment's and Section 3's text, history, or purposes. Baude and Paulsen point to floor debate in Congress reporting that Section 3 was "self-executing." We do not see that they reported any sources–*any*–suggesting that the scope of self-execution extended to the States, particularly those States which had recently rebelled against the national authority. And it was these latter States that the Fourteenth Amendment was directed against.

Chase, in Paragraph [2] above, put Congress on notice that *elected* officials stand in a different legal position from *appointed* officers. And Congress followed Chase's advice. The Enforcement Act of 1870 established a federal quo warranto procedure which provided for prospective removal of a Section 3-covered officials and officers, but there was a carve out. It did not apply to legislators.

We suggest that Chase saw no tensions among the different strands of his opinion. He was responding to the legal issues before him, and he was providing a roadmap for Congress and the political process. It was for Congress to prescribe enforcement measures and those detailed measures would resolve any such tensions through the normal political process.

Let's assume Baude and Paulsen are correct that Section 3 is self-executing as a matter of original public meaning. Let's further assume that States have a coordinate power with Congress to enforce Section 3. Section 3's proscription precludes Section 3-covered persons from "holding" certain "office[s]" and other listed positions. It does not, on its face, give or grant any power vis-

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[149] *See, e.g.*, Vicki C. Jackson, Printz *and* Testa*: The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 122–27 (1998). In other words, disqualification is a two edged sword. *See generally, e.g.*, Tom Ginsburg et al., *The Law of Democratic Disqualification*, 111 CALIF. L. REV. (forthcoming 2023), https://ssrn.com/abstract=3938600.

a-vis the organization of state ballot procedures. Indeed, many (if not all of) the earliest efforts to enforce Section 3 were quo warranto proceedings by federal prosecutors to remove persons allegedly in office contrary to Section 3 or its early statutory analogues. As Baude and Paulsen repeatedly tell us: the Constitution is a text, and that text is law. Section 3 prohibits a covered person's holding the listed positions, and not his participating in elections for those positions. Saying Section 3 authorizes state ballot control mechanisms over federal positions amounts to an inference akin to a protective jurisdiction. And what we mean by protective jurisdiction is a legal fiction; something not otherwise directly supported by the text.

To put it another way, Baude and Paulsen are putting their paper forward as part-and-parcel of the rule of law project via original public meaning. They also acknowledge that the "centralized, government-administered [secret] ballot did not come to America[] until the late Nineteenth Century."[150] If that is the case, then Section 3 was not written with our current election system in firm view. It follows that if Section 3 (old law) applies to modern state balloting schemes (new law), then an argument has to be made to support that position. But Baude and Paulsen do not make any such argument. They just assume that if the quo warranto remedy to remove a Section 3-covered person was available under Section 3, then it follows that Section 3 also allows ballot restrictions at election time to prevent a Section 3-covered person from running for a listed position. But that is hardly obvious. Indeed, given that Congress authorized federal officials to carry out quo warranto actions against Section 3-covered persons, but later Congress expressly removed that power from U.S. enforcement officials, does it really make sense to think that Congress or the public believed that the States, but not Congress, retained an unauthorized and independent Section 3 enforcement power?

During the post-bellum era, the secret, written ballot was introduced. To implement the new voting regimes, states introduced administrative and/or judicial frameworks to control ballot access. State administrative bodies and state courts regularly determine ballot challenges based on qualifications–including Article I and Article II qualifications for elected federal positions. If this practice was never actually authorized by Congress, the practice certainly appears to be one which Congress has long acquiesced in. Nor is the result surprising. The background understanding of Article I, Article II, and the Constitution of 1788 as a whole was that the States and new federal government would divide and share political power. Powers would be enjoyed concurrently. States were not only components, in a sense, of the national government, but the federal government relied upon the States to carry out many functions without which the federal government could not function. Indeed, the power of the States was seen, by some, as a protection against future federal overreach. In that world, one could make a reasonable argument in support of the position that Articles I and II permitted States to monitor federal qualifications for elected positions on the state ballot.[151]

But in 1868, it was a different world. States were not trusted institutions. Section 3 and the Fourteenth Amendment as a whole were a projection of federal power against the States. So the idea that Section 3 permitted States, via ballot control or other elections procedures, to limit voter and candidate participation for federal positions and to do so absent express federal authorization seems (at least to us) very unlikely. And that question hinges on whether Section 3 was self-executing in the sense that it could be used offensively in a suit or proceeding brought by a private person. Chase answered that question with a *no*. Today, the question for us is: Was Chase correct or not?

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[150] Baude & Paulsen, *supra* note __, at 23 n.65.

[151] See Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 600 (2015).

6. Baude and Paulsen argue that Chase violated judicial norms in announcing his colleagues' views.

Griffin's Case was decided in a very different time. In the 1860s, members of the Supreme Court still rode circuit. Indeed, a Circuit Justice could hear a case twice—first on the circuit, and again if the case was certified for Supreme Court review. And going back to the Marshall Court, members of the Supreme Court would often discuss how to resolve pending cases on the circuit, in an effort to promote inter-circuit uniformity. This context helps to explain an aspect of Chase's opinion that Baude and Paulsen ridicule.

In *Griffin's* Case*,* Chief Justice Chase stated that he was "authorized to say" that all of his colleagues on the Supreme Court concurred "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." Chase's colleagues did not opine on Chase's broader and important self-execution position, nor did they opinion on the De Facto Officer doctrine *per se*. All they agreed to was Chase's views on the narrow question of the scope of the habeas remedy. Baude and Paulsen misread what Chase was conveying with this statement. Moreover, Baude and Paulsen charged that Chase violated some unwritten judicial ethics norm. Finally, Baude and Pualsen do not acknowledge that in 1899, the Supreme Court favorably quoted Chase's opinion on this exact point. None of those later Justices were troubled by Chase's opinion or that he communicated the views of his colleagues. Chase's purported breach of judicial norms escaped any criticism until 2020. Indeed, to this day, circuit court judges routinely circulate draft opinions to their colleagues, to flag potential issues that warrant attention. Baude and Paulsen failed to establish that Chase did anything wrong in 1869.

a. Baude and Paulsen's criticism of Chase's announcement

The issues raised by Griffin with regard to the federal habeas statute would not be limited to his case. Similar arguments were already being advanced in many other contexts. The judiciary was no doubt aware of how these issues could arise on collateral review. In his opinion, Chief Justice Chase addressed this question. Chase wrote:

> 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.

In discussing this passage, Baude and Paulsen wrote:

> Chase *represented that the full Supreme Court unanimously agreed with him* that 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." 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 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 Court on a matter pending in the Circuit Court." Fairman further acknowledges technical problems with this maneuver, because the only issue in front of the full Court was an original writ of prohibition in *Ex Parte State of Virginia*, where the Court had granted a stay despite manifest procedural flaws. Somehow the Court's non-ruling in a dubious vehicle became a second-hand advisory opinion on a legal question of great importance. (footnotes omitted)

First, let's correct a few points. (At this juncture, it may be helpful to review the final four paragraphs of Chase's opinion, which we discussed in Part II.A above.) The argument at issue here, i.e., the argument Chase's colleagues agreed to, relates to the scope of habeas relief. That is the argument developed in Paragraph [3]. Chase's colleagues did *not* opine on Chase's broader and important self-execution position developed prior to and in Paragraph [1]. Likewise, Chase's colleagues did *not* agree to Chase's partially developed discussion relating to the De Facto Officer doctrine in Paragraph [2]. All they agreed to was Chase's views on the narrow question of the scope of the habeas remedy. *Contra* Baude and Paulsen: this was not a wholesale adoption by the Court's members of the De Facto Officer doctrine. And *contra* Baude and Paulsen, this was not "a legal question of great importance," particularly because it in no way addressed whether officers in Judge Sheffey's position could be removed in habeas proceedings. According to Chase, they cannot. Here, we think Baude and Paulsen misread Chase.

Second, Chase did not state that the Supreme Court "decided" this issue in the "last term." That's reading too much into the text. Rather, Chase stated that the "judges of the Supreme Court" gave the issue "consideration" at the last term. Judges can have views on legal issues; they can discuss those issues in chambers and in conference, and they can make those views public. *It is desirable that they do so*. Here, the other Justices gave Chase permission to announce their views. If *Griffin's Case* could have been appealed to the Supreme Court, then it would have been less than cautious for the other Justices to have voiced their views in this fashion. But, as Baude and Paulsen acknowledge in a footnote, *Griffin's Case* was not subject to appeal to the Supreme Court. (We discussed this statute, which was analyzed in *Ex Parte McCardle*, above.) In effect, the other Justices expressed a view on an abstract legal issue, not connected to any one specific case, and Chase reported their views in his *Griffin's Case* opinion. Moreover, the other Justices shared their views without opining on the specific facts of *Griffin's Case*. They gave Chase permission to share their views on a legal issue which had been discussed during the prior Supreme Court term, and not in relation to the specific facts before Chase.

There is evidence going back to the Marshall Court that circuit Justices would often discuss pending cases with each other. Gerard Magliocca published a definitive treatment of Justice Bushrod Washington, including discussion of his practices while riding circuit. Magliocca wrote, "When the justices were uncertain about how to resolve their circuit cases, they would turn to one another for help."[152] Specifically, "Many such letters were exchanged among Chief Justice

[152] GERARD MAGLIOCCA, WASHINGTON'S HEIR: THE LIFE OF JUSTICE BUSHROD WASHINGTON 88 (2022).

Marshall, Justice Joseph Story, and Justice Washington."[153] Magliocca points to one letter from John Marshall to Bushrod Washington, in which, apparently, Washington persuaded Marshall to change his approach on a pending case.[154] Chief Justice Chase also engaged in this practice, while riding circuit. In June 1869, Chase sent a letter from Richmond to Justice Nathan Clifford about federal habeas corpus law.[155]

Magliocca suggests that "this sort of communication might be deemed improper, in that another justice was not part of the circuit court that heard the arguments." Even assuming Magliocca's criticism is correct, it is not on-point in regard to Chase's correspondence with his colleagues. Here, Chase was discussing an abstract legal issue, apart from the specific facts and parties before him, that had received consideration by the court's members before, and would certainly arise again. Furthermore, Magliocca points out that "[p]art of the motivation for these inquiries was to make circuit decisions uniform without resorting to Supreme Court review, though sometimes these exchanges made clear that the Supreme Court needed to hear arguments on a tough issue."[156] Indeed, that is akin to what Chase was trying to do—to publicize the already-existing uniformity amongst the various Circuit Justices.

b. The Supreme Court in 1899 favorably quoted Chase's opinion on the very ethical issue raised by Baude and Paulsen

Baude and Paulsen think Chase's and his colleagues' transparency is somehow objectionable. Is it? It is well known that the United States Court of Appeals for the Second Circuit circulates draft opinions to other circuit judges, that is, to judges who are *not* on the panel charged with "deciding" the case before the appellate court. Magliocca, who clerked on the Second Circuit, observed that the correspondences between Justice Washington and his colleagues was "similar to the way that some modern circuits operate when judges seek revisions to panel opinions rather than calling for an en banc hearing of the full circuit court."

The judges on a Second Circuit panel exchange e-mails and memoranda with their non-panel colleagues. And the panel judges very well may revise their draft opinion in response to what they receive. Indeed, that's the purpose of this process. And in some cases, an opinion will note that en banc review was or was not triggered. What is done here is not in public, and it is not well documented. But it is the practice of federal judges, and several other circuits have practices similar to Second Circuit practice.[157] This is basically what Chase did. He discussed a legal issue with colleagues, and he reserved the ultimate decision for himself. The difference between what Chase did, in *1869*, and Second Circuit practice, *today*, is that Chase was transparent and documented what he and his colleagues had done. Yet Baude and Paulsen would fault Chase? For what? For improving on today's practice?

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[153] *Id.*

[154] Letter from John Marshall to Bushrod Washington, July 13, 1821, *in* PAPERS OF JOHN MARSHALL DIGITAL EDITION ("I thank you for the opinion you have been so good as to give me in the case on which I consulted you. I have from the first thought it doubtful but shall decide it in conformity with your opinion.").

[155] Letter of June 22, 1869, from Salmon P. Chase in Richmond, to Justice Nathan Clifford ("I find no instance in which a justice of the Supreme Court has ever allowed a writ of habeas corpus to bring before him a person imprisoned in any district not included in any district not included in the circuit to which he was allotted.").

[156] Magliocca, *supra* note __, at 88.

[157] Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 NYU L. REV. 1373 (2021).

There is a further reason why Baude and Paulsen's criticism of the Chase Court misses the mark. The Supreme Court favorably cited Chase's discussion of the views of his colleagues.

In *Ex parte Ward* (1899), Chief Justice Fuller, for a unanimous Court, held:

> We need not, however, consider the elaborate argument of counsel in this behalf, since we regard the well-settled rule applicable here, that where a court has jurisdiction of an offense and of the accused, and the proceedings are otherwise regular, a conviction is lawful, although the judge holding the court may be only an officer de facto, and that the validity of the title of such judge to the office, or his right to exercise the judicial functions, cannot be determined on a writ of habeas corpus. In *Griffin's Case*, Chase, 364, 425, Fed. Cas. No. 5,815, this was so ruled, and Mr. Chief Justice Chase said: '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, cannot be properly discharged upon habeas corpus.'[158]

Baude and Paulsen do not cite *Ex parte Ward* in their article. Baude and Paulsen do not cite *Ex parte Ward* in regard to the scope of the habeas remedy. And Baude and Paulsen do not cite *Ex parte Ward* in relation to their discussion of Chase's and his colleague's ethics in *Griffin's Case*.

We do not reproduce this passage to illustrate that the rule of law announced by Chase as to the scope of the habeas remedy remained good law in 1899, some 30 years later. (It was.) Instead, we reproduce this passage because it shows that a successor Supreme Court saw nothing wrongful with Chase's reporting his colleagues' views. Indeed, Chief Justice Fuller not only quotes Chief Justice Chase's view on the scope of the habeas remedy, but he also quotes Chase's announcing his (Chase's) colleagues' views. Fuller would hardly do that if he thought Chase and his colleagues had acted wrongfully.

The practices discussed above by the Second Circuit, and in *Ward*, arise in the context of judicial decision-making. Even outside this context, there is a tradition of the Chief Justice of the United States articulating the views of his colleagues on issues of national importance. In 1937, the Senate Judiciary Committee invited Chief Justice Hughes to testify about President Roosevelt's Court packing bill.[159] Hughes declined to testify in person. Rather, he intended to submit a letter that would be signed by all nine Justices. But he was only able to secure approval from two other members: Justice Brandeis (the leader of the Court's liberal wing) and Justice Van Devanter (one of the four conservative horsemen). Hughes wrote in his letter to the Senate:

> I have not been able to consult with the members of the Court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the justices. I should say, however, that I have been able to consult with Mr. Justice

[158] 173 U.S. 452 (1899).

[159] Richard D. Friedman, Chief Justice Hughes' Letter on Court-packing, 22(1) J. Sup. Ct. Hist. 76 (1997), https://core.ac.uk/download/pdf/232690607.pdf.

> Van Devanter and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.[160]

Hughes's letter opined on the constitutionality of the bill. He suggested that cases must be heard by all members of the Court, and not, as the bill would require, by "divisions" or panels. Hughes wrote, "The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts."

For generations, Hughes's letter has been praised as an act of judicial statesmanship. He opined on a matter of pressing concern, in a timely fashion. He also weighed in on the constitutionality of a provision of the bill. Unable to quickly obtain the views of all of his colleagues, Hughes stated that the entire Court would likely agree with him. He may not have been correct. Indeed, Professor Friedman suggests that Hughes "expressed more confidence than he was entitled to, for the Brethren certainly were not unanimous in approving his statement on the constitutionality of separate panels."[161] According to Friedman, Stone and Cardozo disagreed with the message, but remained silent at the next conference, because the letter was already public. Hughes went out on a limb, and did not accurately express the views of his colleagues. Yet the letter was instrumental in halting the Court packing plan. The letter was published on the front page of the *New York Times*.

More recently, Chief Justice Roberts sent a letter to the Senate Judiciary Committee concerning potential ethics reform on the Supreme Court. Roberts suggested that legislation imposing an ethics code on the Supreme Court would be unconstitutional.[162] It is not clear if all of his colleagues agreed to that statement.[163] Roberts also "attach[ed] a Statement of Ethics Principles and Practices to which all of the current Members of the Court subscribe."[164] Hughes and Roberts follow a tradition of Chief Justices who articulated the views of their colleagues on matters of national importance outside of judicial decision-making.

c. Chase's purported breach of judicial norms escaped any criticism until 2020

If Baude and Paulsen were correct here, and Chase's reporting his colleagues' views was a violation of some judicial norm or ethical rule, then one would think that Chase's contemporaries and later commentators would have had something to say on this issue. Did any judges, state or federal, or former Justices chastise or criticize Chase and his colleagues? Members of the bar? Academics? Members of Congress? The press? Anyone at all? The only criticism reported by Baude and Paulsen of Chase's *Griffin's Case* opinion is Trump-era and post-Trump-era criticism. And the only prior critique of Chase, on this issue, which Baude and Paulsen point to is from Professor Charles Fairman, writing in 1971. Fariman offered the tepid critique that Chase's announcement was "unusual." We think Baude and Paulsen erred by casually eliding from

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[160] Text of Hughes Letter, The New York Times at 1 (Mar. 23, 1937), https://perma.cc/4PG7-59ZK

[161] Freidman, *supra* note __, at 82.

[162] Letter from Chief Justice John G. Roberts, Jr. to Senator Richard J. Durbin (Apr. 25, 2023), https://int.nyt.com/data/documenttools/supreme-court-ethics-durbin/cf67ef8450ea024d/full.pdf.

[163] Josh Blackman, Chief Justice Roberts's Letter to Senator Durbin, Volokh Conspiracy (April 26, 2023), https://reason.com/volokh/2023/04/26/chief-justice-robertss-letter-to-senator-durbin/.

[164] Josh Blackman, The Supreme Court's Statement of Ethics Principles and Practices, Volokh Conspiracy (April 27, 2023), https://reason.com/volokh/2023/04/27/the-supreme-courts-statement-of-ethics-principles-and-practices/.

"unusual" to "irregular." That something happens infrequently does not make it an improper violation of judicial ethics.

In any event, Fairman actually *defended* Chase's decision to state the views of his colleagues.[165] Fairman acknowledged that Chase's announcement was "unusual," but "the occasion was unusual." Here, District Judge Underwood had ordered the release of several prisoners based on the argument that judges who presided over their cases were disqualified by Section 3. And, more importantly, Underwood attempted to insulate his rulings from review by deciding the cases alone in the Circuit Court, and *while Chase was absent*. With this approach, there could not be a certificate of division, so a case could not be certified to the Supreme Court. This strategy did not go unnoticed by the third-parties in the press.[166] In January 1869, Chase wrote to Underwood, asking him to wait till Chase arrived in Richmond, rather than proceeding to decide the cases by himself.[167]

Although we do not adopt Fairman's position, Baude and Paulsen cite Fairman as authority. Fairman supported Chase's conduct. Fairman observed, "Here a District Judge, persisting in an abuse of power, was menacing the authority of the State judiciary." Fairman wrote that "prompt action was needed," as all of the "Justices were clear that the District Judge was wrong." And Chase's expressing the views of his colleagues was such prompt action. According to Fairman, "the Court took this direct way to assert its supervisory power and put an end to the mischief" by Judge Underwood. Baude and Paulsen charge Chase with violating judicial norms. However, Chase, his colleagues, and Fairman, agreed that this statement was an appropriate response to Underwood's (purported) misbehavior. At the end of the day, Fairman was no critic of Chase.

The January 1869 letter was not Chase's first attempt to reach out to Underwood concerning his rulings and with Underwood's efforts to insulate his rulings from review. In November 1868, Chase had already sent a letter to Underwood on the same topic.[168] Chase asked Underwood, "would it not be best to postpone the decision till next week & then we can confer on the subject." Chase explained that an 1866 statute restricted when the Circuit Court could hold terms in Richmond.[169] Specifically, under the statute, only the Chief Justice could adjourn terms. Yet, Chase pointed out that Underwood, absent authorization from Chase, was "holding, doubtless, an adjourned term, and the legality of it becomes important." Fairman saw nothing objectionable about the substance, or tenor of Chase's letter. And neither do we.

How do Baude and Paulsen describe this November 1868 letter? They charge, "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 . . . ."[170] Baude and Paulsen recharacterization of a legal discussion between judges sharing circuit court duties does not withstand scrutiny. There was no threat, veiled or otherwise. Certainly Fairman did not characterize Chase's conduct in such terms. We see no indication that Chase's contemporaries or later historians have viewed Chase's conduct as anything other than correct.

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[165] CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, Part One at 607 (1971).
[166] FAIRMAN, *supra* note __, at 604.
[167] FAIRMAN, *supra* note __, at 604 ("If any such application has been made I will join you in hearing it. It may be heard here if you can attend. If not let it be postponed till I can come to Richmond.").
[168] FAIRMAN, *supra* note__, at 603-04.
[169] FAIRMAN, *supra* note __, at 603 n.155 ("He pointed to an Act of Congress of May 21, 1866, 14 Stat. 51. That statute provided that the Circuit Court hold terms in Richmond on the first Monday in May and the fourth Monday in November; special our adjourned terms might be held 'as may be ordered and prescribed by the Chief Justice of the Supreme Court of the United States. . . . .'").
[170] Baude & Paulsen, *supra* note __, at 36 n.122 (emphasis added).

Again, Chase expressed the view that Underwood acted without authority by hearing cases during an adjourned session of the Circuit Court. Chase argued that Underwood's adjourning the session might not be lawful, and that the statute required the Chief Justice to adjourn the session. Baude and Paulsen do not say Chase was wrong on the law. Indeed, Fairman suggests Chase was right on the law. If Chase was right, how was his conferring with Underwood anything like a "threat"? Perhaps ironically, if Underwood had held court during an adjourned session, his actions could possibly be saved by the De Facto Officer doctrine. In those circumstances, Underwood and anyone relying on his prior judgments would assert a position *ad idem* with Chase's opinion in *Griffin's Case*. Doesn't this counterfactual suggest yet another reason to think Chase's opinion in *Griffin's Case* was substantially correct?

As we explained, the sources cited by Baude and Paulsen indicate that Chase asked for Underwood to modify his practice so that both Chase and Underwood could evaluate the decision for the Circuit Court on appeal, and that would allow the Circuit Court to issue a certificate of division to the Supreme Court. Chase was trying to assist appellate review; Underwood was trying to frustrate it. Again, modern readers may think it strange that a Chief Justice would ever have any correspondences with an inferior court judge. But in the 1860s, the Circuit Justice would routinely hold court with the District Judge. They worked together, and necessarily had to have discussions on this and many other procedural issues relating to Circuit Court administration and practice. There is nothing inappropriate here—and certainly not a veiled threat.

d. Griffin's Case has been cited repeatedly without criticism for more than 150 years

We criticize Baude and Paulsen's critique of *Griffin's Case*. Their assertion that the Chief Justice violated ethical norms and that he threatened Judge Underwood is, at best, hyperbole. Our critique relates to these points, but they are equally apt in relation to all too many of the substantive critiques Baude and Paulsen put forward in relation to Chase's *Griffin's Case* opinion. Baude and Paulsen only tell one side of a complex story, and they do so in hyperbolic terms.

Baude and Paulsen take the position that Chase is wrong on the self-execution issue, wrong on the habeas issue, wrong on judicial ethics, and wrong on just about everything (or nearly everything) else. If there is any point Baude and Paulsen suggest Chase decided correctly, we missed it.

Again, they speak of Chase's opinion in *Griffin's Case* with the same scorn that Charles Sumner derided Chief Justice Taney, who had been discredited for his *Dred Scott* opinion. If Baude and Paulsen are correct, one would think that they could point to multiple, independent, substantive critiques of *Griffin's Case* from the 150+ years between 1869 and 2020–including judicial decisions–aligning with their views. But Baude and Paulsen do not point to any such authorities. And that's a tell. Albeit, we acknowledge that the intellectual landscape began to shift during and after Trump's term.

But, prior to 2020, courts, federal, state, and foreign have cited Chase's decision in *Griffin's Case* for many (perhaps all) of its major legal positions. We see no report of any pre-2021 case citing it otherwise than favorably. We already mentioned how the Supreme Court favorably cited *Griffin's Case* in *Ex Parte Ward*.[171] There are many more such citations. *Griffin's Case* has been cited for the proposition that Section 3 was not self-executing.[172] *Griffin's Case* has been cited in

[171] *See Ex parte* Ward, 173 U.S. 452 (1899) (Fuller, C.J.).

[172] *See* Cale v. Covington, 586 F.2d 311 (4th Cir. 1978) (Widener, J.) (citing *Griffin's Case* for its sword-&-shield reasoning); *In re* Brosnahan, 18 F. 62, 81 n.73 (C.C.W.D. Mo. 1883) (McCrary, J., concurring) (same); State v.

regard to habeas law.[173] *Griffin's Case* was cited in regard to constitutional construction.[174] *Griffin's Case* was cited in regard to legislative or statutory construction.[175] *Griffin's Case* was cited in regard to the status of West Virginia and Virginia during and after the Civil War.[176] *Griffin's Case* was cited in regard to the De Facto Officer doctrine.[177] *Griffin's Case* was cited in regard to oaths.[178] *Griffin's Case* was cited in regard to other provisions of law.[179] *Griffin's Case* was even cited by a foreign court.[180]

Could *all* of these jurists have been so wrong to have relied on such a misguided decision from the Chief Justice of the United States? And how could *Griffin's Case* have escaped any criticism until 2020? The more likely explanation is that Baude and Paulsen misread *Griffin's Case*, and they failed to place the decision in its proper historical and intellectual context.

Other commentators have endorsed Baude and Paulsen's views about *Griffin's Case*. Former-judge J. Michael Luttig and Professor Laurence Tribe wrote that *Griffin's Case* was "poorly reasoned" and "Baude and Paulsen decisively dismantle[d] *Griffin* as a precedent."[181] We believe that any claim that the case is "poorly reasoned" is based on a misreading of *Griffin's Case.* We do not suggest *Griffin's Case* was perfect, but, as *Ex parte Ward* and any number of other federal, state, and foreign cases show, it was in the mainstream of judicial thought.

We suggest that, as in court proceedings, the better practice might have been for Tribe and Luttig to have waited a reasonable amount of time for contrary views to percolate in the literature before a rush to judgment. Again, *Griffin's Case* is not perfect—no decision is. But it is defensible,

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Buckley, 54 Ala. 599, 616 (Ala. 1875) (Stone, J.) (same); *see also* Mark R. Hearing, Va. Attorney General to Lee J. Carter, Delegate, Commonwealth of Virginia Opinion No. 21-003, 2021 Va. AG Lexis 1, 2, n.11 (2021) ("[T]he weight of authority appears to be that Section 3 of the Fourteenth Amendment is not 'self-executing'—put another way, it is possible that Congress may need to pass implementing legislation to make this provision operative." (citing *Griffin's Case*)).

[173] Daniels v. Towers, 7 S.E. 120, 121–22 (Ga. 1887) (Bleckley, C.J.) (citing *Griffin's Case* favorably in regard to its habeas holding); *In re* Sheehan, 122 Mass. 445, 449 (Mass. 1877) (Gray, C.J.) (same).

[174] Edye v. Robertson (*The Head-Money Cases*), 18 F. 135, 143 n.26 (C.C.E.D. N.Y. 1883) (Blatchford, Justice) (citing *Griffin's Case* in regard to constitutional construction), *aff'd* (U.S. 1884); Duane v. Philadelphia, 185 A. 401, 403 (Pa. 1936) (Kephart, C.J.) (same); Coyle v. Smith, 113 P. 944, 948 (Okla. 1911) (Williams, J.) (same);

[175] *Ex parte* Klune, 240 P. 286, 287 (Mont. 1925) (Callaway, C.J.) (citing *Griffin's Case* in regard to statutory construction); Brooke v. Turner, 30 S.E. 55, 56 (Va. 1898) (Riely, J.) (same); Sartain v. State, 10 Tex. App. 651, 654 (Ct. App. Tex. 1881) (White, P.J.) (same); Deaney v. Linen Thread Co., 118 A.2d 28, 36 (N.J. 1955) (Heher, J., dissenting) (same).

[176] Woodland v. Newhall's Adm'r, 31 F. 434, 439 (C.C.W.D. Va. 1887) (Paul, J.) (citing *Griffin's Case* for the proposition that the state government in West Virginia was the lawful and recognized government of the entire state of Virginia); Commonwealth v. Chalkley, 61 Va. 404, 409 (Va. 1871) (Joynes, J.) (citing *Griffin's Case* for the proposition that the restored government of Virginia was the lawful government); *In re* Gunn, 32 P. 948, 955 (Kan. 1893) (Allen, J., dissenting) (citing *Griffin's Case* favorably for the proposition that political decisions taken by the elected branches in regard to the organization of Virginia were conclusive on the courts).

[177] Calcutt v. Federal Deposit Insurance Corporation, 37 F.4th 293, 343, 349 (6th Cir. 2022) (Murphy, J., dissenting) (citing Professor Baude and *Griffin's Case*, side-by-side, and fully expounding on the scope and history of the De Facto Officer doctrine), *rev'd on other grounds* (U.S. 2023).

[178] State v. Stephens, 664 S.W.3d 293, 304 n.46 (Ct. Crim. App. Tex. 2022) (Slaughter, J., dissenting) (citing *Griffin's Case* for the history of congressionally imposed oaths).

[179] McGovern v. Mitchell, 63 A. 433 *passim* (Conn. 1906) (Hamersley, J.) (citing *Griffin's Case* for multiple legal propositions)

[180] Re Toronto R. Co. and City of Toronto, 51 D.L.R. 69 (Ct. App. Ont. 1918) (Meredith, C.J.O.) (citing *Griffin's Case* favorably in regard to habeas law), *rev'd on other grounds* (J.C.P.C. 1920).

[181] J. Michael Luttig and Laurence H. Tribe, *The Constitution Prohibits Trump From Ever Being President Again*, THE ATLANTIC (Aug. 19, 2023), https://www.theatlantic.com/ideas/archive/2023/08/donald-trump-constitutionally-prohibited-presidency/675048/.

for the reasons we described above and for others we discuss below. To say that the case is "decisively dismantle[d]" is hyperbole, perhaps, infected by the perceived needs of today as some perceive those needs. Those immersed in the present moment should hesitate before concluding they understand the Fourteenth Amendment better than the Chief Justice who presided during that era, and generally sought to give that constitutional amendment broad effect (indeed, broader than his colleagues) in cases like *The Slaughter-House Cases* and *Bradwell v. Illinois*.

C. Griffin wielded Section 3 as a "sword"

In our view, Griffin invoked Section 3 in an offensive posture, that is, as a cause of action in support of affirmative relief, but he lacked a federal statute authorizing his doing so. We do *not* put this view forward as an after-the-fact invention or ahistorical gimmick which merely accommodates otherwise inconsistent or difficult to explain prior case law. Our position is that this is what Chase was saying in 1869, how he was understood, and how courts and commentators understood the Fourteenth Amendment until . . . until about 2020, and more recently, by Baude and Paulsen. For example, in *Cale v. Covington* (1978), the U.S. Court of Appeals for the Fourth Circuit, held:

> It is true that in [*T*]*he Civil Rights Cases* [(1883)] the [Supreme] Court referred to the Fourteenth Amendment as self-executing, [and] when discussing the Fifteenth, but it is also true that earlier in the opinion, discussing s 1 of the Fourteenth Amendment, the [Supreme] [C]ourt stated: "in order that the national will, thus declared, may not be a mere Brutum fulmen [a mere warning without effect], the last section of the amendment invests Congress with power to enforce it by appropriate legislation." *The Civil Rights Cases* did not overrule *Ex parte Virginia*, and any apparent inconsistency between the two just quoted statements in [*T*]*he Civil Rights Cases* may be resolved, we think, by reference to the protection the Fourteenth Amendment provided of its own force as a ***shield*** under the doctrine of judicial review. See the dissent of Mr. Justice Harlan in the *Civil Rights Cases* quoted infra. See also the *Slaughter-House Cases*, 16 Wall. at 81, where the Court, referring to the equal protection clause of the Fourteenth Amendment, had stated that when it is a State dealt with and not alone the validity of a State law, the matter should be left until Congress should has exercised its power or some case of State oppression by denial of equal justice in its courts claims a decision at the hands of the Supreme Court. Another early opinion, not by the Supreme Court but by Chief Justice Chase sitting as a Circuit Justice, is *Griffin's Case*, 11 Fed. Cases 7 (C.C.D. Va. 1869), which held that the third section of the Fourteenth Amendment, concerning disqualifications to hold office, was not self-executing absent congressional action.
>
> With this understanding in mind, we believe that the Congress and Supreme Court of the time were in agreement that ***affirmative relief*** under the amendment should come from Congress.[182]

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[182] 586 F.2d 311 (4th Cir. 1978) (emphases added). We note that *Cale* was decided after *Ex parte Young*, 209 U.S. 123 (1908) and after *Edelman v. Jordan*, 415 U.S. 651 (1974);. If, as we have argued, as Chase held, Section 3 is not self-executing for the purpose of seeking affirmative relief, then *Ex parte Young* cannot fill the legal gap in Baude and

And what authority did the Fourth Circuit look to and cite: *Griffin's Case*. Former Fourth Circuit Judge Michael Luttig, who recently wrote that *Griffin's Case* was "poorly reasoned," seems unaware of his former court's precedents.[183]

We don't doubt that there are some exceptions to the sword-&-shield framework which we have put forward. *Bivens* is one exception; Takings Clause cases and inverse condemnation proceedings, another. We suspect other exceptions may exist where concrete property rights are in dispute under Article III's equity prong, as opposed to the law prong. There may be other exceptions too. But they are individually and collectively exceptions–often of recent judicial creation. The historically dominant view is what was put forward by Chase in *Griffin's Case*. Our view is that this sword-&-shield framework undermines Baude and Paulsen's core position: they believe that the Fourteenth Amendment is self-executing. If Baude and Paulsen believe all constitutional provisions are self-executing in both senses–as a sword and shield, we think they are in error. If they believe that Section 3 is distinguishable from other constitutional provisions, and yet Section 3 is self-executing in both senses, as a sword and shield, even if other constitutional provisions are not, then we fail to see how they distinguish Section 3 from other constitutional provisions.

III. Chief Justice Chase's Decision in the *Case of Jefferson Davis*

Chief Justice Chase presided over another case that implicated Section 3. Yet, Baude and Paulsen only mention that case in passing.[184] While most people have never heard of Caesar Griffin—indeed, there are some records suggesting his first name was actually Caspar—the other case involved one of the best known confederates: Jefferson Davis.[185] Yes, Chase presided over the treason prosecution of the former president of the (purported) confederate government.

What Baude and Paulsen do say about the case employs hyperbole rarely seen in legal scholarship. Baude and Paulsen characterize Chase's position as "bonkers," and they support their position on atextualist consequentialist grounds.[186] But not everyone has shared Baude and Paulsen's views on this point. In *Cramer v. United States*, Justice Robert H. Jackson, as did the Solicitor General, favorably cited the *Case of Jefferson Davis*.[187] Justice Jackson and the Department of Justice did not think the decision was "bonkers."

Paulsen's theory. *See supra* Part I.C.2.d. A voter or candidate seeking to exclude Trump from the ballot is seeking positive relief via state administrative or judicial action. The relief sought by the voter or candidate is that the state strike Trump from the ballot. And as Judge Sutton explained, such relief still requires a federal statute. *See* Michigan Corrections Organization v. Michigan Dept. of Corrections, 774 F.3d 895, 906 (6th Cir. 2014) (Sutton, J.) ("But matters differ when litigants wield *Ex parte Young* as a cause-of-action-creating sword. In that setting—today's setting—the State is not threatening to sue anyone, precluding an anti-suit injunction from doing the work. [In those circumstances,] [w]hat is required is that Congress create[] a cause of action for injunctive relief in the statute or otherwise made § 1983 available." (internal citation omitted)).

[183] Luttig & Tribe, *supra* note __, at __.

[184] Baude & Paulsen, *supra* note __, at 43-44.

[185] [RICHMOND] DAILY DISPATCH (Nov. 18, 1868).

[186] Baude & Paulsen, *supra* note __, at 43.

[187] 325 U.S. 1, 25 n.38 (1945) (Jackson, J.); *see also* Kawakita v. United States, 190 F.2d 506, 517 n.14 (9th Cir. 1951) (Stephens, J.) (same).

What makes Baude and Paulsen's drive-by treatment even more striking is that Chase is reported to have made a statement that provides support for Baude and Paulsen's position. The standard version of the *Case of Jefferson Davis* is the version as reported by *Federal Cases*. The decision ends with these paragraphs:

> THE CHIEF JUSTICE. Very well. The certificate of disagreement has been made, as requested by the defendant. It may be filed, and a copy forwarded immediately to Washington.
>
> Whereupon the court adjourned.
>
> No further proceedings were had in the cause. The proclamation of general amnesty by the president of the United States at the end of December, 1868 effectually disposed of the criminal prosecution, and the certificate of disagreement rests among the records of the supreme court, undisturbed by a single motion for either a hearing or a dismissal. At a subsequent term of the circuit court, the indictments against Mr. Davis were, on motion of his counsel, dismissed.
>
> THE CHIEF JUSTICE instructed the reporter to record him as having been of opinion on the disagreement, that the indictment [against Davis] should be quashed, and all further proceedings barred by the effect of [Section 3] the fourteenth amendment to the constitution of the United States.

This statement, standing on its own, might seem to suggest that Section 3, in the absence of federal enforcement legislation, was self-executing. Although Professor Gerard Magliocca considers this statement at some length, Baude and Paulsen do not even mention it.

Just as well. This statement is not the slam dunk it seems at face value. And it isn't even clear when, if ever, Chase actually made this statement. Moreover, the case was reported by a former confederate general who allegedly plotted to kidnap Abraham Lincoln. Not exactly a neutral source. Plus, the reporter admitted that he revised Chase's opinions, years later, sometimes with and sometimes without the Chief Justice's knowledge. Oh, and the reporter was Judge Sheffey's lawyer in *Griffin's Case*. There are many good reasons to discount this statement.

Still, even if we assume this statement was an accurate representation of Chase's views during (or, even, after) the *Davis* trial, we can reconcile the *Case of Jefferson Davis* with *Griffin's Case*. Griffin was an applicant; he sought to use Section 3 as a sword, that is, *offensively as a cause of action supporting affirmative relief*, but he could not do so without enforcement legislation. By contrast, Davis sought to use Section 3 as a shield–as a defense in a criminal prosecution, and he could do so without enforcement legislation. The two cases can be reconciled. How was Section 3 used as a shield? Davis's position was that Section 3 displaced federal criminal treason-related prosecutions; rather, Section 3 was the exclusive punishment which could be brought against Section 3-covered persons. We take no position whether or not this position was correct on the merits. Our point is that this framing in regard to how Section 3 was used permitted Davis to invoke Section 3 absent enforcement legislation.

A. What did Chase's Opinion in the *Case of Jefferson Davis* case decide, and not decide?

After the Civil War, Jefferson Davis, the former president of the (purported) confederacy, was indicted on federal treason charges. His lawyers argued that Section 3 displaced all federal criminal treason-related prosecutions in favor of disqualification as the exclusive punishment for those falling within Section 3's reach.[188] Thus, Section 3 foreclosed a prosecution under the federal treason statute. We take no position whether or not this position was correct on the merits. This position, which invoked Section 3 as a defense, did not need to rely on federal enforcement legislation.

If you're looking for a clear statement of how Chase viewed the question, you're out of luck. And the absence of any such opinion is due to how the federal courts were structured in 1868. At the time, federal criminal prosecutions were tried before the federal circuit court, and certain cases were heard by the District Judge and the Circuit Justice sitting together.[189] As you might have surmised, the two judges at this trial, which was held in Richmond, Virginia, were District Judge Underwood and Chief Justice Salmon Chase. Under the rules in effect, a federal criminal prosecution could be appealed to the United States Supreme Court if the district court judge and the circuit justice disagreed. Specifically, the two judges would submit a certificate of division to the Supreme Court.

The *American Law Review*, published in 1869, offered an account of the trial, including detailed descriptions of arguments made by counsel for the defense and the government.[190] After the arguments were submitted, there would be no unanimous resolution of the case. The report states, "After a brief consultation, the following certificate of division of opinion was made by the court."[191] The certificate provides, in part:

> The question arose, whether, by the operation and effect of the third clause of the Fourteenth Amendment of the Constitution, the defendant is exempted from

[188] Judge Richardson of the Fourth Circuit contended that Davis's "defense team made the astonishing argument that, because § 3 of the Fourteenth Amendment was a punishment and not a qualification, he could not be convicted for treason under the Fifth Amendment's prohibition on double jeopardy." Cawthorn v. Amalfi, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring in the judgment) (citing Dwight J. Davis, *The Legal Travails of Jefferson Davis*, 23 J.S. Legal Hist. 27, 73 (2015)). And, Richardson wrote, it was Chief Justice Chase himself who suggested the idea to Davis's defense team, as it would allow a procedural ruling that might "save Chase from making a decision on the question of whether or not secession is treason." *Id.* (citing C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 AKRON L. REV. 1165, 1196 (2009)). Richardson's position baffles us. There is not one word about double jeopardy or the Fifth Amendment mentioned anywhere in the reported decision. The Sixth Amendment is discussed by Chase, but it is difficult to see how this could be a source of confusion for Judge Richardson or anyone else. As to Chase's having suggested the argument to Davis's attorneys, we would not be a bit surprised if that claim were true. And given the political realities at the time, we would not be a bit surprised if the prosecutors thanked Chase for doing just that. We add: Even if Davis's jury were selected from a venire of Virginia Unionists and other men who sat the war out, without openly supporting the rebels, how could anyone have any confidence that it would convict? The prosecutors might have felt as if they had just won the lottery when Chase put forward a legal position amounting to kicking the can down the road without the government's being publicly humiliated by a divided jury or, worse, an actual unanimous acquittal. Again, the case was being heard in Richmond, Virginia—the former rebel capital.

[189] Judiciary Act of 1802, 2 Stat. 156, 159, § 6.

[190] United States vs. Jefferson Davis, 3 AM. L. REV. 368 (1869), https://perma.cc/Y9PG-6TCB. A reproduction of the full issue can be found at https://bit.ly/44PsUHz.

[191] *Id.* at 372.

> liability to indictment or prosecution for treason in levying war, participating or engaging in the late Rebellion. And upon that question the judges [Underwood and Chase] were opposed. And thereupon the said point is, upon the request of the said defendant, stated under the direct[ion] of the said judges, and certified under the seal of the said Circuit Court to the Supreme Court of the United States at its next session.[192]

The *American Law Review* report of the case observed, "The certificate, with an exemplification of the record, was filed in the Supreme Court at the beginning of the December Term."[193] A copy of this certificate can be found in the National Archives.[194]

The certificate does not say how each of the Judges voted. Nor does it say why the judges cast their votes. What we do know is that Chase voted one way, and Underwood the other. We do not know that Chase would have voted the same way and for the same reasons had he been the lone decision-maker where his vote was both determinative and precedent setting.

For all we know, Chase may have voted in opposition to Underwood to ensure the Supreme Court could decide the issue promptly—such a position would have the benefit of nation-wide legitimacy and uniformity across circuits. A letter from Chase to Judge Underwood in January 1869 concerning *Griffin's Case* provides some support for this theory. Chase wrote, "The best and quickest way of obtaining an authoritative & final decision of the point which has arisen is to certify to a division of opinion in the Caesar Griffin case now in the Circuit Court on appeal."[195] Remember, at the time, the Supreme Court could only hear such an appeal if there was a certificate of division.[196] This practice would not have been uncommon. There is some circumstantial evidence that in *United States v. Cruikshank*, Circuit Justice Joseph Bradley intentionally registered disagreement with the District Judge (and future Justice) William Wood, even though he agreed with Wood on the merits, for the purpose of allowing the Supreme Court to hear the case.[197]

We have found no contemporaneous public source discussing Chase's reasons for how he voted on this case. The 1894 report of the case in *Federal Reports*, the version used by most scholars and courts today, states that Chase took the position that the Fourteenth Amendment barred the treason indictment against Davis. Recently, this view of the case has been put forward to show that Chase believed that Section 3 was self-executing.

However, we have found a contemporaneous source which states just the opposite of the position ascribed to Chase in *Federal Cases*. An article appeared in the Richmond *Daily Dispatch* on December 7, 1868. The article stated that, "It was generally believed that the Chief Justice was in favor of sustaining the motion to quash [the indictment of Davis], while Judge Underwood wished to overrule it. But the Chief Justice stated in private conversation that he wished it distinctly understood that he had expressed no opinion on the subject."

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[192] Id.
[193] Id.
[194] Certificate of Division, United States v Jefferson Davis, Supreme Court of the United States (Filed Dec. 5, 1868), https://perma.cc/K7QC-4YZJ. Appellate Jurisdiction Case Files in Record Group 267, Records of the Supreme Court of the United States, at the National Archives. The record from the Supreme Court case can be found at https://perma.cc/FFK7-GHQD.
[195] Fairman, *supra* note __, at 604-05.
[196] Fairman, *supra* note __, at 602.
[197] Barnett & Blackman, *supra* note __, at 756.

Again, there is no contemporaneous public source explaining why Chase voted the way he did. And the case would never be decided by the Supreme Court. Within a few weeks of the case's referral to the Supreme Court, President Andrew Johnson announced an amnesty and the treason charges were no more. Eight years later, and after Chase's death, another account of Chase's opinion would be published.

B. Chase's opinion in the *Case of Jefferson Davis* as reported by Bradley T. Johnson

Modern readers may take for granted that all reported versions of a case will be largely identical. But for much of Anglo-American legal history that assumption would have been wrong. Accounts of judicial decisions were recorded by hand and may be incomplete. Some reporters were deemed more reliable than others. Such is the situation with the *Case of Jefferson Davis*.

The version of the case reported in *Federal Cases*, published in 1894, includes an important sentence that does not appear in the 1869 version in *American Law Review*: "THE CHIEF JUSTICE instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States."

Instead, *Federal Cases* relies on a report by Bradley T. Johnson, who published cases that Chief Justice Chase decided on the Circuit Court of Virginia. Johnson included that same pivotal statement. But it is not known *when*, if ever, Chase instructed Johnson to add that statement. We are somewhat skeptical that Chase made it, at least during or immediately after the trial. This statement was not made in open court. Indeed, the tense shifts from the present tense to past tense ("as having been"). And we have found no contemporaneous record of Chase's making this statement in other public sources. And there is some good reason to treat Johnson as less than a neutral observer. He had served as a general in the (purported) confederate army, plotted to kidnap Abraham Lincoln, and later became a defender of the "Lost Cause." Plus General Johnson represented Judge Sheffey in *Griffin's Case*. So just maybe the reporter had some connection to the self-execution issue which should be a cause for concern.

1. Federal Cases

Let's work backwards chronologically. In 1894, the West Publishing Company published the seventh volume of *The Federal Cases Compromising Cases Argued and Determined in the Circuit and District Courts of the United States*.[198] The *Case of Jefferson Davis* stretches from page 63 through page 102. The very first footnote on page 63 states, "Reported by Bradley T. Johnson, Esq., and here reprinted by permission. 3 Am.Law.Rev. 368, contains only a partial report." On page 102, the report notes that the court adjourned. The final two paragraph state:

> No further proceedings were had in the cause. The proclamation of general amnesty by the president of the United States at the end of December, 1868, effectually disposed of the criminal prosecution, and the certificate of disagreement rests among the records of the supreme court, undisturbed by a single motion for either

[198] 7 The Federal Cases Compromising Cases Argued and Determined in the Circuit and District Courts of the United States (West. Pub. Co. 1894), https://perma.cc/AL7X-UDU4.

> a hearing or a dismissal. At a subsequent term of the circuit court, the indictments against Mr. Davis were, on motion of his counsel, dismissed.
>
> THE CHIEF JUSTICE instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States.[199]

If we simply stopped our analysis here, and took General Johnson's account at face value, then Baude and Paulsen would have some strong evidence that Chase viewed Section 3 as self-executing in the *Davis* case. But there is some reason to keep digging.

2. Reports of Cases Decided by Chief Justice Chase by Bradley T. Johnson

As the footnote observes, this report of the case came from a book published by Bradley T. Johnson in 1876, titled *Reports of Cases Decided by Chief Justice Chase for the Fourth Circuit*.[200] The book has a subtitle, *Revised and Corrected by the Chief Justice*. The report of the *Case of Jefferson Davis* is the first case in the book. The report begins with a "Statement of the Case," and includes detailed accounts of the proceeding. The report concludes on Page 124, including the two paragraphs noted above.

The first paragraph above was necessarily written at some point after the case was transmitted to the Supreme Court, and after President Johnson issued an amnesty for Davis. We know this because that paragraph refers to President Johnson's amnesty. The events described in that paragraph would necessarily have occurred *after* the case had already been certified to the Supreme Court, and President Johnson issued the amnesty. We do not know when, if at all, the Chief Justice instructed the reporter, Bradley T. Johnson, to record his view on the case. It did not happen in open court. There is no indication that Judge Underwood made a similar request. For all we know, it could have happened, if it happened at all, at any point between December 1868, when President Johnson issued his amnesty, and May 1873, when Chase died. Or Johnson could have added the statement *on his own accord* at some point after Chase's death, and before the book was published in 1876.

For some evidence in Bradley Johnson's favor, the preface of the book explains how Chase was involved in the editing process. Johnson relayed that he "proposed to the Chief Justice that, if agreeable to him, [Johnson] would undertake the work of collecting his Circuit Court decisions for publication."[201] Chase "assented to the suggestion with gratification, and subsequently furnished me with copies of his decisions as fast as they were made on circuit."[202] During 1872–1873, Johnson submitted the manuscript to Chase "for revision, and he went over the whole of it with the reporter, making such corrections as he deemed necessary." Johnson explained that the changes "were generally merely verbal, and in the main consisted of softening the language or expressions

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[199] Case of [Jefferson] Davis, 7 F. Cas. 63, 102 (C.C.D. Va. 1871).
[200] BRADLEY T. JOHNSON, REPORTS OF CASES DECIDED BY CHIEF JUSTICE CHASE FOR THE FOURTH CIRCUIT (Diossy & Company, 1876), https://perma.cc/UC4N-3FBC. The phrase "Fourth Circuit" in the title of the book did not refer to the U.S. Court of Appeals for the Fourth Circuit which did not come into existence until many years later. Rather, at that time, "Fourth Circuit" included certain States, such as Virginia. Each state had its own federal circuit court of appeals, and Chase presided over the individual circuit courts in those States.
[201] Johnson, *supra* note __, at iv.
[202] *Id.* at iv.

used in alluding to the war." For example, Chase "struck out the words 'rebellion,' 'rebels,' 'insurrection,' and 'insurgents,' and substituted the words 'civil war,' 'belligerents,' &c., wherever the sense of the text would permit, and instructed me to do so wherever he had overlooked it."

In April 1872, Chase wrote to his daughter, Janet Chase Hoyt, that he visited General Johnson. During that visit Chase "was aiding [Johnson's] revision of [Chase's] decisions."[203] Chase quipped, "I could and would have done more and enjoyed more, if I had been in better health, but I did very well for an invalid."[204] By Johnson's own admission, Chase instructed him to modify reported decisions several years after the fact, with an eye towards softening any negative language towards the former confederates. It is entirely possible that Chase asked Johnson to include the final paragraph at this point, nearly five years after the *Davis* case concluded. That very well could have been Chase's opinion five years later, but, again, we have found no contemporaneous public statement that described Chase's view in the *Davis* case.

Recently, Judge Richardson of the Fourth Circuit, in a concurring opinion, suggested that Chase in fact took a position on whether Section 3 was self-executing *during* the *Davis* trial—at least, this is how we read Richardson's "on the record"-language. In any event, Judge Richardson, like many others, certainly ascribes the position to Chase. Judge Richardson wrote:

> While Andrew Johnson's pardon of Davis eventually mooted the case, Chief Justice Chase went on the record anyway. He agreed with the defendant's argument that § 3 was a punishment and that "it executes itself." *In re Davis*, 7 F. Cas. 63, 90 (C.C.D. Va. 1871). "THE CHIEF JUSTICE instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States." *Id*. at 102.

We have discussed above the provenance of the Chief Justice's purported instructions to the reporter, which were added by Bradley T. Johnson. Judge Richardson's putting "it executes itself" in quotation marks is somewhat confusing. The quoted language is something Davis's attorney—Judge Robert Ould—stated, not Chase. Ould was a former judge advocate in the (purported) confederacy, so he was referred to as "Judge." Ould said, Section 3 "executes itself, acting *proprio vigore*. It needs no legislation on the part of congress to give it effect." Chase never uttered the words "it executes itself" in the record. Indeed, Chase expressed no agreement or disagreement with Ould at that time. Indeed, Chase's only on-the-record comment immediately following Ould's statement concerned the timing of a recess. Contrary to Judge Richardson, we see no clear evidence that Chase, at any time during the *Davis* trial, took any position with regard to whether Section 3 is self-executing.

The *American Law Review* report of the case, published in 1869, soon after the *Davis* case, does not include the final paragraph about Chase's purported views. By contrast, Bradley's report, which was published nearly eight years later, which admittedly modified text without Chase's direct oversight, and which may have inured to the benefit of his clients, including former confederates, did include the final paragraph. Based on these facts alone, we would rely on the earlier report in *American Law Review*. But there is much, much more.

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[203] 5 JOHN NIVEN, THE SALMON P. CHASE PAPERS 368 (letter from Chase to Janet Chase Hoyt, April 12, 1872), https://perma.cc/25TJ-5XWC.
[204] *Id*.

3. Who was Bradley T. Johnson?

Bradley T. Johnson was hardly a neutral reporter. A brief sketch of his history reveals why. According to one account, Johnson was "[t]he man who perhaps did the most to promote Maryland's involvement in the Confederate cause, despite the state remaining in the Union."[205] In 1861, after Maryland remained loyal to the Union, he organized a pro-southern militia. Later his unit crossed the Potomac and was incorporated into General Stonewall Jackson's brigade. He led his Marylanders into several prominent battles. He would achieve the rank of brigadier general in the (purported) confederate army. Apparently, in 1864, "Johnson conceived of a plan to kidnap Lincoln while he was at the Soldiers' Home near the outskirts of Washington, DC," but his plans were thwarted. He commanded a (purported) confederate prison until 1865, when he surrendered to Union forces.

After the war, in addition to reporting Chase's cases, Johnson became "increasingly involved with the Lost Cause."[206] Before the war, Johnson was elected as state's attorney for Frederick County, Maryland.[207] This position very well may have triggered his own disqualification under Section 3. Albeit, in May 1866, President Johnson gave Bradley Johnson a "full pardon and amnesty for all offenses by him committed, arising from participation, direct or implied, in the said rebellion" on certain conditions.[208] Bradley Johnson would also have been covered by the 1872 and 1898 congressional pardons issued under the authority of Section 3. After the Fourteenth Amendment came into effect, it was unclear if those who had already been pardoned by the President were subject to Section 3 disqualification.[209]

There's more. Johnson was Judge Sheffey's lawyer in *Griffin's Case*! Richmond was a small world. Only a few months after the Jefferson Davis trial concluded, General Johnson was Judge Sheffey's advocate in the District Court and in the Circuit Court.[210] And wouldn't you know it? Johnson reported *Griffin's Case* in his volume on Chase's decisions. It appears starting on page 364. *Federal Cases* once again relied on Johnson.[211]

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[205] *Bradley T. Johnson,* AMERICAN BATTLEFIELD TRUST, https://www.battlefields.org/learn/biographies/bradley-t-johnson.

[206] *See also Laura Castro Lindarte, John Wilkes Booth's Abduction Plot Gone Wrong, Boundary Stones* (Mar. 2, 2018), https://boundarystones.weta.org/2018/03/02/john-wilkes-booths-abduction-plot-gone-wrong ("These were not the only plots to kidnap Lincoln. Two members of the Confederacy army also had plans to abduct the President. One was Joseph Walker Taylor, the nephew of former president Zachary Taylor. The other was Colonel Bradley T. Johnson. Neither was carried out and it is unknown whether [John Wilkes] Booth knew about them.").

[207] *A Guide to the Bradley T. Johnson Papers*, UNIVERSITY OF VIRGINIA LIBRARY, https://perma.cc/P9GG-RWNB ("Johnson served as Maryland State's Attorney, Chairman of the Maryland State Democratic Committee, and delegate to both National Conventions of 1860.").

[208] Pardon of Bradley T. Johnson by President Andrew Johnson (May 11, 1866), https://perma.cc/CA5P-4768; Historic Rocky Springs Chapel & School House, Facebook (Nov. 14, 2016), https://www.facebook.com/photo/?fbid=670669726441200&set=a.670660606442112.

[209] 18 Op. Att'y Gen. 149 (1885) (explaining that Section 3-covered persons that had been pardoned by the President *before* the adoption of the Fourteenth Amendment were not precluded by Section 3 from holding office under the United States).

[210] Griffin's Case (*In re* Griffin), 11 F. Cas. 7 (C.C.D. Va. 1869) ("The state of Virginia appearing by the attorney-general, Mr. ________, Judge H. W. Sheffey, the judge of the circuit court for Rockbridge by Bradley T. Johnson, Esq., and the sheriff by James Neeson, Esq. they joined issue on this traverse.").

[211] 11 F. Cas. 7, 27 n.1 ("Reported by Bradley T. Johnson, Esq., and here reprinted by permission. 2 Am. Law T. Rep. U.S. Cts. 93, 3 Am. Law Rev. 784, and 8 Am. Law Reg. (N. S.) 358, contain only partial reports."). Volume VIII of the *American Law Register* of 1869 (not to be confused with the *American Law Review* of 1869) includes a version of the case starting at page 358, https://perma.cc/K9VS-896L, https://archive.org/details/americanlawregi05lawgoog.

It is not unreasonable to be skeptical of the final paragraph of General Johnson's report of the *Case of Jefferson Davis*. That passage attributed to Chase was added by a former confederate. That lawyer also argued in *Griffin's Case* that Section 3 should not disqualify Judge Sheffey. Indeed, the lengthy statement of the case that preceded the *Davis* report was written in a very pro-confederate fashion. A 1953 book observed, "[p]erhaps the able lawyer and distinguished Confederate soldier, Bradley T. Johnson, expressed the best contemporary Southern viewpoint on the question of treason as it touched the supporters of the Confederacy. He set forth his opinion in a long 'Statement of the Case' of Jefferson Davis in his *Reports of Cases Decided by Chief Justice Chase*, 1865-69, published in 1876."[212] In Johnson's view, "any attempt, therefore, to punish Jefferson Davis and other leaders of the Confederacy would be considered disgraceful to the American people."[213] Johnson, a defender of the so-called "lost cause," even included an appendix with the (purported) constitution of the (purported) Confederate States of America![214] The inclusion of this document, after Chase had already died, appears to be a decision of Johnson alone.

We would be very skeptical to rely on the following statement, as reported by Bradley T. Johnson: "THE CHIEF JUSTICE instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States." This statement was not made in open court. And we have found no contemporaneous record of Chase's making this statement in other public sources. Still, we cannot rule out the possibility that such sources may exist. Let's assume that Chase actually said it.

Can we reconcile *Griffin's Case*, which was litigated by Bradley Johnson, with the *Case of Jefferson Davis*, which was reported by Bradley Johnson? Yes, we can.

C. Reconciling *Griffin's Case* and the *Case of Jefferson Davis*

Going forward, we will assume that the statement appended at the end of Bradley Johnson's report in fact reflected the view of Salmon P. Chase during the *Davis* trial. That statement may seem to be in tension with Chase's view a few months in *Griffin's Case*. Recently, Professor Gerard Magliocca has argued that Chase's positions in these two cases were contradictory. According to Magliocca, Chase determined that Section 3 was self-executing in *Case of Jefferson Davis*, but was not self-executing in *Griffin's Case*. Magliocca wrote, "Chief Justice [Chase] offered no explanation, and my opinion is that this pair of results is simply illogical and cannot be explained by legal analysis."[215] Magliocca added, "These two different assessments about whether Section Three was self-executing in Virginia are almost impossible to reconcile . . . ."[216] Commentator Roger Parloff endorsed Magliocca's view.[217] Baude and Paulsen favorably quote a

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[212] Jonathan Truman Dorris, *Pardon and Amnesty under Lincoln and Johnson: The Restoration of the Confederates to Their Rights and Privileges, 1861-1898* (1953) 106, https://perma.cc/EC27-QQ5K.
[213] *Id.* at 107.
[214] Johnson, *supra* note __, at 557-578.
[215] Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 CONST. COMM. 87, 105 (2021).
[216] *Id.* at 100.
[217] Roger Parloff, *After the Cawthorn Ruling, Can Trump Be Saved From Section 3 of the 14th Amendment?,* LAWFARE (June 7, 2022, 1:32 PM), https://www.lawfareblog.com/after-cawthorn-ruling-can-trump-be-saved-section-3-14th-amendment.

2017 book suggesting that Chase had ulterior political motives in the *Davis* case.[218] Professor Mike Dorf wrote that "Chief Justice Chase cannot be trusted on this question."[219]

Judge Richardson of the Fourth Circuit likewise agreed with Magliocca. Richardson found that *Griffin* was "a reversal from [Chase's] opinion in *Davis*."[220] Richardson contended that both cases are "in question" due to their "contradictory holdings, just a few *years* apart."[221] (The cases were decided a few months apart.) Richardson wrote that these contradictory opinions "make it hard to trust Chase's interpretation."[222] Indeed, Judge Richardson even gave credence to the argument that Chase could have been "motivated by Confederate sympathies or some sort of prejudice, as he twisted § 3 one way to help arch-Confederate Jefferson Davis and then twisted it the other to ratify decisions by a former-Confederate judge."[223] Richardson rejected such insinuation as "probably not right," as Chase was a prominent abolitionist.[224] But Richardson settled on a "more likely . . . [that] Chase was against § 3 for pragmatic reasons."[225] Richardson remarked that "Chase had worked vigorously to keep § 3 out of the Fourteenth Amendment, fearing that it 'was too harsh on former Confederate officials,' making reunification harder.[226]

Richardson concluded that regardless of "Chief Justice Chase's reasons," he would "not take either *Davis* or *Griffin* for much useful background" about Section 3.[227] And Richardson explained that Chase's discussion did not provide "much evidence of broader contemporary understanding" in light of Chase's "shifting legal conclusions, Chase's pragmatic political concerns, and the obvious conflict*s* [*!*] of interest."[228] (What these multiple "obvious conflicts" are, Judge Richardson did not say.) Richardson wrote that the *Case of Jefferson Davis* and *Griffin's Case* "are too confused and confusing to help much."[229]

Finally, Judge Richardson wrote that Chase's opinions while riding circuit were not "binding on" the Fourth Circuit.[230] We are uncertain about this last point. We do not know how the U.S. Court of Appeals for the Fourth Circuit treats precedents from its predecessor courts, including the Circuit Court for the District of Virginia. Indeed, the Fourth Circuit favorably cited *Griffin's* case in a decision about five decades ago. The opinion in *Cale v. City of Covington* explained that "Chief Justice Chase sitting as a Circuit Justice . . . [in] *Griffin's Case* . . . held that the third section of the Fourteenth Amendment, concerning disqualifications to hold office, was not self-executing absent congressional action."[231] (We discussed Judge Widener's Fourth Circuit opinion in *Cale* above.) The Fourth Circuit, which is Judge Richardson's court, added, "[W]e

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[218] Baude & Paulsen, *supra* note __, at n.152 ("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" (quoting CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS 293-300 (2017))).

[219] Dorf, *supra* note __.

[220] Cawthorn v. Amalfi, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring in the judgment).

[221] *Id*. (emphasis added).

[222] *Id*.

[223] *Id*.

[224] *Id*. (citing *Magliocca* at 106) (noting that Chase was "was one of America's greatest antislavery lawyers, and his record refutes any inference of racial animus").

[225] *Id*.

[226] *Id*. (citing C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 AKRON L. REV. 1165, 1196 (2009)).

[227] *Id*.

[228] *Id*. (emphasis added).

[229] Cawthorn v. Amalfi, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring in the judgment).

[230] *Id*.

[231] 586 F.2d 311, 316 (4th Cir. 1978) (Widener, J.).

believe that the Congress and Supreme Court of the time were in agreement that affirmative relief under the [Fourteenth] [A]mendment should come from Congress." At a minimum, *Cale* would be circuit precedent for Judge Richardson to consider. In any event, there was no indication that Chase's decision was in any regard outside the mainstream of Fourth Circuit jurisprudence circa 1978.

These intellectual indictments from Maglioca, Parloff, Richardson, Baude, Paulsen, and others, directed against Chase's opinions are damning, but only if the defects the critics allege are real. We think the defect is in the purported errors. Rather, there is a far simpler way to reconcile *Case of Jefferson Davis* and *Griffin's Case*. In the former case, a criminal prosecution, the defendant could raise Section 3 as a defense in the absence of enforcement legislation. In the latter, Griffin was an applicant; he sought to use Section 3 as a sword, *offensively* as a *cause of action seeking affirmative relief*, but he could not do so without enforcement legislation.

Case of Jefferson Davis did not turn on whether Section 3 was self-executing as a sword, while *Griffin's Case* did. Chase acted consistently, and in accordance with well-established principles of federal litigation. With regard to the *Case of Jefferson Davis*, any discussion of Section 3 as "self-executing" or "non-self-executing" is better reconceptualized as the application of judicial review, which has traditionally allowed constitutional rights to be asserted as defenses absent enforcement legislation.

In short, the two holdings can be distinguished through traditional legal analysis. We find this doctrinal rationale at least as plausible as allegations that Chase acted based on political, pragmatic, and even personal biases. Rather, the Chief Justice of the United States faithfully decided the cases before him based on the particulars of those disputes. And both cases differed in substance and in their procedural postures.

To our knowledge, contemporary critics did not object to these rulings as contradictory. It is difficult to imagine any alleged inconsistency falling under the radar. Both opinions were announced at about the same time. Both opinions were announced by the same court and, subsequently, appeared in the same reporter. Both opinions were announced by the Chief Justice of the United States. Both opinions spoke to issues that were thought to be important by the public at the time they were issued (if not also for many years later). How is it that no one noticed the inconsistency until 2020—about 150 years after-the-fact? Such a *no-one-noticed-until-me* argument is conceivable, but such a position calls for some explanation. What is that explanation?

In *Griffin's Case*, Chase explained that his position was supported by "enlightened jurists."[232] Baude and Paulsen take exception to Chase's characterization because they believe Chase was *only* referring to the views he had expressed in the *Case of Jefferson Davis*.[233] That is, Chase was the enlightened jurist. Their criticism misses the mark. First, there is nothing improper, at all, with a jurist referring back to his own writings. Today, Supreme Court Justices will often cite their prior opinions, concurrences, and dissents, even from cases they had adjudicated while serving on lower federal courts. Second, the phrase "enlightened jurists" seems to have been a

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[232] Griffin's Case (*In re* Griffin), 11 F. Cas. 7, 26 (C.C.D. Va. 1869) ("It is true that in the judgment of some enlightened jurists, [Section 3's] legal effect was to remit all other punishment. And such certainly was its practical effect, for it led to the general amnesty of December 25, of the same year, and to the order discontinuing all prosecutions for crime, and proceedings for confiscation originating in the Rebellion. But this very effect shows distinctly its punitive character.").

[233] Baude & Paulsen, *supra* note __, at 44 ("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.").

reasonably common usage at the time.[234] And such usage continues to this day. Recently, a joint dissent by the United States Supreme Court praised "judges of wisdom."[235] Even if Chase was referring to himself, he may have used the phrase in a self-deprecating manner, and not to inflate his own regard. Third, unlike Baude and Paulsen, we are not at all sure that Chase, in *Griffin's Case* (1869), was referring to his own views, as he had apparently previously put forward in the *Case of Jefferson Davis* (1868). We write "apparently" because there is some good evidence that Chase did not make this statement on the record in the *Case of Jefferson Davis* (1868). Indeed, no account of that statement in the *Case of Jefferson Davis* would be made until the 1876 publication of General Johnson's book. Moreover, Chase referred to "enlightened *jurists*," plural. Chase was but one jurist. It seems unlikely that Chase was referring to a legal position that he, alone, had apparently made at the time (assuming he had made it all). Rather, Chase may have been alluding to the views of commentators on international law and treason.

Long before the American Civil War, jurists had written about punishing people for treason after a long conflict, civil war, or war of conquest, and whether such punishments were applicable. The substantive question here is not whether Chief Justice Chase, while on circuit, actively cited himself or any other source for his position as to the effect of Section 3 on treason cases. Rather, the question is whether Chase's views as to the effect of Section 3 comported with long-standing public international law norms governing the behavior of belligerents during and after a war.

For example, in response to disturbances along the United States-Upper Canada frontier during the Rebellions of 1837-1838 and the 1838 Patriot War, law officers of the crown furnished the (U.K.) Secretary of State for War with a legal opinion. The law officers wrote:

> Where an insurrection against a Government has become so formidable as to assume the aspect of an equally balanced civil war, the laws of war are to be observed between the Government and the insurgents; and [even] native-born subjects taken prisoners could not be tried [under the criminal law as] as traitors.[236]

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[234] *See e.g.*, Michoud v. Girod, 45 U.S. 503, 558–59 (1846) ("[I]n Louisiana, where the civil law exists in a modified form, and is still often the rule of decision by its enlightened jurists."); Parker v. Stiles, 18 F. Cas. 1163, 1172 (C.C.D. Ohio 1849) ("And it is now a principle, settled by the concurrent opinions of some of the most enlightened jurists of this country . . . ."); Goodyear Dental Vulcanite Co. v. Willis, 10 F. Cas. 754, 755 (C.C.E.D. Mich. 1874) (introducing a point with: "in the opinion of the most enlightened jurists"); Russel v. The Empire State, 21 F. Cas. 23, 25 (D. Mich. 1857) ("The most enlightened jurists of this country have refused to apply . . . . "); United States v. One Thousand Three Hundred & Sixty-Three Bags of Merch., 27 F. Cas. 340, 341 (D. Mass. 1863) ("These rules could not indeed bind his own judgment; but, having been practically adopted by enlightened jurists."); Latham v. United States, 1 Ct. Cl. 149, 154 (1864) ("Many more cases might be cited to show that the most eminent and enlightened jurists and the highest courts.").

[235] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2350 (2022) ("The Justices who wrote those words—O'Connor, Kennedy, and Souter—they were judges of wisdom." (emphasis added)).

[236] 2 INTERNATIONAL LAW OPINIONS: PEACE 146, 147–48 (Lord McNair, ed., Cambridge University Press 1956) (reproducing August 21, 1838 opinion from crown law officers, and nowhere naming the short-lived Republic of Canada in their opinion) (emphasis added), http://tinyurl.com/5h58ktbj, *reprinted in* WILLIAM FORSYTH, CASES AND OPINIONS ON CONSTITUTIONAL LAW 199, 202 (London, Stevens & Haynes 1869); [CHIEF JUSTICE] JOEL PARKER, THE DOMESTIC AND FOREIGN RELATIONS OF THE UNITED STATES 19 (Cambridge, Mass., Welch, Bigelow, and Co. 1862) ("[I]n proportion to the magnitude and gravity of the warfare [during an insurrection], it gradually loses, in the public mind, its distinctive character of an insurrection, being known as a civil war; and then it is hardly expedient to insist upon the enforcement of the extreme penalties of treason . . . ."); *see also* Calvin's Case (*Case of the Postnati*), 77 Eng. Rep. 377, 384 (1608) (Ellesmere LC, Coke CJ, and others) ("But if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treason . . . and therefore he shall be put to death by martial law."); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF CROWN 35 (1716) (explaining that when "aliens" invade the kingdom in a "hostile manner," they "cannot be punished as traitors, but shall be dealt with by martial law" under the laws of war); S.C. Biggs, *Treason and the Trial of William Joyce*, 7(1) U. TORONTO L.J. 162, 165 (1947) ("Since no

The law officers cite no authorities, perhaps, because none were needed. This jurisprudence developed prior to the ratification of Section 3.

Like the law officers of the crown, Chase put forward no citations in support of the view that Section 3 precludes a federal treason prosecution. There might be some reasons for that. Chase was writing in 1869; he was about 60 years old and only a few years from death. He was on circuit—more than one hundred miles from the capitol and his home. He had no computer. He had no law clerk. For all we know, he had no good law library. He was on his own–in the former rebel capital. Just perhaps, under these conditions, one might say Chase's work-product was, at least, broadly consistent with professional standards of the day? *Contra* Baude and Paulsen, we think all things considered, as a matter of domestic law applicable in federal courts, Chase *may* have been wrong in the *Case of Jefferson Davis* with regard to whether a treason prosecution was precluded by Section 3. But right or wrong, Chase's position was not "bonkers."

Finally, does not normal humanity counsel that we cut Chase just a little slack? Do we really need to say that "Chief Justice Chase was not shooting straight in his applications of Section Three."[237] As a general matter, we are doubtful courts and others would or should generally review a post-bellum case with such a jaundiced lens that questions the motivation of the authoring judge—at least we doubt that they should do this absent the clearest proofs of gross negligence or bad faith. The situation Chase faced had been and continued to evolve quickly. It was complex. And the legal and political stakes were high. Even if Davis's jury were selected from a venire of Virginia Unionists and men who sat the war out, without openly supporting the rebels, how could anyone have any confidence that it would convict? And there was also the possibility that former rebels or sympathetic family members of former rebels would be on the jury. Had Davis been convicted, it risked turning him into a martyr for the Lost Cause. Had he been acquitted, he would have made rebellion the law of the land. Even putting Davis before a jury risked giving him a national forum allowing him to refight the Civil War in a federal courtroom. All these possibilities posed dangers, and who could predict the consequences? Chase's vote worked a delay for Supreme Court review–was that really so wrong? And Supreme Court review would lead to national uniformity on this point of law, and it would have greater legitimacy with the wider public than a lower court decision by Underwood and Chase, acting separately or jointly.

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duty of allegiance can arise in the absence of its counterpart protection, an enemy alien (whether civilian or soldier) cannot commit the crime of treason."); Jennifer Scott, *Northern Ireland legacy bill approved by MPs - but legal fight could be coming*, Sky News (Sept. 6, 2023 15:32), https://tinyurl.com/yrycbpu8 (explaining that the bill, if enacted, "will stop new cases and inquests being opened into killings on both sides of the conflict"). By the time of the American Revolution, in the English-speaking world, the willingness of Parliamentarians and Royalists, during and after the English Civil Wars, and other seventeenth century court-affiliated and country-affiliated factions to try one another for treason or any other Civil War-related crime (other than for violations of the law of war) is remembered as a disgrace, and not as a confirmation of the rule of law. *See generally* Barbara Donagan, *Atrocity, War Crime, and Treason in the English Civil War*, 99(4) Amer. Hist. Rev. 1137, 1139 (Oct. 1994) ("In a civil war, laws of war came into conflict with laws of peace that punished taking arms against authority as treason. When fighting began in [the English Civil War in] 1642, the status of the conflict as war was not self-evident. The history of the English civil war is in part a history of why it was fought as a foreign war and of lapses from that mode."); *id*. at 1141 ("Despite difficulties, however, the principle had been made explicit: the laws of war rather than the laws of the civil state were applicable, and Englishmen confronted each other [not as prosecutor and traitor, but] as 'lawful enemies.'"); James R. Phifer, *Law, Politics, and Violence: The Treason Trials Act of 1696*, 12(3) Albion: A Quarterly Journal Concerned with British Studies 235, 238 (Autumn 1980) ("In the course of the century Royalist and Parliamentarian were in turn pulled down by charges of treason, and violence became an ordinary part of the political struggle."); *id*. at 243 ("Reflecting on the 1680s, spokesmen from the two parties urged those among their colleagues who still longed for a violent revenge to consider the virtues of moderation and to end the use of treason as a weapon.").

[237] Baude & Paulsen, *supra* note __, at 44.

IV. Section 3, Insurrection, Enemies, and Treason

The first three parts of this article explained why an applicant cannot wield Section 3 as a sword or cause of action seeking affirmative relief absent federal enforcement legislation. Part IV will address the offense element of Section 3, which imposes disqualification if a covered person "shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." The offense element has two prongs: (i) engaging in insurrection or rebellion against the United States, and (ii) giving aid or comfort to the enemies thereof. These elements are textually distinct, and they reflect longstanding aspects of domestic and international law. One can only be an enemy during a war. But not all insurrections are war. One can engage in insurrection without aiding an enemy. One who engages in insurrection without aiding an enemy is an offender, a criminal, or a felon. But absent a war, he is not an enemy. And one can aid an enemy without engaging in insurrection or rebellion. Yet, Baude and Paulsen conflate these two elements. They effectively rewrite the offense element such that a Section 3-covered person is one who shall have engaged in or have given aid or comfort to insurrection or rebellion or to the enemies of the United States. That is not what the text says. And that is not what long-standing principles of domestic and international law support.

Moreover, Section 3's "engage" prong does not extend to wrongs and crimes that are inchoate or indirect. However, the "aid or comfort" prong does seem to extend beyond direct crimes and direct wrongdoing. It includes "aid[ing] and comfort[ing]" an enemy. This prong might very well extend to inchoate and indirect wrongs, akin to accessory liability. Here, Baude and Paulsen's atextual reading allows them to transform a direct substantive offense (i.e., engaging in insurrection) into an indirect or inchoate offense (i.e., aiding or comforting enemies). But the Framers of Section 3 did not make this choice. Nor does the "engage" prong extend to inaction—for example, failing to take action with regard to an insurrection or rebellion.

Worse still, Baude and Paulsen never actually define what an enemy is. Their conception of this term is limited to the Civil War. We acknowledge that many confederates would have *both* engaged in insurrection and given aid to an enemy. This dual liability was possible because the Civil War was an insurrection, and an undeclared, but de facto war. Baude and Paulsen make no effort to define "enemy" outside the context of the Civil War. They see no need to, because their atextual reading only requires giving aid and comfort to an insurrection. But a cursory study of how enemies are traditionally defined shows that the word "enemy" is not coextensive or overlapping with insurrection or rebellion. Baude and Paulsen rely on an atextual reading that conflates the two prongs. They have some duty to explain what exactly they think an "enemy" is. Instead of defining what is an enemy, Baude and Paulsen tell us that enemies and insurrectionists are the same or overlapping categories. But that conclusion is not supported, and it certainly is not a reading based on the plain text. Baude and Paulsen's rationale for grafting Section 3's "aid or comfort" language onto "rebellion and insurrection" does not succeed. Finally, Baude and Paulsen suggest that secession movements categorically amount to Section 3 insurrections. That is not accurate. Peaceful advocates for Puerto Rico's independence, for example, should have no fear of treason charges and no fear of Section 3 disqualification.

A. The two prongs of Section 3's offense element

Section 3 defines the conduct that may trigger disqualification. In our prior publications we did not offer an interpretation of Section 3's offense element.[238] Here we put forward a view as to how the offense element should be understood.

Section 3 imposes a disqualification if a covered person "shall have engaged in *insurrection or rebellion* against the same, or given aid or comfort to the *enemies* thereof." (italics and underscores added). The text includes two prongs: (i) engaged *in insurrection or rebellion against the United States*, and (ii) given aid or comfort *to the enemies thereof*. Under a plain reading of the text, these two acts are distinct. They are separated by a comma and the disjunctive *or*. A covered person can be disqualified for engaging in insurrection or rebellion, without ever having given aid or comfort to enemies. And a covered person can be disqualified for giving aid or comfort to enemies, without ever having engaged in insurrection or rebellion. This separation suggests that the meaning of "insurrection or rebellion" is distinct from the meaning of "enemies." Likewise, the meaning of "engaged" is distinct from the meaning of "given aid or comfort." Section 3 attaches to two different branches of conduct.

We do not think these basic textualist readings should be controversial. Yet, Baude and Paulsen conflate the two prongs of the offense element. In their view, a covered person may be disqualified if he gives aid or comfort to insurrection or rebellion. They state that Section 3 liability is premised on a person's having "engage[d] in or giv[en] aid and comfort to an insurrection."[239] They repeat this conflation throughout their Article.[240] Baude and Paulsen's reading effectively rewrites Section 3 in this fashion: a Section 3-covered person is one who shall have engaged in or given aid or comfort to insurrection or rebellion or to the enemies of the United States. In other words, Baude and Paulsen take the position that the "aid or comfort" language, which applies to "enemies," also extends to "insurrection or rebellion" or, perhaps better, the "aid or comfort" language extends to those who commit "insurrection or rebellion." This category would include insurrectionists. As a result, a person who never gave *aid and comfort* to an *enemy*, and never *engaged* in *insurrection or rebellion*, could still be disqualified if he gave *aid and comfort* to an *insurrection or rebellion*. If Section 3's text means what Baude and Paulsen think it means, then it would have been very simple for its drafters to have written it the way Baude and Paulsen understand it. But they did not.

Indeed, there is some good reason to reject this reading. The Insurrection Act of 1862, which President Lincoln signed into law, made it a crime to "give[] aid or comfort" to "any

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[238] Blackman & Tillman, NYUJLL, *supra* note __, at 3 ("This article does not focus on the offense element [2] and the amnesty element [4].").
[239] Baude & Paulsen, *supra* note __, at 5.
[240] *Id.* at 67 (asking: "Likewise, what is the relationship between the disqualification for having given 'aid or comfort' to insurrectionists, rebels, or other enemies of the United States and the First Amendment?" (emphasis added)); *see also id.* at 74 ("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 . . . .")

rebellion or insurrection."[241] The modern version of that statute uses similar language.[242] The Framers of the Fourteenth Amendment could have used the Insurrection Act as a model. The Framers of the Fourteenth Amendment could have drafted the offense-element of Section 3 to cover giving aid or comfort to an insurrection or rebellion. But they did not. They drafted the provision to cover giving aid or comfort to an enemy.

Baude and Paulsen offer two primary lines of reasoning supporting their significant reconstruction of the text. First, they argue that "engage" is a "capacious" term, that is, one which incorporates inchoate and indirect wrongs and crimes.[243] Baude and Pauslen state that the meaning of "engage" extends to lesser wrongs or crimes involving "assistance, or encouragement . . . in the form of either words or deeds."[244] Likewise, Baude and Paulsen write that the "engage" prong in Section 3 "resembles" common law "accomplice liability," as well as "conspiracies, attempts, incitements, and advocacy."[245] If Baude and Paulsen are correct about this "resemblance," that too would be some reason to justify mapping "aid or comfort" back onto "rebellion or insurrection."

Second, Baude and Paulsen claim that just as "rebellion" and "insurrection" are largely synonymous or overlapping terms, "enemies" is a similar term or has largely overlapping scope. For example, they write that "Given the history and context of Section Three 'enemies' seems to include the domestic rebels and insurrectionists just described earlier in the sentence."[246] Likewise, Baude and Paulsen contend that "giving 'aid or comfort' to enemies will be similar to the kind of conduct that counts as having 'engaged in' insurrection or rebellion."[247] If correct, this analogy would also be some reason to justify mapping "aid or comfort" back onto "rebellion or insurrection."

Both of Baude and Paulsen's arguments are problematic. We will address both arguments in turn. We will also explain why failing to take action to stop an insurrection does not amount to engaging in insurrection.

B. Section 3's "engage" prong does not extend to wrongs and crimes that are inchoate or indirect

We think Baude and Paulsen's reading is difficult to justify as a purely textualist matter. The two prongs are distinct. But even more problematic, this atextualist reading radically expands

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[241] The Act of July 17, 1862 law can be found at ch. 195, § 2, 37 Stat. 590 ("That if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid and comfort thereto, or shall engage in, or give and comfort, to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court.").

[242] 28 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."). We trace the history of this statute in Blackman & Tillman, *supra* U. Ill. L Rev. Online, note __, at __.

[243] See, e.g., Baude & Paulsen, *supra* note __, at 63 (characterizing all the primary terms under discussion as "capacious").

[244] *Id*. at 67.

[245] *Id*. at 67 n.31, 53.

[246] Baude & Paulsen, *supra* note __, at 68.

[247] Baude & Paulsen, *supra* note __, at 67; *see also id*. at 68 ("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"); *id*. at 67 (discussing "obvious overlap" among the primary terms under discussion).

the scope of Section 3's "insurrection and rebellion" prong to include wrongs and crimes that are inchoate or indirect. The text of Section 3's offense element resembles a traditional criminal offense. In general, insurrection and rebellion are thought of as traditional crimes, with traditional defenses, as defined by congressional statutes and pre-statutory common law principles. This crime is defined by the Insurrection Act of 1862, which remains largely unchanged to this day. Traditional crimes have elements, defenses, and customarily, one determines liability for a crime through the criminal process with all its constitutional protections, procedures, substantive and procedural.

In our view, "engag[ing]" in insurrection or rebellion might mean committing the actus reus of those crimes, and, perhaps, establishing liability through the criminal law. In other words, Section 3 imposes punishment or liability for *actually* committing insurrection or rebellion. The word "engaged" does not seem to include inchoate offenses, such as attempted insurrection or rebellion, conspiracy to commit insurrection or rebellion, or accessory liability (before- or after-the-fact) in relation to insurrection or rebellion. The "engage" prong addresses direct wrongs, not indirect or inchoate wrongs.

To draw a contrast, the Insurrection Act of 1862, discussed above, does prohibit inchoate crimes with regard to insurrection. The statute made it a crime to "incite, set on foot, assist, or engage in any rebellion or insurrection."[248] It was also a crime to "engage in, or give and comfort, to any such existing rebellion or insurrection." In the 1862 Act, the Framers of Section 3 had a ready model that would prohibit inchoate and indirect crimes based on insurrection. But they did not use words like "incite, set on foot, [or] assist" or "give and comfort" to insurrection. In the first prong, the Framers only used the verb "engage." The contrast between the Insurrection Act and the offense-element of Section is some evidence against Baude and Paulsen's analysis.

By contrast, in Section 3's offense-element, the "aid or comfort" prong does seem to extend beyond direct crimes. It includes "aid[ing] or comfort[ing]" the commissioning of a crime or wrong. This prong might very well extend to inchoate and indirect crimes, as well as to accessory liability. This prong might even extend to non-criminal activity entirely, as long as that activity gave "aid or comfort" to "enemies." (We will address below who the "enemies" may be.)

Baude and Paulsen swept together the first and second prongs. Doing so forced inchoate and indirect crimes into the "engage" prong. This move allowed them to conclude that Section 3 included indirect participation with an insurrection. But we should hesitate before transforming a direct crime, like "engaging in insurrection" to an inchoate crime or to indirect participation in an insurrection. This caution is especially well-placed because the second prong reflects liability premised on well-understood inchoate and indirect activity—indeed, the Treason Clause defines, in part, the outer limits or scope of the offense of treason, by using "aid and comfort" and "enemies" language. This point was made recently by former Judge Michael McConnell, who is also Baude and Paulsen's constitutional law casebook co-author. McConnell stated, "Section 3

[248] The Act of July 17, 1862 law can be found at ch. 195, § 2, 37 Stat. 590 ("That if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid and comfort thereto, or shall engage in, or give and comfort, to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court.").

uses the verb 'engage in,' which connotes active involvement and not mere support or assistance."[249]

Further support for our reading can be found in the Second Confiscation Act of 1862.[250] Just as Baude and Paulsen discuss the Insurrection Act of 1862, Baude and Paulsen also spend several pages discussing the Confiscation Act of 1862.[251] The Second Confiscation Act provides:

> [I]f any person shall hereafter *incite, set on foot, assist, or engage* in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give *aid or comfort* thereto, or shall *engage in, or give aid and comfort* to, any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court.[252]

We think this statutory language undermines Baude and Paulsen's reasoning. If it were clear that "engage" was capacious and that it was understood to include "aid or comfort," then it was hardly necessary to include such both "engage"- and "aid and comfort"-language in the 1862 statute, and it was hardly necessary to include such language immediately alongside one another. Likewise, if "engage" included inchoate and indirect participation in insurrection and rebellion, then why does this provision separately list "incite, set on foot, [and] assist"? More importantly, Baude and Paulsen assert that this statute was one of several contemporaneous working models for drafting Section 3 in the Fourteenth Amendment. But the drafters of Section 3 substantially departed from the 1862 statutory model, and they used relatively textually limited and restricted language. We submit that a reasonable person circa 1866–1868, when the Fourteenth Amendment was proposed and ratified, would have understood the scope of Section 3's language to have been limited compared to this statute's broad language above.

Insurrection and rebellion are crimes. Everyone knew this in 1868, and everyone knows this today. Where a constitutional provision makes a crime a condition of disqualification, we think it quite reasonable to suggest that the insurrection or rebellion prong was understood as requiring a full criminal trial, prior to or part of any proposed Section 3 proceeding, where the "defendant" had a right to all the standard criminal law defenses and all the customary constitutional safeguards, protections, and procedures. The first prong was hard to establish, unless it was preceded by a criminal conviction establishing guilt. We think it highly unlikely that the original public meaning of Section 3 permitted administrative officials—the predecessors of modern-day election boards—to make such determinations in civil proceedings.

By contrast, the "enemies" prong was not premised on an established crime. (For example, to establish treason, one must do more than give aid and comfort to enemies—one must also *adhere* to the enemies.) Who gave "aid or comfort" to the (purported) confederacy was no secret. Most of its supporters were not ashamed for having supported and having fought for the (purported) confederacy, and they did not deny or hide their participation. Reliable public records, including

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[249] Eugene Volokh, *Prof. Michael McConnell, Responding About the Fourteenth Amendment, "Insurrection," and Trump*, VOLOKH CONSPIRACY (Aug. 12, 2023), https://reason.com/volokh/2023/08/12/prof-michael-mcconnell-responding-about-the-fourteenth-amendment-insurrection-and-trump/.

[250] 12 Stat. 589 (1862).

[251] Baude & Paulsen, *supra* note __, at 81-84.

[252] 12 Stat. 589 (1862) (emphasis added).

(purported) confederate records, recorded their deeds. Enforcing the "enemies" prong was relatively easy. A "defendant" had no entitlement to standard criminal law defenses and customary constitutional safeguards, protections, and procedures. It might all be determined administratively or via judicial notice in a civil proceeding (assuming notice and an opportunity to be heard before a neutral adjudicator). Therefore, it could be enforced outside the traditional confines of substantive and procedural criminal law.

We will turn to the enemies prong below. As a practical matter, it would be much simpler to establish Section 3 liability under the "gave aid or comfort to enemies" prong, than under the "engaged in insurrection" prong. But first, we consider a related question: does one engage in insurrection by failing to take steps to stop an insurrection?

C. Section 3's "engage" prong does not extend to inaction with regard to an insurrection

In our view, the "engage" prong is limited to direct substantive offenses, and it does not extend to wrongs or crimes that are inchoate or indirect. There is a corollary to this position: the "engage" prong does not extend to *inaction* with regard to an insurrection. The language of Section 3 uses active verbs. It speaks to having "engaged" in wrongdoing. In other words, failing to take actions to address an insurrection does not, by itself, amount to engaging in insurrection. As a general matter, failing to act does not support the imposition of liability. Contrary to the series finale of *Seinfeld*, generally, the American legal tradition does not support so-called *Good Samaritan* laws. However, liability may be imposed if a person has some positive duty of care.

Baude and Paulsen recognize this issue. They argue that the Take Care Clause of the Constitution imposes such a duty to stop an alleged insurrection. Specifically, they charge Trump with "deliberate inaction against the January 6 attack."[253] Baude and Paulsen write that Trump "took no action to urge" his supporters to leave the Capitol, "despite having a constitutional duty to take care that the laws be faithfully executed."[254] Baude and Paulsen's position amounts to an intuition: On January 6, 2021, a proper President would not have acted the way Trump acted, and from that they conjure a positive duty that he should have acted differently, and his having violated that newly-minted duty amounts to a Section 3 violation for which he should be disqualified.

There are many problems with this intuition. For starters, Baude and Paulsen offer no accounting of what exact duty the Take Care Clause imposes. They point to no precedents where Section 3 and the Take Care Clause have been used in the manner they suggest. They point to no scholarship. They point to no debates—in Congress or in the state legislatures or among the public, suggesting that the text of Section 3 was or should have been understood in 1868 along the lines they suggest. Indeed, the phrase "Take Care" appears only once in the article. (Once again, Baude and Paulsen make a blanket statement about a complex provision of constitutional law, with no further development.[255]) This is a gap in their argument. Or perhaps they think that Section 3 actually modified the Take Care Clause, and imposed an affirmative duty on the President to stop an insurrection? Who knows? Without a theory of constitutional change and the scope of Section

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[253] Baude & Paulsen, *supra* note __, at 112.
[254] Baude & Paulsen, *supra* note __, at 120.
[255] Blackman has developed the relationship between the Take Care Clause and failure to faithfully execute the laws with regard to the enforcement of federal immigration law. *See* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 TEX. REV. OF L. & POLITICS 215 (2015).

3 retroactivity, just about anything might be possible under Section 3.[256] Perhaps, this issue will be developed in some future paper.

Even assuming their reading of the Take Care Clause has some support, Baude and Paulsen do not even begin to explain what other species of presidential inaction would run afoul of the Take Care Clause. Not everything is about Trump. There is a much more relevant historical inquiry: the inaction of President James Buchanan prior to Lincoln's inauguration very well may have triggered disqualification under Baude and Paulsen's theory. And Buchanan's inaction would have been on the minds of those who framed and ratified Section 3.

President Buchanan is usually rated the worst or among the very worst of our former presidents.[257] That view is not an entirely modern one. He was not well liked by a large segment of Unionist sentiment during the Civil War. What did President Buchanan do wrong? One thing: during secession, he did next to nothing. Buchanan was unwilling to use force—particularly the U.S. Army and U.S. Navy—to enforce federal law in States which had (purportedly) seceded; to protect loyal federal judges and other loyal federal officers in carrying out their lawful duties in States which had (purportedly) seceded; to protect federal enclaves and property in States which had (purportedly) seceded; and, to stop the formation of the (purported) confederate government in violation of United States law.

Would Baude and Paulsen argue that Buchanan "took no action to" stop an insurrection "despite having a constitutional duty to take care that the laws be faithfully executed"? Did Buchanan violate his oath of office? Could Buchanan, during his term, have been impeached and disqualified for failing to take care that the laws were being faithfully executed? Could Buchanan have been impeached and disqualified after he left office for the same offenses?[258] Would Buchanan, a former Senator, have been disqualified when Section 3 was ratified? Any theory of Section 3 premised on inaction must at least address James Buchanan. Yet, Baude and Paulsen only mention Buchanan once in an unrelated context.

History suggests that the answers to these questions, and more, are *no*. There was no serious move to impeach him while he was president. And there was no serious move to impeach Buchanan after Lincoln succeeded to the presidency. (Albeit, one reason for the latter may have been because the issue of late impeachment always would complicate the legal analysis.) With the departure of all southern Democrats from the House and all southern Democrats from the Senate, Senator Andrew Johnson excepted, impeachment by the House should have been a snap, even if securing a Senate conviction would not have been entirely certain. One wonders: Why was Buchanan not impeached for failing to enforce the law, or for failing to defend the country, etc, etc?

We submit there is a reason: What might look like *inaction* from outside the White House could look like a deliberation from within the White House, at each step of the process. Buchanan may have had hope that there would be a change of political opinion in the seceded states. (Alas, that hope was forlorn.) Buchanan may have feared that moves by the U.S. armed forces to compel compliance with federal law would be perceived as an invasion, and that would consequently push undecided border states towards secession. (With hindsight, we know this consequence happened under Lincoln.) Buchanan may have determined that a civil war would be costly in treasure and

[256] *See* II.B.5.d (discussing Baude and Paulsen's lack of a constitutional theory with regard to retroactivity).

[257] Hailey Philbin, *The unforgettably forgettable president: A look at Mr. Buchanan*, NATIONAL MUSEUM OF AMERICAN HISTORY (Mar. 4, 2019), https://americanhistory.si.edu/blog/buchanan.

[258] Baude and Paulsen both recently supported the position that late impeachment was constitutional. *See supra* note __ (discussing late impeachment).

lives. (According to some modern estimates, the war resulted in over 600,000 Union dead and wounded, and in over 400,000 confederate dead and wounded.) Buchanan may have worried that a Union victory was not possible or, at least, was not assured. (Especially in the early days, victory for the Union was certainly not assured.) Buchanan may have determined that if disunion came, if it came amicably, then in the future, partial or total, reunification remained a real possibility. (Ex ante, this position would not have been unreasonable.)

We do not suggest that Buchanan was right and that Lincoln was wrong. But one reason Americans, today, think Lincoln was right is because by 1865, he and the armed might of the United States prevailed. But in 1861, after Fort Sumter—and especially prior to Gettysburg, and prior to Sherman's taking Atlanta, and prior to the election of 1864—it was hardly clear that the Union would prevail.

Buchanan's efforts, such as they were, were grounded in a moral vision and policy choice. It may be a policy choice that you disagree with. But that sort of choice is part of normal democratic politics—albeit, normal politics, including wartime politics, where the central issue on the table is the continued existence of the nation itself. That is what elections are meant to and must decide, because if it is not decided by elections, then it can only be resolved by accident and violence.[259] Buchanan's inaction violated no statute or any other positive law. Buchanan did not take a bribe or act for self-interested ends.[260] Here the President had lawful discretion if and when to use force. He acted in a disinterested manner (i.e., akin to complying with a fiduciary duty of loyalty); he was fully informed (i.e., akin to complying with a fiduciary duty of care). Buchanan did not go rebel, like Jefferson Davis. He did not give speeches in support of the confederacy, like Clement Vallandigham. Buchanan's actions were transparent—albeit, objectionable to many. A retrospective inquest on a disputed policy matter cannot convert inactivity into a constitutional "high crime and misdemeanor" and cannot amount to "engaging in insurrection or rebellion."

Indeed, all law enforcement officers face Buchanan's choice. In every law enforcement action, there is always a question of if, and when, and how much lawful force should be used, and how long (if at all) enforcement can and should be delayed, and once started, how long the enforcement policy should continue. Those questions are always a judgment call, where not guided by statute or other positive law or court orders. For these reasons, we have no history of impeaching officers based upon a retrospective investigation and trial which reaches a different conclusion than that which had been reached by the original officeholder as to what precisely was best policy *ab initio*.

One reason such trials and investigations are to be feared is that they will be conducted by subsequently elected officials seeking to vindicate different values and goals. Likewise, Section 3 has not been used in this manner: disqualifying office-holders based on a prior failure to act.

At least with regard to Trump, we feel a sense of déjà vu. The first Trump impeachment was premised on charges of "abuse of office." At the time, we warned about the fundamental danger of this charge.[261] It was a vague standard that converted normal democratic disagreement, where elected officials must make decisions in real-time based upon imperfect information, into investigations and trials, and then seeks to disqualify political opponents. We are seeing that effort

[259] *See Federalist No. 1* (Hamilton).
[260] Josh Blackman & Seth Barrett Tillman, *Defining a Theory of 'Bribery' for Impeachment*, LAWFARE (Dec. 6, 2019), https://www.lawfaremedia.org/article/defining-theory-bribery-impeachment.
[261] Josh Blackman, *Trump Acts Like a Politician. That's Not an Impeachable Offense*, THE NEW YORK TIMES (Jan. 23, 2020), https://www.nytimes.com/2020/01/23/opinion/trump-impeachment-defense.html [https://perma.cc/D5GG-RLA4].

again, but here, the controversy will not be limited to Congress. Rather, executive bodies and the courts have been and will be co-opted into the process.

D. Enemies are not coextensive with insurrectionists or rebels

Baude and Paulsen suggest that the word "enemies" is a similar term or has a largely overlapping scope to "insurrection or rebellion." Therefore, they contend, a covered person may be disqualified under Section 3 by giving aid and comfort to an insurrection. To their credit, Baude and Paulsen develop at some length the meaning of "rebellion" and "insurrection." They illustrate the views of different authorities, and explain how the terms may be coextensive or overlapping. We do not contest that research here. Yet, Baude and Paulsen have surprisingly little to say about how to identify "enemies." Instead, they wrote:

> Finally, aid or comfort to whom? "[T]he enemies thereof." We believe that "enemies" as employed in Section Three, embraces 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, and it seems clear from the political context of Section Three, enacted in the wake of a domestic civil war, that domestic enemies are enemies. It is almost unthinkable that Confederate rebels would not have been thought "enemies" in the sense employed by the text. Given the history and context of Section Three "enemies" seems to include the domestic rebels and insurrectionists just described earlier in the sentence.

Here Baude and Paulsen state a conclusion: "enemies" would include Civil War rebels and insurrectionists, but they do not actually identify who (or what) is or is not an "enemy," in the abstract, apart from the Civil War. Their conclusion is likely correct in the context of the Civil War. Although we suggest they are correct, in regard to many potential Section 3-defendants from that era, it is *not* because "enemy" and "insurrectionist" are *always* co-extensive or overlapping categories. Rather, Section 3-covered persons from the Civil War era faced *dual* liability under each Section 3 prong in connection with the particular facts and circumstances of the Civil War: they *both* (i) engaged in insurrection and (ii) gave aid or comfort to enemies.

A key difficulty with Baude and Paulsen's position is that they do not offer any developed position as to what defines an enemy. (In much the same fashion, Baude and Paulsen insist the President is an "Officer of the United States" without ever identifying what an "Officer of the United States" is.) Baude and Paulsen's failure to define the term "enemy," outside the context of Section 3-covered confederates, is an omission, and we think a substantial one. They insist that Section 3 is a clause for all seasons, and it is not limited to the Civil War. But their analysis is so limited. This omission is even more significant because there is law and scholarship expounding on the meaning of *enemy*. And that jurisprudence predates the Civil War and was developed during the Civil War.

We make four points. First, we settle some terminology. An "enemy" is a nation that the United States is at war with. Enemies can only exist during a war. Not all insurrections or rebellions amount to war. Therefore, in the absence of a war, there can be no enemies. Likewise, treason can only be committed in relation to a war.

Second, these principles were reflected by the Union's prosecution of the Civil War in the courts and on the battlefield. Though the Civil War was not a declared war, it was still a de facto war. Most confederates who supported the (purported) de facto confederate government were insurrectionists *and* gave aid or comfort to an enemy. As a result, many Civil War-era Section 3-covered persons would have been subject to disqualification under *both* prongs of Section 3's offense element.

Third, this background demonstrates that the word "enemy" is not coextensive or overlapping with insurrection or rebellion. Baude and Paulsen's rationale for grafting Section 3's "aid or comfort" language onto "rebellion and insurrection" must fail.

Fourth, Baude and Paulsen's are laser-focused on the Civil War and January 6, but disregard other historical and political events. (In much the same fashion, they are laser-focused on whether the President is an "officer of the United States," but offer no attempt to define that term in the abstract.) Such myopia disregards a basic premise of self-governance: secession movements may be lawful, and not traitorous. Today, many Puerto Ricans seek independence from the United States, without fear of treason charges. A century ago, Filipinos likewise sought independence from the United States. Around the world, secession movements in the United Kingdom (i.e., Brexit), Scotland (i.e., from the United Kingdom), and other jurisdictions and would-be jurisdictions are supported by loyal citizens. This longstanding history further demonstrates why Baude and Paulsen misunderstand the relationship between secession and Section 3.

1. Defining the terminology: enemy, war, and treason

Here, we will define three primary terms, and related topics. First, we define an "enemy." An "enemy" is an "enemy nation" and, sometimes, an "enemy national." Second, we demonstrate that enemies can only exist during a war. Third, we explain that treason can only be committed in relation to a war.

a. Who or what is an enemy?

An "enemy," on some occasions is used to refer to an "enemy nation." An enemy nation is a nation that your country is at war with. An enemy nation could be a nation de jure, as in an internationally recognized country, or a nation de facto, as in a nation lacking the indicia of international recognition. Whatever sort of nation it is–it is only an enemy if it is at war with your own.

In regard to individuals, who is an "enemy"? It is not the case that any crime, even a felony, makes one an "enemy" of the United States. Customarily, a person who commits a crime is termed a wrongdoer, offender, or, depending on the character of the crime, a felon. We submit an "enemy" is something substantially different.

The Constitution of 1788 includes the word "enemies" in the Treason Clause: "Treason against the United States, shall consist only in levying War against them, or in adhering to their *Enemies*, giving them Aid and Comfort."[262] "Enemy," as used in the Treason Clause was, and remains, a term from international law. There are two senses of the term *enemies* as applied to individuals. First, a national of an enemy nation is an *enemy national.* Second, a person living in

[262] U.S. CONST. art. III, § 3, cl. 1 (emphasis added).

territory controlled by an enemy nation is also sometimes characterized, considered, or treated as an enemy, even if his loyalties do not run to the de facto government.[263]

In the *Prize Cases*, the Supreme Court used "enemy" in both senses: an enemy is an "enemy nation" and also as an "enemy national." The Court construed as an enemy nation the (purported) confederacy, which was the de facto government in a de facto war with the United States. We carefully describe that (purported) government as "de facto." The (purported) confederate government controlled territory and asserted its independence. However, the United States did not recognize the (purported) Confederate States of America, and the United States sought to ensure that other nations did not do so either. The Court also construed as enemies the nationals of that enemy nation who were loyal to that (purported) government—that is, they gave "aid and comfort" to that nation. The Court also construed as enemies, for some purposes, those who were living in the territory that the enemy nation controlled.

Section 3 was drafted, passed by Congress, and ratified, several years after the *Prize Cases* was decided. Section 3 did *not* adopt both senses of "enemies."[264] Merely being a national living in an enemy nation, for example, would not trigger disqualification. We think residents of West Virginia (before it was organized as a loyal government) during the Civil War could fit this bill.[265] And what was true in West Virginia, was equally true for many parts of all or nearly all of the States under control of the (purported) confederacy. It was the case that some residents in States that (purportedly) seceded in fact remained loyal to the Union, and they did not grant aid and comfort to the (purported) confederate government. Rather, to trigger disqualification, it is necessary to give "aid or comfort" to enemies. Some affirmative act is required. *Section 3 liability is only imposed for giving aid and comfort to enemies—no Section 3 liability is imposed for being an "enemy" or an "enemy" nation*. This analysis establishes that, in Section 3, "enemies" refers exclusively to enemy nations, and not enemy nationals. Enemy nationals only face Section 3 liability if they give "aid or comfort" to an enemy.

The *Prizes Cases* also provides some guidance on how to define the word enemy.[266] Justice Grier wrote for the Court, "But in defining the meaning of the term 'enemies' property,' we will be led into error if we refer to Fleta and Lord Coke for their definition of the word 'enemy.'"[267] Grier continued that "'enemies' property'" "is a technical phrase peculiar to prize courts, and depends upon principles of public policy, as distinguished from the common law."[268] Grier's language is opaque—to twenty-first century American lawyers, even to those immersed in English history and English common law. And, for reasons, we explain, perhaps, especially to them. But in 1863, it would have been otherwise. The background to understanding Grier was that King James I, through his Attorneys-General for England and Wales, reviewed the *Earl of Oxford's Case* (1615).[269] In effect, the King was deciding which of two competing judgments, and, by

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[263] *See generally* Ford v. Surget, 97 U.S. (7 Otto) 594, 604 (1878); *see also* CONGRESSIONAL RESEARCH SERVICE REPORT, DETENTION OF U.S. PERSONS AS ENEMY BELLIGERENTS (Jan. 23, 2014), https://crsreports.congress.gov/product/pdf/R/R42337.

[264] 1 [CHIEF JUSTICE] MATTHEW HALE, THE HISTORY OF PLEAS OF THE CROWN 159 (1736) (affirming that only foreigners "come properly under the name of enemies").

[265] *See* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291 (2002).

[266] The Prize Cases, 67 U.S. 635 (1863).

[267] 67 U.S. at 674.

[268] 67 U.S. at 674.

[269] King's Order and Decree, 21 Eng. Rep. 61 (1616) , *affirming Earl of Oxford's Case*, 21 Eng. Rep. 485 (Eng. Ct. Ch. 1615) (Ellesmere LC), http://www.commonlii.org/uk/cases/EngR/1615/2.pdf. As is well known, the King used "take care"-language in his decree. *See generally* Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66) and the Supreme Court of Judicature Act 1875 (38 & 39 Vict. c. 77),

implication, which of two competing legal systems, to uphold. The choice was between Coke's judgment, as Chief Justice of the King's Bench, or Lord Ellesmere's judgment, as Lord Chancellor. Coke was the expositor of the common law and the representative of the common law courts, and Ellesmere was the expositor of equitable principles and the Court of Chancery. The *Earl of Oxford's Case* established that, in the event of conflict between the two systems, equity prevails over the common law. Like Coke, *Fleta* or Fleta's treatise is another (much earlier) exposition of the common law of England. In rejecting *Fleta* and Coke, and the common law, Grier was, instead, looking to equity, natural law, and public international law as the proper sources to understand the Constitution's use of "enemies." As a matter of original public meaning, we suspect Grier was correct. To be sure, we do not know.

Baude and Paulsen cite Lord Coke in their discussion of what it means to give "aid or comfort" to "enemies."[270] In the *Prize Cases*, Justice Grier expressly disagrees with Coke's understanding. Baude and Paulsen tell us that the *Prize Cases* was core to the intellectual background that informed Section 3. The *Prize Cases* expressly rejects using Coke as a source. It seems inconsistent, then, for Baude and Paulsen to rely on Coke.

b. Enemies can only exist during an actual war, including de facto war, declared war or undeclared war

War—what is good for?[271] With regard to enemy status, absolutely everything. An enemy can only exist during a war. Thus, to define *enemy*, we must examine the term *war*. War might include a publicly declared war or an undeclared war. And just as not every crime is a felony, and not every felony is an insurrection or rebellion, not every insurrection or rebellion is a war. The *sine qua non* of liability based on enemy status was the existence of actual war. This principle was recognized in the seriatim opinions in *Bas v. Tingy*,[272] which "comes as close as the Supreme Court has ever come to providing a definition for the term 'war.'"[273]

The Prize Cases observed that neutrals "have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy." Actual war was sufficient to establish enemy-based/war-based liability. That rule covered the Civil

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[270] Baude & Paulsen, *supra* note __ at 71.

[271] War by Edwin Starr, Genius, https://genius.com/Edwin-starr-war-lyrics.

[272] Bas v. Tingy, 4 U.S. 37, 39 (1800) (Moore, J.) ("But, if words are the representatives of ideas, let me ask, by what other word the idea of the relative situation of America and France could be communicated, than by that of hostility, or war? And how can the characters of the parties engaged in hostility or war, be otherwise described than by the denomination of enemies?"); *id*. at 41 (Washington, J.) ("In support of this position, it has been observed, that in no law prior to March 1799, is France styled our enemy, nor are we said to be at war. This is true; but neither of these things were necessary to be done: because as to France, she was sufficiently described by the title of the French republic; and as to America, the degree of hostility meant to be carried on, was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by congress, might have constituted a perfect state of war, which was not intended by the government."); *id*. at 44 (Chase, J.) ("As there may be a public general war, and a public qualified war; so there may, upon correspondent principles, be a general enemy, and a partial enemy. The designation of 'enemy' extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare. If congress had chosen to declare a general war, France would have been a general enemy; having chosen to wage a partial war, France was, at the time of the capture, only a partial enemy; but still she was an enemy."). *See generally* 1 [CHIEF JUSTICE] MATTHEW HALE, THE HISTORY OF PLEAS OF THE CROWN 164 (1736) ("[S]o that an enemy extends farther than a king or state in enmity, namely an alien coming into *England* in hostility."); *id.* at 164 (1736) (explaining that in order to establish adherence to an enemy there must be a war).

[273] *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 198 (Princeton University Press 2020).

War, which was a de facto war among combatants that did not recognize one another. Such a war was sufficient to establish liability based on enemy status. In the *Prize Cases*, the Supreme Court treated the Civil War as a de facto war.[274] The Court made this finding, i.e., the existence of a state of war, in substantial part, based on the fact that the courts of the de jure government had been closed by the insurgents.[275]

Our position can be summarized in five points. First, Section 3-liability premised on the enemies prong is based on the existence of an enemy. Second, Section 3-liability can be premised on a war among combatants who recognize one another or combatants who do not recognize one another, but there must be some actual war. Third, Section 3-liability can be premised on a war that is a declared war or an undeclared war, but there must be some actual war. Fourth, Section 3-based liability, as the text states, does not extend to being an enemy; liability only extends to giving an enemy aid or comfort. Fifth, an "enemy" in everyday English usage *could* be used to refer to enemy nations or enemy nationals, but in Section 3 "enem[y]" only refers to an enemy nation and liability is premised on giving that wartime enemy nation aid or comfort. If our analysis is correct, then Baude and Paulsen have erred in mapping the second prong's "aid and comfort" language onto the first prong's "insurrection or rebellion" language. Why? Because liability under the second prong is premised on actual war, and liability under the first prong only requires an insurrection or rebellion, which do not require an actual war.

c. Treason can only be committed during an actual or de facto war

The Constitution defines treason in only two fashions—both of which require a state of war. First, as "consist[ing] . . . in levying War against" the United States. And second, "in adhering to their Enemies, giving them Aid and Comfort." This second prong refers to enemy nations that the United States is at war with. If there is no war—whether actual or de facto—there are no "enemies." It is impossible to commit treason absent a war.[276] This principle was followed in the wake of the American Revolution.[277]

However, not all support of enemy nations would constitute treason. The Treason Clause imposes a relatively exacting standard. Moreover, not all conduct that may disqualify a person under Section 3 would constitute treason. In some ways, Section 3 liability was substantially wider

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[274] Prize Cases, 67 U.S. (2 Black) 635 (decided Mar. 1863) ("'A civil war,' says Vattel, 'breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge.").

[275] *Id.* at 667, 670.

[276] *See also Ex parte* Bollman (1807) (Marshall, C.J.) ("Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.' To constitute that specific crime for which the prisoners now before the court have been committed, *war must be actually levied against the United States*. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason." (emphasis added)).

[277] *See* Respublica v. Chapman, 1 U.S. (1 Dall.) 53, 57 (Pa. 1781) ("Locke says, that when the Executive is totally dissolved, there can be no treason; for laws are a mere nullity; unless there is a power to execute them. But that is not the case at present . . . for before the meeting of Council in March, 1777, all its members were chosen, and the legislature was completely organized: so that there did antecedently exist a power competent to redress grievances, to afford protection, and, generally, to execute the laws; and allegiance being naturally due to such a power, we are of opinion, that from the moment it was created, the crime of High Treason might have been committed by any person, who was then a subject of the Commonwealth."); *see also* Josh Blackman, *Original Citizenship*, 159 University of Pennsylvania Law Review PENNUmbra 95, 113 (2010) ("A person deemed to be a subject of England could wage war against America, and could not be found guilty of treason, for his loyalty lay with the crown. In contrast, a disloyal citizen of the United States could be prosecuted for treason, for his loyalty was to the United States.").

than what was permitted under the Treason Clause. Specifically, the "aid or comfort" prong of Section 3 was not coextensive with the outer bounds of the crime of treason as defined by the Treason Clause. We put forward three reasons in defense of this position.

First, Section 3 does not characterize the "aid or comfort" prong as treason. The subject of treason was on everyone's mind immediately before, during, and after the Civil War. Indeed, Jefferson Davis, the former president of the (purported) confederacy was indicted on charges of treason. The Civil War was considered a *de facto* undeclared war. There does not need to be a declared war to support a treason charge. However, the Framers of Section 3 did not use the word "treason." Why? We can surmise that the provision was not designed to disqualify people from Section 3-covered positions based on treason, which was a traditional criminal offense. For example, the "aid or comfort" prong referred to a lesser wrong.

Second, the Treason Clause's second- or enemies-prong required that a defendant adher[ed] to their enemies *and* g[ave] their enemies "aid and comfort."[278] We suggest Treason requires both elements: "adhering to" was the criminal intent, and "aid and comfort" was the actus reus.[279] But Section 3 had no intent language. If a covered person gave "aid or comfort" to an enemy, but did not adhere to the enemies, he may be disqualified pursuant to Section 3, but would not be liable for treason. Thus, a Section 3 disqualification based on Section 3's second- or enemies-prong was not tantamount to establishing the elements of treason. In consequence, Section 3-liability did not carry the same moral opprobrium that attached to treason.

Finally, treason under the Constitution required proof that the defendant gave "aid *and* comfort." However, Section 3 only required "aid *or* comfort." The threshold for establishing treason is higher than the threshold or establishing disqualification under Section 3. Again, Section 3 liability under Section 3's second- or enemies-prong was not predicated on establishing treason or any other established crime. Because no known crime is associated with Section 3's second prong, and certainly not treason, a defendant did not enjoy an established right to all the standard criminal law defenses and all the customary constitutional safeguards, protections, and procedures–substantive and procedural connected to alleged violations of federal criminal law. By contrast, liability under the first prong was characterized as criminal wrongdoing: insurrection or rebellion. The federal criminal statute prohibiting insurrection was signed by President Lincoln before the ratification of the Fourteenth Amendment.[280] (To date, as far as we know, no one involved in January 6 has been charged with violating this statute.[281])

The first prong relates to criminal liability and the second prong does not. For these two reasons, and others, Baude and Paulsen err by mapping the second prong's relatively expansive "aid or comfort" language back on to the first prong's relatively narrow "engage" language.

Baude and Paulsen also err in regard to treason. They assert that "In one of many strange asides, Chase noted the possibility that Section Three had *implicitly repealed the Treason Clause*. . . ."[282] Chase was not referring to the Treason Clause of the Constitution. He was referring to the Treason Act, which President Lincoln signed into law in 1862. That was the statute that Jefferson Davis was indicted under. This conflation also mistakes how the Treason Clause operates. The Constitution's Treason Clause restricted how Congress may define treason, and it restricted what

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[278] *See also* Cramer v. United States, 325 U.S. 1 (1945) (Jackson, J.).
[279] *See also id.*
[280] The modern version of that statute appears at 18 U.S.C. § 2383. We discussed this statute in Blackman & Tillman, *supra* U. ILL. L. REV. ONLINE, note __, at __.
[281] Josh Blackman, *What The Trump Indictment Left Out*, VOLOKH CONSPIRACY (Aug. 1, 2023), https://reason.com/volokh/2023/08/01/what-the-trump-indictment-left-out/.
[282] Baude & Paulsen, *supra* note __, at 43.

evidence and procedures would support such a charge. The Treason Clause was not self-executing. Only Congress could put it into effect, and the States had no coordinate power to define treason against the United States. If Chase had held that Section 3 superseded the Treason Clause, then that would have *expanded* congressional power to define treason. If anything, Chase was suggesting that Section 3 *limited* the scope of Congress's treason statute. We think this is yet another example of how Baude and Paulsen have misunderstood Chase and his thinking.

We also suggest that Baude and Paulsen's position may actually provide some support for Chase's conclusion regarding the treason statute. Jefferson Davis's lawyers argued that Section 3 displaced all federal criminal treason-related prosecutions in favor of disqualification as the exclusive punishment for those falling within Section 3's reach. If Baude and Paulsen are correct that Section 3 modified statutory law, such as federal habeas law,[283] why couldn't Section 3 also modify other statutory law, such as the treason statute? We do not endorse that argument. We merely point out Baude and Paulsen provide no fixed rule, or even any stopping point, explaining how to determine what prior law, including constitutional law and statutory law, was upset by Section 3. Once we start from the Baude-Paulsen presumption that Section 3 reached back, with the potential of upsetting all facets of federal law, even retroactively, Davis's and Chase's position in the *Case of Jefferson Davis* cannot be rejected out of hand.[284]

2. Section 3's two prongs mirror the Union's dual-track legal theory for prosecuting the Civil War

During and after the Civil War, the Union's law officers followed a dual-track legal theory to prosecute the war and to punish Civil War era wrongdoing.[285] The first track permitted criminal prosecutions. Americans and foreigners who engaged in insurrection or rebellion (or worse) could be prosecuted as criminals. And Americans and, in certain circumstances, foreigners who adhered to the (purported) confederacy, and gave that enemy nation "aid and comfort," could be prosecuted for treason. (Again, Jefferson Davis was charged with treason.) Generally, former confederates who faced sanctions for insurrection could also be liable for treason.

Criminals and traitors were prosecuted through the criminal law in civilian courts. The government could charge those captured in the field, as well as those who were part of the planning stage. The government could also charge those who supported and maintained the (purported) confederacy's armies and militias in the field. An alleged criminal would have the benefit of traditional criminal law defenses: voluntariness, duress, incapacity, etc. However, very few captured rebels were tried in civilian courts.

The second track relied on military force. The Union fought the (purported) confederacy as an enemy nation. In doing so, the Union was not recognizing the (purported) confederacy under international law, much less recognizing the legitimacy of secession. Rather, the Union recognized the existence of a de facto war against a de facto government. This limited recognition of actual belligerency in the field permitted the Union to take actions in regard to persons and property that were not otherwise permitted in peacetime, but were permitted in war time as a matter of international law. And this authority was supplemented by the Lieber Code, which was the military law that governed the Union Army. This authority was also supplemented by constitutionally granted presidential war powers, and by acquiescence and affirmative actions by Congress

[283] *See supra* Part II.B.4.
[284] *See supra* Part II.B.5.
[285] *See* JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (rev. ed. 1964).

generally. This authority was also supplemented by extant statutory authorities, such as e.g. the Militia Acts and Insurrection Acts, as amended. It was a messy legal theory in a messy war.

The Prize Cases (1863) and other Civil War era federal cases recognized these principles.

The Union's dual track theory of the Civil War expanded the lawful options available to the Union's military and civilian courts and administrators. First, the Union's law officers contended that captured rebels *could* be tried as criminals in civilian courts for federal statutory crimes. It was on this authority that Jefferson Davis was indicted following the Civil War. (As we discussed above, Chief Justice Chase presided over that trial in federal court.) Second, the Union's law officers contended that captured military rebels *could* be tried in military tribunals for war crimes. Captain Henry Wirz, for example, was tried before a United States Military Commission in Washington.[286] Wirz was convicted, and he was sentenced to death.[287] Third, the Union also contended that captured rebels *could* be detained, as prisoners of war under the law of land warfare–at least until hostilities concluded. For example, confederate prisoners of war were held by the Union at Camp Douglas in Illinois.[288] There was another possibility, at the margins of the law. In theory, civilians loyal to the (purported) confederacy *might* have been detained as enemy nationals. This status was provided in the Enemy Aliens Act of 1798, one of the several acts later known as the Alien and Sedition Acts enacted during the Adams Administration. But the Union did not follow this path.

Section 3's two disqualification prongs mirrored the Union's dual-track legal theories for prosecuting the war and for punishing Civil War era wrongdoing. Section 3 could disqualify those who engaged in insurrection and rebellion, and those who gave aid or comfort to the enemy. There is no secret code here. Section 3 *was* expansive in that Section 3-covered persons could be disqualified from public positions in two ways: (i) under the first prong based on criminal law violations encumbered by traditional constitutional protections, or (ii) under the second prong's enemies-language. But the *sine qua non* of being an enemy or giving an enemy aid and comfort demands a war.

3. Baude and Paulsen err by mapping the "aid and comfort" prong onto the insurrection prong

An "enemy" can be an insurrectionist. And an insurrectionist can be an "enemy." We think many former confederates fit both descriptions during the Civil War. But in the abstract, the word "enemy" is not coextensive or overlapping with one who committed insurrection or rebellion. They are not coextensive terms, and they are not overlapping terms. A person can be guilty of the crimes of insurrection or rebellion absent a war, and a person can give aid or comfort to an enemy nation absent involvement in any insurrection or rebellion. Consider a hypothetical: a U.S. national aids a foreign nation in mounting a foreign invasion on the United States. That person could be liable

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[286] United States v. Henry Wirz, 8 AMERICAN STATE TRIALS 657 (Oct. 24, 1865), https://perma.cc/55BQ-AQDP.

[287] *Myth: Henry Wirz was the only person tried for war crimes in the Civil War*, NATIONAL PARK SERVICE, https://www.nps.gov/ande/learn/historyculture/wirztribunal.htm. As far as we know, Jefferson Davis was the only person indicted and tried for treason against the U.S. before a U.S. civilian court for Civil War activities. President Johnson's amnesty terminated that case. As far as we know, William Mumford was the only person tried, convicted, and executed for treason against the U.S. for Civil War activities—but Mumford was convicted by a wartime military tribunal, and not in a civilian court. The Union's lack of interest in treason prosecutions goes some way to explain why Chase *may* have believed that Section 3 superseded federal treason prosecutions. Chase was being practical; his rulings were in line with the loyal population's sentiment—or, so he may have believed.

[288] DENNIS KELLY, A HISTORY OF CAMP DOUGLAS, ILLINOIS, UNION PRISON, 1861-1865, at 5 (National Park Service Aug. 1989), https://perma.cc/6B3B-UWWZ.

for giving aid and comfort to enemies, but he would not be liable for engaging in insurrection or rebellion. But a person cannot give aid or comfort to an enemy nation absent a war. It is actual war that gives an enemy the character of being an enemy. And such a war includes declared and undeclared wars, among combatants who recognize one another and among combatants who do not.

Baude and Paulsen write: "As the *Prize Cases* teach, not every insurrection or rebellion ripens into a full-fledged war."[289] We agree. And this is another good reason not to rewrite the two prongs of Section 3: the first prong focuses on insurrection and rebellion, and the second focuses on enemies and war. Because not every insurrection is a war, one cannot map the second prong's "aid or comfort" language onto the first prong's "insurrection or rebellion" prong.

Judge McConnell likewise observed that the phrase "giving aid or comfort" is "reserved for giving aid and comfort to the 'enemies' of the United States, which has historically meant enemies in war."[290] We agree. For these reasons, Baude and Paulsen's rationale for grafting Section 3's "aid or comfort" language onto "rebellion and insurrection" does not succeed.

4. Not all secessionists are insurrectionists or enemies

There is another reason to reject Baude and Paulsen's characterization of Section 3-based liability. They write that "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."[291] We think this statement cannot be directed against all secession movements, and not even against all secession movements directed towards seceding from the United States.

Secession in 1861 was wrongful because it was unilateral in character, illegal in how it was carried out, and violent. It was not only violent. It was not only an insurrection and rebellion. It was a war–a civil war. But not all secessions take that character–not all are wrongful, unilateral, illegal, and amount to war-making.

Baude and Paulsen quote from Lincoln's March 4, 1861 inaugural address.[292] Lincoln stated: "It follows from these views that *no State upon its own mere motion* can lawfully get out of the Union; that resolves and ordinances to that effect are legally void, and that *acts of violence* within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances." Lincoln did not reject secession in all regards. Rather, he objected to the particulars of the secessions of the (purported) confederacy because of its unilateral, violent, and illegal character. Yet, Baude and Paulsen characterize secession per se as amounting to a Section 3 violation. That reading cannot be squared with Lincoln's own understanding of the Civil War.

Baude and Paulsen's broad understanding of Section 3 would brand members of many pacific and lawful secession movements as enemies, traitors, or worse. Let's start with Puerto Rico. Recently, Justice Sotomayor discussed at some length the independence movement in Puerto Rico,

[289] Baude & Paulsen, *supra* note __, at 113.

[290] Eugene Volokh, *Prof. Michael McConnell, Responding About the Fourteenth Amendment, "Insurrection," and Trump*, VOLOKH CONSPIRACY (Aug. 12, 2023), https://reason.com/volokh/2023/08/12/prof-michael-mcconnell-responding-about-the-fourteenth-amendment-insurrection-and-trump/.

[291] Baude & Paulsen, *supra* note __, at 74 (emphasis added).

[292] Baude & Paulsen, *supra* note __, at n.228 (citing 2 ABRAHAM LINCOLN, SPEECHES & WRITINGS, 1859-1865: SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, PRESIDENTIAL MESSAGES & PROCLAMATIONS 217-218 (First Inaugural Address, March 4, 1861)).

which was grounded in domestic law, international law, and popular sovereignty.[293] Justice Sotomayor did not offer even the slightest intimation that people who favored independence could be seen as "'engaging in' or giving 'aid or comfort to' the Union's enemies."[294] In 2022, the United States House of Representatives passed a bill that would allow Puerto Rico to hold a binding referendum on statehood or independence.[295] Were the representatives who supported that bill giving aid and comfort to the enemy? Of course not. Imagine if the governor of Puerto Rico had at some point taken a Section 3 oath, and then he openly supported and presided over a territorial secession convention for Puerto Rico. If that convention failed, and Puerto Rico became a state, would the governor be disqualified under Section 3 from serving in the United States Senate? Did he support an insurrection? Give aid or comfort to enemies? We think the answers to all of these questions must be emphatically *no*. (Hint: because there was no war in our hypothetical*!*)

Let's go further back in time. William Howard Taft was the Governor General of the Philippines, a United States territory, from 1901-1903.[296] Taft had previously served as a federal circuit court judge, and had taken an oath to the Constitution. What if Taft, as Governor General of the Philippines, had voiced political support for political disunion? Imagine he simply entertained a meeting with members of the community who opposed the Philippine's continuing status in the United States, and as a territory within the United States. And imagine that meeting gave legitimacy to a nascent secession movement. Would Taft, in Baude and Paulsen's words, have "assisted" a "secession" to "U.S." authority, and thus given "aid and comfort" to the Union's enemies? Would Taft have been disqualified under Section 3? Again, we think the answer is emphatically *no*.[297]

Now, let's look overseas. Many secession movements were completely lawful and completely pacific. Would those who supported Brexit be deemed traitors? Only a very foolish person would suggest that Scots voting for or against independence from the United Kingdom were somehow anything but loyal and law-abiding. What about the breakup of Czechoslovakia?

Liability based on Section 3's second prong is limited to those who give "aid and comfort" to the enemies of the United States in relation to an actual war, and it does not extend to those engaging in normal democratic politics. Secession in 1861 was not normal democratic politics. But secession, in the abstract, can be, and it frequently is normal democratic politics. This point reflects a broader criticism of Baude and Paulsen's article. They approach Section 3 from two very important, but very narrow vantage points: the American Civil War and Washington, D.C. on January 6. They attempt to pigeonhole the language of Section 3 to fit neatly into those two events. But their theory only fits well into one. The language designed in consequence of the Civil War experience is not a tight fit for all subsequent events. The language that Section 3's second prong

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[293] Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1677 (2020) (Sotomayor, J., concurring) ("Thus, in the eyes of the international community looking in, as well as of the Federal Government looking out, Puerto Rico has long enjoyed autonomous reign over its internal affairs. Indeed, were the Federal Government's representations to the United Nations merely aspirational, the United States' compliance with its international legal obligations would be in substantial doubt.").

[294] Baude & Paulsen, *supra* note __, at 74.

[295] Farnoush Amiri and Danica Coto, *House approves referendum to 'decolonize' Puerto Rico*, ASSOCIATED PRESS (Dec. 15, 2022), https://apnews.com/article/referendums-puerto-rico-b96884274da9c970e710b6d7d2f65a4d.

[296] *William Howard Taft*, BRITTANICA, https://www.britannica.com/biography/William-Howard-Taft.

[297] In reality, Taft "became the unofficial leader of a 'retentionist' movement to stop the US Democratic Party from making any firm promise of future independence for the islands, which he saw as a 'policy of scuttle.'" Adam D. Burns, *Retentionist in Chief: William Howard Taft and the Question of Philippine Independence, 1912-1916*, https://www.jstor.org/stable/42634756, https://perma.cc/RU4S-BH36 But other Section 3-covered positions, including several members of Congress, favored independence for the Philippines.

spoke to was in relation to wartime enemies. And there is nothing in Section 3 which suggests that all secession movements are created equal.

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Does our analysis about the scope of Section 3's offense element prove that Baude and Paulsen are wrong? We think they are wrong. At the very least, we think they need to be more forthcoming and define the scope of Section 3's "enemies" language. We also think they need to define the scope of the Section 3's "office" and "officer" language–the issue to which we now turn.

V. Is the President an "Officer of the United States" for purposes of Section 3?

So far, we have addressed two necessary conditions to finding that a person is disqualified under Section 3. First, is Section 3 self-executing, such that it can be enforced in the absence of any federal legislation? Second, can a Section 3 disqualification be triggered if a person gives aid and comfort to an insurrection? *Contra* Baude and Paulsen, for both of these questions, we do not think that *all* or even most of the originalist evidence points towards a *yes* answer. In Part V, we will address another threshold question: which types of positions are covered by Section 3? Section 3 applies to a person "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 . . . ."

What is the meaning of the phrase "officer of the United States" in Section 3? Baude and Paulsen address this question from a singular focus: is the President (the position that Donald Trump held) an "officer of the United States." They offer no theory at all to determine which *other* positions fit within the scope of this language. Indeed, they raise the atextualist argument that the phrase "Officer of the United States" in Section 3 is indistinguishable from the phrase "Office . . . under the United States," which is also used in Section 3. If they were writing on a blank slate, perhaps this position would be understandable. But Tillman, and later Blackman, have been writing on this position for some time. Indeed, some seven years ago, Baude publicly praised Tillman's scholarship on the Constitution's "office"- "and "officer"-language.

In their article, Baude and Paulsen summarily dismiss our position. Baude and Paulsen contend that our textualist approach is "hidden-meaning hermeneutics" that renders Section 3 "a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati." Baude and Pauslen do not address the evidence we put forward, instead choosing to disparage our position in hyperbolic terms. We suppose we are in good company, as Baude and Paulsen use the same sort of charged language against us, as they used against Chief Justice Chase.

There is no secret code. Our 2021 article cites sources from the period roughly contemporaneous with ratification to support the position that the President is not an Officer of the United States. During an 1876 impeachment trial, a Senator said "the President is not an officer of the United States." An election law treatise from 1878 stated "[i]t is *obvious* that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'" This position has support in jurisprudence from Justice Story to Chief Justice Roberts.

Baude and Paulsen pay very little attention to the most obvious source of the meaning of the "office"-language in Section 3: the same and similar language in the Constitution of 1788. Section 3 resembles the Article VI Oath or Affirmation Clause, which uses the phrase "Officers . . . of the United States." The President does not take an Article VI Oath. Instead, he has always taken his own Article II oath. The conventional view is that the President is not an "Officer of the United States" for purposes of the Article VI Oath or Affirmation Clause. Baude and Paulsen also fail to address other provisions of the Constitution of 1788 that use the phrase "Officers of the United States": the Impeachment Clause, the Appointments Clause, and the Commissions Clause. The conventional view is that in each provision, the President is not included under the aegis of the term, "Officers of the United States."

Instead of parsing the Constitution of 1788, they focus on original intentions and consequentialism. These sorts of arguments do not pass originalist muster. All of the usual rejoinders to original intentions and consequentialism—which are well known to originalist debates—apply here with full force. More pressingly, Baude and Paulsen fail to account for our evidence concerning the original meaning of the phrase "Officers of the United States," and instead rely on scattered statements concerning other language, such as "Office . . . under the United States." Further, Baude and Paulsen fail to fully address the positions that were enumerated in Section 3, which suggests that the Framers did not purport to include all positions in all regards. Section 3 was not all-encompassing. It did not cover the "waterfront."

At bottom, Baude and Paulsen simply look away from contrary evidence. On this issue, it is simply not the case that "essentially all the evidence concerning the original textual meaning of Section Three . . . points in [their] direction." Indeed, much of the evidence points in our direction. And if the presidency is not an "Officer of the United States," then the full sweep and force of Section 3 cannot touch Trump.

A. There is no "secret code"

Baude and Paulsen dismiss our textualist approach as "hidden-meaning hermeneutics." Baude and Paulsen reject our reading of Section 3, which apparently renders the provision "a 'secret code' loaded with hidden meanings discernible only by a select priesthood of illuminati." They claim our support was written in "disappearing ink."

Our reading is not "secret" at all, and our evidence is written in plain black-and-white text. Our 2021 article cites several sources from the period roughly contemporaneous with ratification to support the position that the President is not an Officer of the United States. For example, we wrote:

> In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, "the President is not an officer of the United States."[298] Instead, Booth stated, the President is "part of the Government."[299] Two years later, David McKnight wrote

[298] CONGRESSIONAL RECORD CONTAINING THE PROCEEDINGS OF THE SENATE SITTING FOR THE TRIAL OF WILLIAM W. BELKNAP, LATE SECRETARY OF WAR, ON THE ARTICLES OF IMPEACHMENT EXHIBITED BY THE HOUSE OF REPRESENTATIVES 145 (Washington, Government Printing Office 1876) (reproducing May 27, 1876 statement of Newton Booth, Senator from California); *see also id*. at 130 (reproducing May 25, 1876 statement of George Sewell Boutwell, Senator from Massachusetts).

[299] *Id.* at 145.

> an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that "[i]t is *obvious* that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'"[300]

Maybe Booth and McKnight were right, or maybe they were wrong. No doubt, there are other competing authorities. The important point is that Booth and McKnight were not writing in "disappearing ink." They were not Illuminati priests. Booth was speaking on the Senate floor, and McKnight's writing appeared in a well-regarded treatise which continues to be cited nearly 150 years later. Both were speaking and writing to the American public. Nothing here is in any way secret or hidden or confined to a select priestly interpretive caste. Indeed, McKnight thought his position was "obvious." And Baude has studied and written about the Belknap impeachment trial, in which Senator Booth testified.[301] These sources were not hidden.

For these reasons, we conclude that the interpretive issue here is a common one—it is the sort of question on which dispassionate, reasonable minds can disagree after having reviewed competing streams of authority, argument, and evidence. In addition to Booth and McKnight, our 2021 publication on Section 3 also discussed other contemporaneous authorities, as well as related antebellum and modern authorities. These authorities include Justice Joseph Story's celebrated *Commentaries on the Constitution*, and modern Supreme Court decisions, including one from Chief Justice Roberts, that support our position as to the scope of the Constitution's "Officer[] of the United States"-language. Far from a "secret code" or "hidden-meaning hermeneutics," our view was and remains well-known.

Baude and Paulsen do not acknowledge, consider, and balance these contrary authorities in any systematic fashion against their own preferred positions. Moreover, Baude and Paulsen pay very little attention to the most obvious source of the meaning of the "office"-language in Section 3: the same and similar language in the Constitution of 1788.

B. What about the Constitution of 1788?

Section 3 of the Fourteenth Amendment was not written on a blank slate. Compare the Oath of Affirmation Clause in Article VI with Section 3 of the Fourteenth Amendment.

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[300] DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES: A CRITICAL AND HISTORICAL EXPOSITION OF ITS FUNDAMENTAL PRINCIPLES IN THE CONSTITUTION, AND OF THE ACTS AND PROCEEDINGS OF CONGRESS ENFORCING IT 346 (Philadelphia, J.B. Lippincott & Co. 1878) (emphasis added); *see also* Blackman & Tillman, *supra* NYUJLL note __, at 30.

[301] Will Baude, *Does the Chief Justice Preside over an Ex-President's Impeachment Trial?*, VOLOKH CONSPIRACY (Jan. 15, 2021), https://reason.com/volokh/2021/01/15/does-the-chief-justice-preside-over-an-ex-presidents-impeachment-trial/.

Oath or Affirmation Clause (1788)	Section 3 (1868)
"The [1] Senators and Representatives before mentioned, and the Members of the [2] several State Legislatures, and [3] *all executive and judicial Officers, both of the United States* [4] and of the several states, shall be bound by Oath or Affirmation, to support this Constitution"	"No person . . . who having previously taken an oath, as a [1] member of Congress, or as [3] *an officer of the United States*, or as a [2] member of any state legislature, or as an [4] executive or judicial officer of any State, to support the Constitution of the United States. . . ."

Both provisions reference, in some fashion, the same four categories of office holders who swore an oath to support the Constitution: [1] Senators and Representatives, [2] members of the state legislatures, [3] executive and judicial officers of the United States, and [4] executive and judicial officers of the states.

We do note one subtle distinction between Article VI and Section 3. Article VI refers to "Senators and Representatives;" by contrast, Section 3 refers to "members of Congress." We are not surprised by this different choice of language. We are not surprised that Article VI made use of "Senators and Representatives"-language and that Section 3, by contrast, made use of "member of Congress"-language. In 1787–1788, when the Constitution was drafted, proposed, and ratified there were no members of Congress (under the Constitution of 1788). Article VI acted prospectively on these positions which were not yet filled by election—so the language of membership would have been less than exact. By contrast, Section 3 acted on extant institutions (e.g., Congress) with extant members. That may be why both Article VI and Section 3 referred to members of the state legislatures: a set of institutions and officials that were already in existence when the original Constitution and Section 3 went into effect. If we are correct, it illustrates that constitutional draftspersons, in 1787–1788 and 1866–1868, closely adhered to parliamentary drafting conventions.

If these drafting conventions now appear to some like a secret code, it is: [i] because legislative drafting is no longer considered a central skill within the legal profession and among legal academics (who may never take a course in it, much less teach it), and [ii] more importantly, because of the decline of any continuity in Anglo-American (oral) parliamentary culture and the concomitant decline of the mimetic transfer of legal knowledge in favour of a judiciary-centred legal culture giving voice to separation of powers norms.[302]

Which position(s) is/are not mentioned in Article VI and in Section 3? Among others, the President. Perhaps there is a reason for both provisions' failing to expressly incorporate any reference to the President? We do not know whether Baude and/or Paulsen would suggest that the President is covered by the phrase "Officer[] of the United States" in the Article VI Oath of Affirmation Clause. No President has ever taken an Article VI oath, as defined by statute. Rather, presidents have always relied on their Article II oath. President Washington took his Article II oath

[302] *See also* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES, Section 1 (Washington City, Samuel Harrison Smith 1801) (starting his manual with: "Mr. Onslow, the ablest of the Speakers of the House of Commons, used to *say* . . . ." (emphasis added)); *cf.* Haym Soloveitchik, *Rupture and Reconstruction*, 28(4) TRAD. 64 (1994) ("One learns best by being shown, that is to say, mimetically. When conduct is learned from texts, conflicting views about its performance proliferate, and the simplest gesture becomes acutely complicated."), https://tinyurl.com/yc4ak29f.

before the first statutory oath was enacted.[303] Indeed, that bill could not have even become law until it was presented to *President* Washington.[304] These textual arguments, buttressed by an uninterrupted historical practice since President Washington, would seem to indicate that the President is not fairly encompassed by Article VI's "Officers of the United States"-language.

And there is some good evidence to conclude that in the 1860s, the public would have recognized the similarities between the officer-language in the Oath or Affirmation Clause and the officer-language in Section 3. In 1867, Attorney General Stanbery wrote an opinion opining on the officer-language used in the not-then-yet ratified language of Section 3 of the Fourteenth Amendment. With regard to state officers, Stanbery observed that the "same term of descriptions" was used in the first oaths statute, enacted in 1789, as was used in Section 3. Attorney General Stanbery was not an Illuminati priest. It is reasonable to conclude that the public would have likewise seen the similarities between the phrase "Officers of the United States" in the Oath or Affirmation Clause, and the phrase "Officer of the United States" in Section 3.

How would the public in 1868 have understood this language? Would they parse it in light of today's (that is, 1868's) meanings or by incorporating by reference—that is, transplanting the meanings from 1788 as a result of copying the 1788 language? We do not say this question has an obvious answer. Rather, we say it does not have an obvious one. If so, ambiguity leans against extending disqualifications. In examining the effect of this ambiguous language, then-Attorney General Stanbery wrote: "Those who are expressly brought within its operation cannot be saved from its operation. Where, from the generality of terms of description, or for any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the law . . . ."[305] Here, we think Stanbery articulated the premises of the Democracy Canon.[306]

Although we do not know, we can suppose that Baude and Paulsen embrace the conventional view: the President is not an "Officer[] of the United States" as used in Article VI and the other provisions of the Constitution of 1788. Given all that, Baude and Paulsen might consider acknowledging and dealing with the textualist difficulty for their position: Given that the President is not covered by the phrase "Officer[] of the United States" in the Article VI Oath or Affirmation Clause, what about Baude and Paulsen's position offers sufficient clarity for their reading of Section 3—that is, that the President is an "Officer[] of the United States" as that phrase is used in Section 3?

Baude and Paulsen also fail to address three other relevant provisions in the Constitution of 1788 that use the phrase "Officers of the United States."

- The Impeachment Clause: "The President, Vice President and all civil *Officers of the United States*, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."
- The Appointments Clause: The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all other Officers of the United States* . . . ."

[303] Tillman & Blackman, Part III, *supra* note __, at 424-428 (discussing the oaths for President Washington, Vice President Adams, and the First Congress).
[304] An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789).
[305] Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 141, 160 (1867).
[306] *See generally* Richard L. Hasen, The Democracy Canon, 62 STAN. L. REV. 69 (2009).

- The Commissions Clause: The President "shall Commission all the *Officers of the United States*."

First, presidents fall under the scope of the Impeachment Clause precisely because there is express language in the clause providing for presidential impeachments; the Impeachment Clause does not rely on general "office"- or "officer"-language to make presidents impeachable. We think this is the common convention with regard to drafting constitutional provisions. When a proscription is meant to control elected positions, those positions are expressly named, as opposed to relying on general "office"- and "officer"-language. Congress does not hide the Commander in Chief in mouseholes or even foxholes. For example, in 1969, future-Chief Justice William H. Rehnquist, then an Executive Branch attorney, addressed this sort of clear-statement principle. Statutes that refer to "officers of the United States," he wrote, generally "are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive."[307] Five years later, future-Justice Antonin Scalia, then also an Executive Branch attorney, reached a similar conclusion with regard to the Constitution's "office"-language.[308] These Executive Branch precedents would counsel against deeming the President an "officer of the United States."

Second, as to the Appointments Clause, which uses "Officers of the United States"-language, Presidents do not appoint themselves or their successors. The Supreme Court hears a never-ending stream of cases that ask if a particular position is a *principal* or *inferior* officer of the United States—even though the Appointments Clause does not even distinguish between those two types of positions.[309] Where has the Court ever suggested that the President falls in the ambit of the Appointments Clause's "Officers of the United States"-language?

To the contrary, the Court has asserted just the opposite. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, Chief Justice Roberts observed that "[t]he people do not vote for the 'Officers of the United States.'"[310] Rather, the Appointments Clause requires appointment of these individuals. Chief Justice Roberts reaffirmed this position in *Seila Law LLC*

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[307] Memorandum from William H. Rehnquist to Egil Krogh Re: Closing of Government Offices in Memory of Former President Eisenhower (Apr. 1, 1969), https://perma.cc/P229-BAKL.

[308] Memory from Antonin Scalia to Kenneth A. Lazarus, Re: Applicability of 3 C.F.R. Part 100 to the President and Vice President (Dec. 19, 1974), https://perma.cc/GQA4-PJNN.

[309] Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. TEX. L. REV. 349, 392 (2023) ("The Constitution does not expressly say that 'principal officers . . . must be appointed by the President with the advice and consent of the Senate.' Indeed, the text of the Appointments Clause does not distinguish between principal and inferior officers, generally. The Appointments Clause does refer to 'inferior Officers,' which are 'Officers of the United States' but, the phrase 'principal Officer' does not appear in the Appointments Clause. The phrase 'principal Officer' appears in the Opinion Clause—Article II, Section 2, Clause 1."). And the text of the Constitution says nothing at all about what duties can and cannot be assigned to those positions. *See* Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an 'Officer of the United States' or an 'Employee of the United States'?*, LAWFARE (July 23, 2018, 2:50 PM), https://www.lawfareblog.com/robert-mueller-officer-united-states-or-employee-united-states [https://perma.cc/XK32-Q3JW] (concluding that under current precedent, Special Counsel Mueller was not an "Officer[] of the United States," but a mere "employee of the United States").

[310] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–98 (2010) (citation omitted) (first quoting U.S. CONST. art. II, § 2, cl. 2; then citing *The Federalist No. 72*); *see* United States v. Mouat, 124 U.S. 303, 307 (1888) ("Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.").

v. CFPB.[311] He wrote, "Article II distinguishes between two kinds of officers—principal officers (who must be *appointed* by the President with the advice and consent of the Senate) and inferior officers (whose *appointment* Congress may vest in the President, courts, or heads of Departments)."[312] Both categories of positions are *appointed*.

And, finally, as to the Commissions Clause, which also uses "Officers of the United States"-language, Presidents do not commission themselves, their vice presidents, their successor presidents, or successor vice presidents.[313]

In all, there is a rich history illustrating that when the Constitution of 1788's text uses "Officers of the United States"-language, that phrase does not reach the presidency. (In the third installment of our ten-part series, we explain at some length why the President is not considered a "Officer[] of the United States" in these three provisions, as well as the Oath or Affirmation Clause.[314])

We are not sure if Baude and Paulsen would argue that the President is covered by the "Officers of the United States"-language in any of these constitutional provisions from the 1788 Constitution. Perhaps, they (too) are "non-committal"? It is possible that they agree with us on this limited issue. If so, why might they agree?

We do *not* suggest that these authorities—from the text of the Constitution of 1788, Chief Justice Roberts, Justice Story, Senator Booth, and David McKnight—prove that we are *undoubtedly* correct as to the meaning of Section 3's "Officer of the United States"-language, and that Baude and Paulsen are *unequivocally* wrong. But we do think, at the very least, that the authorities, evidence, and arguments we have marshaled are probative of the interpretive issue at hand and deserving of a response consistent with prevailing academic norms. So why all the talk about "secret codes," "hidden-meaning hermeneutics," "disappearing ink," and "illuminati priests." Why all the hyperbole?

These textual arguments lead to what we think is a point of agreement with at least one of the two authors. Footnote 393 of Baude and Paulsen's article points out that in 2016, Baude "complimented Tillman's prior scholarship" in *Jotwell* regarding the office- and officer-language in the Constitution of 1788. In 2016, Baude wrote, Tillman's "position has [not] been conclusively proven. But at this point, I think he has singlehandedly shifted the burden of proof."[315] Thus, it may be that the core of our current disagreement is whether the 1788 meaning *drifted* on the road to 1868. To establish such drift, Baude and Paulsen would need substantial evidence that the phrase "Officers of the United States" included the elected President. The originalist evidence must be substantial because the effect of Section 3 is to disqualify a candidate and to limit the ability of voters to elect the candidate of their choice. We do have statements that the phrase "Officers of the United States" excluded the President—see Booth, McKnight, and others discussed above. We

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[311] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2199 n.3 (2020).

[312] *Id.*

[313] *See* Tillman & Blackman, Part III *supra* note __, at 412-19 (discussing practice under the Commissions Clause).

[314] *See* Tillman & Blackman, Part III.

[315] William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016), https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/It may be that Professor Baude's 2023 co-authored article illustrates that he has changed his mind, in whole or in part, from the views he put forward in *Jotwell* in 2016. That is something he is perfectly entitled to do, and in no way should anything we write be understood as a criticism directed against him for any apparent or real inconsistency. People are entitled to change their minds. It is a good thing to reopen old questions, and courageous to do especially when one knows that criticism (as we put forward here) will follow. We only ask, if he has changed his mind, what are the reasons, including new evidence and new arguments, that account for this new position?

wait for concrete evidence that the President was considered an "Officer of the United States," as that phrase was used in Section 3.

We do acknowledge, and have long acknowledged, the possibility that meaning may have drifted from 1788 to 1868 with regard to *another* phrase within Section 3.

C. Potential linguistic drift for "Office . . . under the United States"

In our view, the phrase "Office . . . *under* the United States" as used in the Constitution of 1788 did not refer to elected positions like the President. We have made efforts to establish this position in the fourth installment of our ten-part series, and will not rehash those arguments here in detail.[316] In short, our position is that "Officers of the United States" encompasses appointees in the judicial and executive branches of the federal government, and "Office . . . under the United States" includes all "Officers of the United States" and also those holding appointed positions in the national legislature. Indeed, seven years ago, Baude suggested that our position had some merit.[317]

Still, we are not so certain the meaning of "Office . . . under the United States" remained constant over the decades. In our 2021 article, we wrote:

> But we have been very careful to avoid resolving the scope of the phrase "office . . . under the United States" in the disqualification element [of Section 3]. Suffice to say, in light of the possibility of linguistic drift from 1788 till 1868, we think this issue is contestable.

We presented what we thought was a reasonable position: the evidence put forward to date does not support linguistic drift with regard to the phrase "Officers of the United States," but linguistic drift with regard to "Office . . . under the United States" was less clear.

Baude and Paulsen appear baffled by what they see as a bifurcated position. They wrote we "equivocate" and we are "non-committal." In our view, we were being careful. There is no logic or scholarly tradition in requiring *every* academic paper to address *every* issue; rather, a good paper should add something *new* to the body of scholarship. We would prefer to *add* to the body of scholarship and be *correct*, rather than *overreach* and be *wrong*.

For example, we think the Appointments Clause ought to be read to *define* the phrase "Officers of the United States." And there are Supreme Court cases adjudicating Appointments Clause challenges that discuss the clause's "Officers of the United States"-language. Again, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, Chief Justice Roberts observed that "[t]he people do not vote for the 'Officers of the United States.'"[318]

In contrast to the Constitution's Appointments Clause which defines the phrase "Officers of the United States," there is no similar provision within the Constitution defining the scope of the phrase "Office . . . under the United States." The Foreign Emoluments Clause, for example, which uses "Office . . . under the United States"-language, does not expressly indicate which positions are covered. In other words, because of the absence of any constitutional provision defining "Office . . . under the United States," it would have been more likely for the meaning of that phrase to have drifted from its 1788 moorings than for the meaning of "Officer[] of the United

[316] Tillman & Blackman, Part IV, *supra* note __, at __.
[317] See JOTWELL, *supra* note __, at __.
[318] 561 U.S. 477, 497–98 (2010) (citing U.S. CONST. art. II, § 2, cl. 2; *The Federalist No*. 72 (Hamilton)).

States" to have drifted. The latter phrase's meaning was less likely to have drifted precisely because its meaning was hardwired or fixed by the Constitution's text, i.e., the Appointments Clause.

D. What is Baude and Paulsen's theory?

Baude and Paulsen have not put forward a fully fleshed out theory about what Section 3's "office"- and "officer"-language means. Rather, their focus is on the one position which is on everyone's mind today–the Presidency. The risk of taking that route, with its singular focus on the *now*, is that it might very well lead to distorting their understanding of Section 3's original public meaning. In *Morrison v. Olson*, Justice Scalia's dissent warned about similar risks when a single-minded independent counsel proceeds on an Inspector Javert-like hunt of a single target. We think the same risk applies to legal scholarship. One way of minimizing this risk is to develop broad, generally applicable theories, at a reasonably high level of abstraction, that extend beyond any present controversy. We have spent the better part of the past decade on that enterprise.[319]

But Baude and Paulsen never actually define what positions Section 3's "office"- and "office"-language include. They do suggest that the preposition "of" is linked with "officer" and the preposition "under" is linked to "office."[320] It is true that the Framers of the Constitution carefully used language, always referring to an "officer of" and "office under," but never an "officer under" or an "office of."[321] We have argued that this consistency supports our position that different "office"- and "officer"-language have different meanings.[322] Baude and Paulsen

[319] *See* Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part IV: The "Office . . . under the United States" Drafting Convention*, 62 S. TEX. L. REV. 455 (2023), https://ssrn.com/abstract=4432246; Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. TEX. L. REV. 349 (2023), https://ssrn.com/abstract=4432164; Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part II: The Four Approaches*, 61 S. TEX. L. REV. 321 (2021), https://ssrn.com/abstract=4021548; Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S. TEX. L. REV. 309 (2021), https://ssrn.com/abstract=3890400. The remaining 6 parts are scheduled to appear over the course of 2023 through 2025.

[320] Baude & Paulsen, *supra* note __, at 108 ("The minor textual difference between the triggering clause ('officer of') and the positions-disqualified clause ('office under')—a choice between prepositions—appears 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."). Here, Baude and Paulsen echo an argument made by Akhil Reed Amar and Vikram David Amar concerning the Succession Clause. *See* Akhil Reed Amar & Vikram David Amar, Is the Presidential Succession Law Constitutional?, 48 STAN. L. REV. 113, 115 (1995) (noting that "As a textual matter," these varied references to "[O]fficers of the United States" and "[O]ffice[s] . . . under the United States" "seemingly describe[] the same stations."). We have addressed the problems with the Amars' atextualist position at some length. Tillman & Blackman, Part II, *supra*, at 357-368. Like Baude and Paulsen, the Amars put forward no principled account supporting their view that the Constitution's disparate "office"- and "officer"-language all mean the same thing.

[321] *See* Tillman & Blackman, Part III, *supra*, at 360 (observing consistent usage of "office"- and "officer"-language in the Constitution of 1788.

[322] Tillman & Blackman, Part IV, *supra*, at 484 ("And there was coordination. The framers of the Articles of Confederation and of the Constitution used the phrase "Office . . . under the United States" without any apparent material inconsistency or variation between the two documents. Indeed, absent this drafting convention, it is nearly impossible to explain the Constitution's 'office'- and 'officer'-language."); *see also* Asher Steinberg, The Textual Argument That the President Does Not Hold an "Office Under the United States," Narrowest Grounds Blog (Sept. 21, 2017), https://narrowestgrounds.blogspot.com/2017/09/the-textual-argument-that-president.html [https://perma.cc/MS3J-6MKL] ("This settled British legal and linguistic tradition of understanding office under the

draw the opposite inference: that carefully-used, different language, was in fact used to convey the same meaning. The inference they draw seems less than well supported. Without a grounded theory, Baude and Paulsen cannot explain why the Framers of Section 3 carefully distinguished between an "officer of" and an "office under." Why did not Section 3's drafters simply use either: (i) *officers of the United States* and *offices of the United States*; or, (2) *officers under the United States* and *offices under the United States*. Why try to confuse one-and-all by using "of" and "under" if the same meaning was intended? Baude and Paulsen also made no effort to reconcile the two clauses of Section 3, which list positions, with the language of the Constitution of 1788.

Without any textualist support, Baude and Paulsen revert to sense and sensibilities. They state, "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." That move is unexplained. Why reference "office under the authority of the United States" at all? That phrase does not appear in Section 3. The only constitutional provision to use that phrase, i.e., "office under the authority of the United States" is the Sinecure Clause.[323] The Framers of the Fourteenth Amendment would have been aware of the Sinecure Clause, which directly limited the ability of members of Congress to accept presidential appointments. Again, Baude and Paulsen fail to assess the baseline language used in the Constitution of 1788.

It is difficult to figure out how Baude and Paulsen decide which positions to include in the aegis of "Officers of the United States," other than to reject a distinction between "Officers of the United States" and "Office . . . under the United States." Rather, they focus on one, and only one elected position: the President. And they are certain that the President is covered by that language. Their intellectual position is not well supported merely by uttering the intuition that it is "sensible and straightforward." No intellectual position is well supported merely by making such an announcement. And that principle is just as true for the most mundane questions of constitutional law as it is for the most important questions, whatever they may be.

E. Original meaning and intentions

Our scholarship attempts to illustrate the original public meaning with regard to the Constitution's "Officers of the United States"-language. We focus, in large part, on the meaning of that term in the Constitution of 1788, and we attempt to show there is no substantial evidence of linguistic drift. Baude and Paulsen, in their efforts to determine the original public meaning of Section 3, do not acknowledge, consider, and balance these contrary authorities in any systematic fashion against their own preferred positions and evidence. Rather, they focus on many instances of original intentions and expectations. We are not alone in making this observation. Professor Eric Segall, a prominent critic of originalism, wrote "throughout the 126 pages, the authors use original intent repeatedly."[324] Baude and Paulsen parse statements from members of the Reconstruction Era Congress about the phrase "Office under the United States" to determine the

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Crown to exclude elected office explains how the framers and ratifiers could have coordinated around the otherwise cryptic and novel phrase, 'office under the United States.' Indeed, something like a practice of this kind is almost necessary to explain how such coordination was possible.").

[323] U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil *Office under the Authority of the United States*, which shall have been created, or the Emoluments whereof shall have been encreased during such time."). We discuss the meaning of the "office"-language in the Sinecure Clause in Part II of our ten-part series.

[324] Eric Segall, *Of Insurrections, Presidents, and the Utter Failure of Constitutional Law to Address the Real Issues*, DORF ON LAW (Aug. 14, 2023), https://www.dorfonlaw.org/2023/08/of-insurrections-presidents-and-utter.html.

meaning of the phrase "Officers of the United States." Of course, this argument based on original intentions and expectations only works (if at all) if the two phrases have the same meaning, and that atextualist position itself also requires substantial evidence.

One of the more relevant pieces of historical evidence that Baude and Paulsen put forward to support this atextualist position actually rebuffs the "secret code" argument. In 1866, a five-member select committee of the House of Representatives prepared a report.[325] The proceedings stretch more than 300 pages. What was it about? In April 1865, Roscoe Conkling of New York was selected as a judge advocate—a special prosecutor—to investigate misconduct in the military.[326] For his services, Conkling was paid $3,000.[327] During this period, Conkling became a member-elect of the House.

The primary issue before the Conkling Committee was whether Conkling violated various statutes that prohibit those holding certain government positions from also holding other positions or receiving outside compensation.[328] One of the statutes provided, "no person hereafter who holds or shall hold, any *office under the Government of the United States*, whose salary or annual compensation shall amount to a sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office."[329]

As a threshold matter, the committee found that Conkling, as a member-elect, did not hold an "'office' in such sense as to bring him within the prohibition of the act of 1852."[330] That finding, standing alone, could have fully determined the matter before the Committee.

Nevertheless, the Committee then proceeded to consider the issue further. The Committee quoted eight provisions of the Constitution of 1788 that use different office- and officer-language.[331] None of these provisions use the precise phrase used in the statute: "office under the government of the United States." The closest language in the Constitution of 1788 is the Necessary and Proper Clause, which refers to any officer *of* the government of the United States.[332] We have previously written that "officers *of* the government of the United States," would include *all* appointed and elected federal positions in the Executive and Judicial Branches, including the President.[333] In our prior scholarship, we have not had occasion to opine on the phrase "office under the government of the United States." Again, this phrase does not appear in the Constitution of 1788 or in the Fourteenth Amendment. We will discuss below how this language is used in the Ironclad Oath statute of 1862. Based on our reading of that statute, this language includes *all* appointed federal positions and *all* elected federal positions in the Legislative, Executive, and Judicial Branches. This language would include the President and members of Congress. That said,

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[325] *See Conkling, Roscoe, and Provost Marshal General Fry, Report No. 93*, *in* THE REPORTS OF THE COMMITTEES OF THE HOUSE OF REPRESENTATIVES 1865-1866 (Washington, GPO 1866), http://bit.ly/3PxmM2h (hereinafter "Conkling Report"). The Conkling Report begins at page 550 of this PDF: https://perma.cc/P5TP-GH85

[326] Conkling Report, *supra* note __, at 10.

[327] *Id*.

[328] *Id*. at 12-13.

[329] Conkling Report, *supra* note __, at 10 (emphasis added). On page 21, this statute is referred to as the Act of August 31st, 1852, but on page 17 it is referred to as the Act of July 21st, 1852. The Supreme Court used the former citation in 1884, and placed the citation at 10 Stat. 100. *See* United States v. Brindle, 110 U.S. 688 (1884), https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=010/llsl010.db&recNum=121.

[330] *Id*. at 17.

[331] *Id*. at 19.

[332] U.S. CONST. art. I, § 8 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[333] Tillman & Blackman, *supra* note Part II.

having examined eight constitutional provisions, the Committee did not reach any determinative conclusion. Rather, the Committee concluded that this issue, the scope of the Constitution's "office"- and "officer"-language, did not need to be reached.[334]

The Committee still felt compelled to interpret language in an 1852 statute by referring to language in the Constitution of 1788, including the Impeachment Clause. (Baude and Paulsen rely on the Committee report, but do not bring forward the Committee's discussion of the Constitution of 1788.) As an example, the Committee invoked the 1797-1799 house impeachment and senate trial of Senator William Blount.[335] And those proceedings were centered around debates on the Constitution's Impeachment Clause and other provisions using "office"- and "officer"-language.

The conventional view of the *Blount* case is that it determined that members of Congress are not "Officers of the United States," and thus, they are not subject to impeachment. However, the members of the Conkling Committee seem to cast some doubt on that conventional view. The Committee was "wholly unable to come to the conclusion that the members of the national Congress are not, *in the enlarged and general sense of the Constitution*, officers of their government."[336] In other words, the Committee suggested that members of Congress are "Officers of the United States," and can be impeached. Here, the Committee rejected the standard understanding of what the *Blount* case determined. We do not know if Baude and Paulsen agree with the Committee, and, perhaps, reject the conventional view of the *Blount* case. If Baude and Paulsen disagree with the Committee's apparent rejection of *Blount*, then they may be skeptical about some of the Committee's other conclusions.

For example, the Committee favorably quotes from Alexander J. Dallas, a lawyer for Blount.[337] The Committee wrote, quoting Dallas, "But a little consideration of this matter will show that 'officers of' and 'officers under' the United States are (as said by Mr. Dallas in this Blount case, p. 277) 'indiscriminately used in the Constitution.'"[338] That statement provides some evidence for Baude and Paulsen's position. Indeed, that position was made by Dallas six decades before the Fourteenth Amendment was drafted. And this debate on the scope of the Constitution's "office"-language predates not just the Fourteenth Amendment, but goes back to 1788-89.

Yet, Dallas's view was not the only view expressed during the *Blount* proceedings. The views of the parties and attorneys at the *Blount* proceedings were not monolithic. The Committee did not quote from Blount's other attorney, Jared Ingersoll.[339] Ingersoll contended that the phrase "Officers of the United States" was different from the phrase "Office . . . under the United States."[340] He explained, "[t]he expression [in the Appointments Clause] is not, that the President shall appoint all officers holding under the United States, but all officers of the United States." Ingersoll did not view "Officers of the United States" and "Office under the United States" as synonymous. We discussed Ingersoll's views in the third installment of our ten-part series.[341]

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[334] Conkling Report at 22 ("In the opinion of the committee, the determination of this point is not necessary to the right determination of all that is before the committee, and this is not, perhaps, a proper case in which to make a precedent upon so vital a constitutional question.").

[335] *Impeachment Trial of Senator William Blount*, 1799, UNITED STATES SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-blount.htm.

[336] Conkling Report at 21-22 (emphasis added).

[337] Senate, Blount, *supra* note __, at __.

[338] Conkling Report at 20; Congressional Globe at 3939 (third column towards the top), https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=074/llcg074.db&recNum=100.

[339] *Jared Ingersoll*, PENN LIBRARIES, https://archives.upenn.edu/exhibits/penn-people/biography/jared-ingersoll/.

[340] http://bit.ly/3sw38KR.

[341] Tillman & Blackman, Part III, *supra* note __, at 405-08.

We do not provide Ingersoll's quote to show that he was correct or incorrect. Rather, since 1788, debates have ensued about the meaning of the Constitution's "office"- and "officer"-language. Baude and Paulsen wrote, "If a secret code was really at work, it was an extraordinarily well-kept secret." But there was no secret. There is no secret code. Ingersoll, Dallas, and Conkling were not Illuminati priests. And the five members of the House committee, which Baude and Paulsen rely on, were not the Oracles at Delphi. The view advanced by Dallas was just one view. The Committee relied on Dallas's view. But the Committee gave no explanation why Dallas's view should be preferred over all the other views that were expressed at the *Blount* proceeding.

There is also a problem with the manner that Baude and Paulsen presented this material. On Footnote 399, Baude and Paulsen quote from a post Professor Mark Graber wrote on *Lawfare*.[342] Baude and Paulsen state:

> Professor [Mark] 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.'''[343]

Here is the original text, as it appears in the Congressional Globe:

> "But a little consideration of this matter will show that 'officers of' and 'officers under' the United States are *(as said by Mr. Dallas in this Blount case, p. 277)* 'indiscriminately used in the Constitution.'"[344]

Baude and Paulsen accurately quoted Graber. But Graber omitted the parenthetical: "(as said by Mr. Dallas in this Blount case, p. 277)." The customary use of ellipses would have been appropriate here. As a result of Graber's omission, Graber's readers were not informed that the Committee was quoting from the *Blount* case's hearings transcript, and that the Committee was *not* interpreting the meaning of the 1852 statute based on its plain text. Rather, the Committee was interpreting the 1852 statute with reference to debates from 1797–1798 on the Constitution of 1788. Likewise, this information has not been readily conveyed to Baude and Paulsen's readers.

The Committee's 1866 report relied on Dallas—just one view from the *Blount* hearing. But they put forward no reason why that view was more reliable than any other view put forward in the 1790s. No matter how hard Baude and Paulsen try to stay in the 1860s, they cannot escape the gravitational force of the Constitution of 1788.[345]

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We recognize that we do not have a clear statement during the debates over Section 3 of the Fourteenth Amendment that the President *is not* an "Officer[] of the United States." Nor have Baude and Paulsen (or any others) yet put forward any clear statements from the debates that the

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[342] Mark A. Graber, *Disqualification From Office: Donald Trump v. the 39th Congress*, LAWFARE (Feb. 22, 2023), https://www.lawfaremedia.org/article/disqualification-office-donald-trump-v-39th-congress ("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.'").

[343] Baude & Paulsen, *supra* note __, at 110 n.399.

[344] CONGRESSIONAL GLOBE at 3939 (1866) (emphasis added).

[345] Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411 (2013).

President *is* an "Officer[] of the United States" for purposes of Section 3. In fact, many (but not all) such sources, especially those which merely express conclusions or expectations, and do so without explanation or reasons, are not particularly probative as a matter of original public meaning. We say this even if such sources support our or Baude and Paulsen's position in regard to how Section 3 uses "Officers of the United States." As a result of this paucity of contemporaneous commentary, today's commentators, including ourselves, have turned to other sources beyond the debates on the Fourteenth Amendment to determine the meaning of Section 3's "Officer of the United States"-language. We think the search for that meaning starts with the Constitution of 1788, discussed above. Below, we also look to the 1862 Ironclad Oath statute to illustrate our views, and we do so *because* Baude and Paulsen have argued that this act forms a part of the background that informed how Section 3 was understood.

F. Original meaning and consequentialism

Beyond intentions, the locus of Baude and Paulsen's argument focuses on consequentialism. They ridicule "the seeming absurdity of the prospect of exclusion of the offices of President and Vice President from triggering the disqualification fashioned by the Radical Reconstruction Congress that drafted the Fourteenth Amendment."[346] Their view, as we understand it, is that Blackman and Tillman's position *has* to be wrong because it would lead to what Baude and Paulsen view as bad outcomes. We disagree with their methodological choice. Original meaning cannot be supplanted by consequentialism. But let's take their approach on its own terms. Could the framers of the Fourteenth Amendment possibly have excluded a person who took one, and only one oath as President (or Vice President), from the scope of Section 3? It is undisputed that no such living person existed in 1868. And from 1789 through 2016, all of the presidents and vice presidents had previously taken a Section 3-related constitutional oath in some other government position—state or federal, civilian or military.

The Framers of the Fourteenth Amendment were not omniscient. Could they have failed to anticipate that a businessman would ascend to the presidency without having held any prior office tied to any Article VI oath? Yes, of course, they could have. It is equally possible that they failed in this manner because their legal focus was on the nexus of historical events that gave rise to and shaped secession, the Civil War, and Reconstruction.[347] If Section 3's Framers failed to imagine such an outcome, and, if, as a result, they chose language that failed to account for a possibility that they had not experienced or considered, then we should not be surprised and we cannot play *let's pretend*—we have no warrant to alter the meaning of the words which they have actually chosen.

Finally, Baude and Paulsen seem to assume that the "office"-language in Section 3 should "sweep" as broadly as possible, to include the widest range of positions. But the text of Section 3, as a whole, suggests otherwise. Consider the positions listed in the first two clauses:

1. 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 . . .

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[346] Baude & Paulsen, *supra* note __, at 111.

[347] *See* Baude & Paulsen, *supra* note __, at 3 (Section 3 "was designed to address a particular historical situation and acute problem arising in the aftermath of the Civil War"); *id*. at 8 (same).

2. 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 . . . .

The second clause does not expressly list several categories of positions: e.g., presidential electors, appointed officers of state legislatures, members of state constitutional conventions, and state militia officers. The first clause does not expressly list several categories of positions: e.g., members of the state legislatures, and members of state constitutional conventions. Neither list expressly mentions the President and Vice President. More fundamentally, the two lists are different, and they are different in ways that Baude and Paulsen make no effort to account for. If the goal was to cover the "waterfront," as Baude and Paulsen suggest, then Section 3's Framers could have used the same basic language in both lists. The Framers left out some important positions. The "office"- and "officer"-language within both clauses in Section 3 was not all-encompassing. We will address some of those omissions here.

1. Presidential electors

Presidential electors are listed in the first clause.[348] A person disqualified by Section 3 cannot serve as a presidential elector. One could reasonably infer that because electors are expressly listed in the first clause, they are not covered by the language "any office, civil or military, under the United States, or under any State."[349] Were they covered by this language, there likely would not have been a need to list them separately. However, presidential electors are not expressly listed in the second clause.[350] If presidential electors were not covered by the second clause, a person who took an oath as a presidential elector before the Civil War, and then engaged in insurrection, could still hold a position otherwise prescribed by Section 3.

Presidential electors pose a significant problem for Baude and Paulsen's theory. Baude and Paulsen suggest that electors circa 1868 did not take oaths to the Constitution, so listing them in the second clause would not have triggered any Section 3 disqualification.[351] Baude and Paulsen put forward no reason to believe that the rationale which they suggest is what motivated the disparate language between the first and second clauses. They simply advance an assumption.

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[348] U.S. CONST. amend. XIV, § 3 ("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 . . ." (emphasis added)).

[349] In our view, electors hold "public Trust[s] under the United States." Tillman & Blackman, Part II *supra* note __, at 340 ("These individuals are appointed by the states to elect the President. Unlike irregular and transitional positions, the centrally important role played by Presidential Electors remains very relevant today."). The precise status of presidential electors was at issue in *Chiafalo v. Washington*. *See* Josh Blackman & Seth Barrett Tillman, *What are Presidential Electors?,* VOLOKH CONSPIRACY (May 21, 2020), https://reason.com/volokh/2020/05/21/what-are-presidential-electors/. However, the Court did not resolve this issue. *See* Chiafalo v. Washington, 140 S. Ct. 2316 (2020); *see also* Josh Blackman & Seth Barrett Tillman, Chiafalo v. Washington *Did Not Resolve The Precise Status of Electors*, VOLOKH Conspiracy (July 6, 2020), https://reason.com/volokh/2020/07/06/chiafalo-v-washington-did-not-resolve-the-precise-status-of-electors/ ("The Court studiously avoided this unresolved question. There is not a word about how to characterize electors.").

[350] U.S. CONST. amend. XIV, § 3 ("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 . . . .").

[351] Baude & Paulsen, *supra* note __, at 105 ("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.").

More importantly, this assumption is not supported. Baude and Paulsen do not explain *why* they believe the majority practice of States in the Union, circa 1868, was that electors were not required to take an oath to support the Constitution. Baude and Paulsen's theory as to why presidential electors are excluded from the list of triggering positions, but included in the list of positions a Section 3-covered person is disqualified from holding, only makes sense if they can point to some meaningful research as to what electors actually did on or about December 7, 1864– the last meeting of presidential electors prior to Congress's agreeing to the text of the Fourteenth Amendment in 1866. Yet, they offer no empirical support for this assumption.

Our research suggests there may be some contrary authority.[352] And, in modern times, States impose an oath requirement on its presidential electors. Maryland and Colorado, for example, require electors to take an oath "support the Constitution of the United States."[353] just as required by Section 3.

Baude and Paulsen write that presidential electors were not "required" by Article VI to take an oath to support the Constitution.[354] But this response is not relevant. Section 3 is *practical*. Section 3's list of positions that trigger liability extends to those who held a listed position and had "taken an oath . . . to support the Constitution" in connection with that position--whether or not that oath was required by Article VI. Presidential electors may have taken such an oath under the aegis of state election law or the common practice among electors since 1789 (or since their state's admission to the Union), or even as a result of a mistake of law. In any of these situations, or others, the text of Section 3 would control, and not a theoretical position in regard to the scope of Article VI's oath requirement. Indeed, Baude and Paulsen repeatedly make the point that there is no mistake of law defense in regard to Section 3 liability.[355] If the principle Baude and Paulsen have announced is correct, that is, there is no mistake of law defense under Section 3, then that principle would apply, as Baude and Paulsen suggest, to the substantive conduct prongs (e.g., engaging in insurrection), and it would equally apply to Section 3's predicate conduct (i.e., holding a triggering office and taking an oath to support the Constitution).

We must admit that determining the common practice of electors circa 1864-1868–to take an oath to uphold the U.S. Constitution or not to do so–would be an intense research project. And given that Baude and Paulsen are the proponents of a novel position leading to a limit on

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[352] *See Electoral College*, ALBANY JOURNAL (Dec. 7, 1864) 1 (explaining that when the electors met "the usual oath office was administered"); *New York Electoral College*, NEW-YORK DAILY TRIBUNE (Dec. 7, 1864) 4 (noting that the Secretary of State "called the College to order, and administered the Constitutional oath to each member").

[353] *See* Maryland Code, Election Law, § 8-505 (citing Article I, § 9 of the Maryland Const of 1867), https://casetext.com/statute/code-of-maryland/article-election-law/title-8-elections/subtitle-5-presidential-elections/section-8-505-presidential-electors-meeting/1;Colorado Secretary of State Election Rules [8 CCR 1505-1], https://www.sos.state.co.us/pubs/rule_making/CurrentRules/8CCR1505-1/Rule24.pdf. .We must admit to determine the common practice of electors circa 1864-1868–to take an oath to uphold the U.S. Constitution or not to do so– would be an intense research project. And given that Baude and Paulsen are the proponents of a novel position leading to a limit on democratic participation, the burden of persuasion lies with them.

[354] Baude & Paulsen, *supra* note __, at 105 ("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." (emphasis added)). Taking the position that electors are not required to take an Article VI oath would require Baude and Paulsen to argue that presidential electors are not "officers of the United States" or "officers . . . of the several states" for purposes of the Article VI Oath or Affirmation Clause, at least for purposes of the Constitution of 1788. *See* Baude, JOTWELL, *supra* note __, at __ ("Next time you confront a separation of powers problem or read through parts of the Constitution, keep Professor Tillman's chart in hand. Suddenly, it will be hard to assume that the Constitution's textual variations are meaningless. Indeed, Professor Tillman's theory makes sense of patterns that most of us never saw. It brings order out of chaos.").

[355] *See e.g.*, Baude & Paulsen, *supra* note __, at 65 ("Mistake of law is no defense to a coup d'etat.").

democratic participation, the burden of persuasion lies with them. It would be a substantial undertaking to determine what was the common practice at the time Congress passed and the States ratified the Fourteenth Amendment. But without this research, Baude and Paulsen merely assume that the common practice aligns with their position, and then proffer that assumption to account for the different language used in Section 3's list of positions which trigger disqualification and Section 3's list of positions from which a disqualified person is excluded from holding. But their assumption is just that: an assumption absent support.

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If electors regularly took an oath to support the Constitution, then Baude and Paulsen's theory explaining the textual choices in Section 3 falls to the ground. The two different lists of positions in the first and second clauses of Section 3 pose a challenge to Baude and Paulsen's position. This different language between the two lists suggests that as far-reaching Section 3 was, it was not meant to be all-encompassing. Not all positions were *swept* in. Our job as interpreters is to determine what the language effectively encompassed.

There's more, much more.

2. Members of state legislatures

Baude and Paulsen write that Section 3'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 appropriate, as with adding the category of electors to the list of positions from which a covered person is disqualified."[356] But the text suggests that the Framers did not cover the waterfront.

Members of state legislatures are enumerated in the second clause, but not in the first. Still, Baude and Paulsen reason that insurrectionists would be disqualified by Section 3 from serving in the state legislatures. Baude and Paulsen write that "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." Awkward or not, the failure to enumerate membership in the state legislatures in the first clause is significant. Former insurrectionists were not expressly or clearly disqualified from serving in state legislatures. We think Baude and Paulsen's "somewhat . . . awkward" hedge is something of an understatement. Since the congressional proceeding involving the impeachment and trial of Senator Blount, 1797–1799, the prevailing view has been that the Constitution's "Office"-language does not reach legislators—state or federal. (Professors Akhil and Vikram Amar have been the leading modern proponents of this view.) Is it Baude and Paulsen's view that the drafters of Section 3 were ignorant of this traditional understanding of the scope of "office"-language as used in the Constitution? On the other hand, if they were aware of this traditional understanding, why would they risk departing from it? Why not just include "members of the state legislatures" among the proscribed positions in the first clause as opposed to risk lumping such positions within the provision's general "any office . . . under the United States"-language?

Given that the draftspersons of Section 3 expressly included Senators and Representatives in the first and second clause, why did they not also include analogous language for state legislators in the list of positions in the first clause? After all, they could have done so just by relying on Article VI-like language. Why rely on generalized "office"-language if one seeks to disqualify a

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[356] Baude & Paulsen, *supra* note __, at 105 (emphasis added).

Section 3-covered person from being members of the state legislators? To put it another way, with a focus on contemporaneous history, it was the state legislatures of the (purported) confederate states that *caused* secession and raised armies to fund and fight the Civil War. The state legislatures authorized the secession conventions. If Section 3's drafters intended to encompass state legislators among the positions within the first list, one would think such language would have enjoyed pride of place and listed in the most direct and explicit terms. The fact is that the drafters of Section 3 did not take this path. On that basis, might not one fairly conclude that Section 3's drafters did not intend any broad sweep among all federal and state positions (where holders had taken a prior Article VI oath)? Indeed, membership in the state legislature was in every sense of the word an "important" position. So, one might fairly conclude that Section 3's drafters did not intend any broad sweep even among "important" federal and state positions (where holders had taken an Article VI oath)?

Indeed, this particular risk—involving membership in state legislatures—would have been far more apparent in 1868 than a hypothetical in which an insurrectionist former president (not otherwise subject to disqualification) ran for re-election. But the Framers, at a minimum, left the issue of state legislators not as clear as Baude and Paulsen would have us believe. And this omission was both significant, in that it involved an important position, and, in that it was noticed by commentators. A decade after the ratification of the Fourteenth Amendment, John Randolph Tucker, a congressman from Virginia, stated that "[I]t is clear that a member of a State Legislature is not a civil or military officer under any State, any more than a member of Congress is a civil or military officer under the United States . . . ."[357] Baude and Paulsen cite Tucker as counter-authority. But they offer no explanation why he was wrong.

The Framers of Section 3 stopped far short of covering the "waterfront." The list of Section 3 positions a disqualified person is disqualified from holding (i.e., the first clause) *does not* expressly include membership in the state legislature. But the list of positions leading to disqualification (i.e., the second clause) *does* include membership in a state legislature. To be sure, the second list only reaches members of a state legislature, it does *not* reach appointed officers of the state legislative houses: e.g., the secretaries of the state legislative upper houses, the clerks of the state legislative lower houses, the sergeants-at-arms, the doorkeepers, the parliamentarians, etc. And we are not the first to notice this omission. Attorney General Stanbery observed, "The terms of exclusion are not the members and officers of a State legislature, but simply the members of a State legislature." All these appointed positions are excluded from the operation of Section 3—there is no way to shoehorn these positions into the list of Section 3-triggering positions leading to disqualification.

3. Members of state conventions

What about analogues to state legislative houses? Here we include state conventions to amend state constitutions (*akin to state conventions to secede from the Union*—something which the drafters were likely to have given some thought to), state conventions to ratify proposed federal constitutional amendments meeting under the aegis of Article V, as well as state delegates to an Article V national convention. Attorney General Stanbery observed, "those who have been members of conventions framing or amending the constitution of a State, prior to the rebellion, are not subject to disqualification." Again, there is no way to shoehorn these positions into the list of

[357] John Randolph Tucker, *General Amnesty*, 126 THE NORTH AMERICAN REVIEW 53 (1868) https://www.jstor.org/stable/i25110155.

positions leading to disqualification, and these positions, likewise, are not in any obvious way covered by the first clause listing the positions that a Section 3-covered person is excluded from.

Baude and Paulsen provide no clarity or guidance as to how (if at all) Section 3 covers these positions. That's not surprising: the Second Confiscation Act expressly distinguished state legislative membership from membership in a state convention.[358] Or, perhaps, Baude and Paulsen think these positions were less than "important"? If Section 3 did not apply to state conventions, which were the *immediate* cause of secession, then Section 3 simply does not cover the waterfront of positions that everyone had firmly in mind in 1868. The 1860s—just prior to the Civil War, during the war, and during Reconstruction—was awash with state conventions, including special conventions to decide on seceding from the Union and those charged with adopting Reconstruction-era constitutions. Can Baude and Paulsen really suggest that such positions were less than "important"? We wonder.

4. State militia officers

But there is still more. Earlier, we referenced an opinion by Attorney General Stanbery. (Baude and Paulsen have also cited this opinion with regard to the opinion's Ex Post Facto Clause analysis.) Stanbery wrote that state militia officers are *not* encompassed within the list of Section 3-triggering positions (i.e., the second clause). In fact, Stanbery wrote: "I begin then with the inquiry whether officers of the militia of a State are embraced within [the second clause], and I have no doubt that they are not."[359] Stanbery also excluded municipal officers and those holding a mere employment as coming within the purview of the list of Section 3-triggering positions.[360] We do not suggest that Stanbery was the first and last word on the meaning of the text of Section 3 of the Fourteenth Amendment. What we do suggest is that the scope of Section 3's "Office"-language is hardly obvious.

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We do not identify these specific gaps (and we could have identified others) between the first and second clauses as some sort of *gotcha* argument. Rather, we merely show that the "office"- and "officer"-language within both clauses in Section 3 was not all-encompassing. The Framers did not subject all federal and state positions to Section 3. They left out some positions, and some of those positions were important. Thus, *contra* Baude and Paulsen (and others), there is no strong presumption that the presidency was shoehorned into Section 3's general "officer of the United States"-language.

G. Baude and Paulsen's Reliance on the 1862 Ironclad Oath Statute Undermines Their Position

In 1862, Congress enacted the Ironclad Oath statute.[361] This statute required certain officeholders to swear an oath. Committing perjury in taking the oath falsely was a crime, and upon conviction, the person would be disqualified from holding certain positions in the future. The

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[358] Second Confiscation Act, 12 Stat. 589, 590, ch. 195, § 5 (1862) (authorizing the seizure of property of "any person acting as governor of a state, *member of a convention or legislature*, or judge of any court of any of the so-called confederate states of America." (emphasis added)).
[359] Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 141, 151 (1867).
[360] *Id*. at 152–57.
[361] See 37 Cong. Ch. 128 (July 21, 1862).

statute has two relevant parts. The first part lists those who had to take the new statutory oath: "hereafter every person elected or appointed to *any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States*." These individuals "shall, before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof, take and subscribe the following oath or affirmation." The second part of the statute lists the positions that a convicted person may be disqualified from holding: "And any person who shall falsely take the said oath shall be guilty of perjury, and on conviction, in addition to the penalties now prescribed for that offence, shall be deprived of his office and rendered incapable forever after of holding *any office or place under the United States*."

We make three primary observations based on the plain text. First, the "office"-language in the first part is different from the "office"-language in the second part. The former refers to "any office of honor or profit under the *government* of the United States." The latter refers to "any office or place under the United States." The fact that the same statute uses different "office"-language strongly suggests that that the language refers to different positions. In much the same way, Section 3 refers to different categories of offices: "Officers of the United States" and "Offices . . . under the United States." (The Ironclad Oath does not make use of any "Officers of the United States"-language.) The use of different lists with different language suggests different meanings. Where the same meaning is intended, one chooses the same phrase, and if a different meaning is intended, one varies the language. That's what a good draftsperson would do, and that's how one normally interprets a legal document. What the public saw in 1862 was two different phrases. Therefore, the public likely understood each phrase as meaning something different. We believe the presumptive view, which should not be set aside absent concrete evidence, is that the two phrases are *not* coextensive.

We make a second observation based on the plain text of the Ironclad Oath statute. The President is expressly excluded from the scope of the term "office of honor or profit under the government of the United States." The fact that the Framers expressly excluded the President from this category suggests that the President would otherwise hold an "office of honor or profit under the government of the United States." Why was the presidency excluded from the list of positions that had to take the oath? Perhaps he was excluded for policy reasons. It may have been considered inappropriate to require the President to take the Ironclad Oath. If, e.g., Lincoln was re-elected, would he or his successors have been required to take the oath? What about Lincoln's successors? There is another possibility. As we discussed above, the President has always taken a separate Article II oath, rather than an Article VI oath. Congress may have understood the Article II oath as exclusive, and that the Article VI Oath or Affirmation Clause reached all the most significant appointed and elected officials, except the President. Under this Article-II-is-exclusive view, the President, alone among federal officials, could not be compelled to take a statutory oath. Either way, the text of the provision shows an active choice by the draftspersons. Where the statute's draftspersons intended to exclude the President, they were in command of language to do just that. So two reasons for excluding the President are possible. But under either rationale, the phrase "office of honor or profit under the government of the United States" was viewed differently than the other phrase used later in the statute. This phrase omits "the government": "any office or place under the United States."

We make another observation. The President is not expressly excluded from the scope of the term "any office or place under the United States." This textual decision can be understood in three fashions. First, perhaps the President was not thought to hold an "office or place under the

United States," so there would be no reason to exclude him from that category. This reading would be consistent with how we understand the phrase "office . . . under the United States" in the Constitution of 1788. Second, perhaps the meaning of the phrase "office . . . under the United States" in the statute was unclear. If so, that counsels against using this statute as a model to understand Section 3, and it tells us that similar language in Section 3 was unclear. But we think a lack of clarity would have been extremely problematic in the context of disqualification. A statute should clearly spell out which positions are covered. Third, perhaps the President was thought to hold an "office or place under the United States," and the Framers intended that a person convicted of violating the Ironclad Oath statute *would* be disqualified from holding the presidency. This alternate reading is not inconsistent with our position. Again, we acknowledge the possibility that there was linguistic drift with regard to the phrase "office . . . under the United States" between 1788 and the 1860s. But for good reason, this statute does not provide evidence of linguistic drift.

The dominant view at the time of the framing, and today, is that Congress cannot enact statutory qualifications for elected federal positions. *Federalist No. 60* provides some substantial originalist support for this position. Hamilton wrote, "The qualifications of the persons who may choose or be chosen [for Congress], as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the [national] legislature." And the Supreme Court reaffirmed this historical analysis in *Powell v. McCormack* and *U.S. Term Limits v. Thornton*.[362] *Powell* adopted Hamilton's position from *Federalist No. 60*: Congress cannot add qualifications to elected federal positions such as Representative and Senator, and by implication, to the presidency. *U.S. Term Limits* examined whether the States, as opposed to Congress, have the power to add to the Constitution's qualifications for elected federal positions. The *Thornton* Court explained that "the debates at the state conventions . . . 'also demonstrate the framers' understanding that the qualifications for members of Congress had been fixed in the Constitution.'"[363] We do not think this position is controversial.[364] For all these reasons, in this statute, the phrase "Office . . . under the United States" should not be read to include the elected presidency.

The Ironclad Oath statute creates some difficulties for Baude and Paulsen. They contend that the phrase "Office . . . under the United States," which is used in Section 3, *obviously* includes elected positions like the presidency. And they also rely on the Ironclad Oath, which is best read to suggest that the presidency is *not* an "Office . . . under the United States." If Baude and Paulsen are correct, and the framers of the Ironclad Oath intended to reach the president, then Congress enacted an unconstitutional statute.

The better explanation is that the statute can easily be read as constitutional. And no dexterous saving construction is needed. The phrase "Office . . . under the United States" should be read, as in the Constitution of 1788, to exclude the elected president. Does this argument counsel that "Office . . . under the United States," here and in Section 3, does not extend to the elected officials, including the President. We say *yes*. Our view explains why there was no textual exclusion for the presidency and other elected officials in the second list: because the second list's "office under the United States"-language was not understood as reaching the presidency and other elected officials. We think there are two conceivable interpretations of the phrase "Office . . . under

[362] 514 U.S. 779, 792 (1995).
[363] *Id*. (quoting *Powell*, 395 U.S. at 541 (citing 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 8 (J. Elliot ed., Washington, 1836))).
[364] *See* Tillman & Blackman, *supra* Part IV, at 520-24 (contending that statute enacted by First Congress should not be construed to add qualifications to federal elected officials).

the United States" in the statute. First, if that "office"-language reaches the presidency, then the statute is unconstitutional. Second, if that language does not reach the president, then the statute is constitutional. Which construction should we and the courts adopt? We should favor the construction that maintains the statute's constitutionality. And this language is not just in the Ironclad Oath. Those who violate the Second Confiscation Act are similarly disqualified from holding "any office under the United States."[365]

If in 1862 "office under the United States"-language did not reach the presidency, and if this statute was a model for Section 3, as Baude and Paulsen argue, then that is a substantial reason to conclude that Section 3's "office under the United States" language did not reach the presidency. Textualism and original public meaning and methods trumps conclusory analysis and original expectations.

Finally, we acknowledge the limits of our argument. We would be remiss if we left the reader with the impression that every pre-1868 statute in *Statutes at Large* supports our position. In the nearly 80 years between 1789 and 1868, there were countless federal statutes using "office"- and "officer"-language. We don't doubt that somewhere, at sometime, there might exist one or more statutes supporting Baude and Paulsen's views. Then again, a more recent statute, which generated some discussion regarding candidates for the 2016 and 2024 presidential elections, provides some support for our position.[366] Our point is that two of the statutes Baude and Paulsen *do* cite, both of which were enacted in 1862—the Ironclad Oath Statute and the Second Confiscation Act[367]—do not support their atextual position. In fact, the language in both statutes cuts against their position.

Baude and Paulsen wrote: "In the end, essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ." Again, that's hyperbole. Our point is more limited, Section 3 is difficult to interpret, there is evidence pointing in different directions. If Section 3 is ambiguous, such ambiguities furnish no good ground to exclude a candidate from the ballot or denying a voter his preferred choice.

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[365] Second Confiscation Act, 12 Stat. 589, 590, ch. 195, § 3 (1862).

[366] In 2016, Tillman argued that then-candidate Hillary Clinton could not be disqualified from the presidency for violating 18 U.S.C. § 2071(b). That statute, which prohibits destruction of certain government records, disqualifies a convicted person from "holding any office under the United States." *See* Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BR. J. AM. LEG. STUDIES 95 (2016). Former-Attorney General Michael Mukasey, who had previously contended that Clinton could be disqualified, was persuaded by Tillman. He wrote "on reflection, … Professor Tillman's [analysis] is spot on, and mine was mistaken . . . ." *See* Eugene Volokh & Seth Barrett Tillman, *No, Hillary Clinton wouldn't be legally ineligible for the Presidency even if she had violated government records laws*, THE WASHINGTON POST—THE VOLOKH CONSPIRACY (Aug. 26, 2015, 12:54 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/26/no-hillary-clinton-wouldnt-be-legally-ineligible-for-the-presidency-even-if-she-had-violated-government-records-laws/; *see also* Charlie Savage, 'If Trump broke a law on the removal of official records, would he be barred from future office?,' NEW YORK TIMES (Aug. 8, 2022, 10:18 PM), https://tinyurl.com/mry48pmf ("But in considering that situation, several legal scholars — including Seth B. Tillman of Maynooth University in Ireland and Eugene Volokh of the University of California, Los Angeles — noted that the Constitution sets eligibility criteria for who can be president, and argued that Supreme Court rulings suggest Congress cannot alter them."). More recently, former-Attorney General Mukasey wrote that the President is not an "Officer of the United States" for purposes of Section 3. Michael Mukasey, "Was Trump 'an Officer of the United States'?," WALL STREET JOURNAL (Sept. 7, 2023, 12:59 pm ET), https://wsj.com/articles/was-trump-an-officer-of-the-united-states-constitution-14th-amendment-50b7d26. As the world turns, in 2022, the search warrant for President Donald Trump's home at Mar-A-Lago invoked Section 2071. *See* https://reason.com/volokh/2022/08/08/no-18-u-s-c-%C2%A7-2071-cannot-disqualify-trump-from-the-presidency/ Ultimately, candidate Trump was not indicted with violating this statute.

[367] *See supra* Part IV.B.

H. Parting thoughts on the phrase "Officer of the United States" in Section 3

To this day, it remains quite common for legal documents to distinguish appointed officers from elected, apex officials when discussing constitutions, as well as in many other contexts. For example, in the corporate law setting, insurance against suits alleging a violation of fiduciary duties is most commonly called: "directors and officers insurance" or "directors and officers liability insurance." Identifying such insurance as "directors and other officers insurance" or as "directors and other officers liability insurance" is virtually unheard of.[368]

Many parliamentary draftsmen and learned scholars wrote that way in 1788 and in 1868. That linguistic convention still survives to this day. Recently, two learned scholars wrote:

> These actors [enforcing Section 3] 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.

The scholars, of course, are Baude and Paulsen.[369] We flagged this passage earlier in Part I.B.3. When Baude and Paulsen wrote the passage above, they did not notice they implicitly followed this linguistic convention: there was no reason to list "governors" if they were dead sure that such positions were already incorporated in "other state executive or administrative officials." That's a tell.

Likewise, when Baude and Paulsen list the President, they list that position expressly and contrast it with "subordinate executive branch officers." Why use that language? You will not find "subordinate executive branch officers" in the Constitution or in any of the statutes they suggest were models for Section 3. Indeed, under the Supreme Court's precedents, Article II distinguishes between *principal* officers of the United States and *inferior* officers of the United States—all of whom are subordinate to the President. Yet no one would describe the President as a principal officer. The President is distinguished from officers of the United States.

To communicate with the reader, Baude and Paulsen depart from the language of Article VI and Section 3. When they want you to know the presidency is included, they list his position expressly. When Section 3 does not expressly use such language, they want you to believe that general "office"- and "officer"-language achieves the same effect. They know how to write and communicate clearly and proceed to do so. Yet, Baude and Paulsen want you to believe that the Framers of the Constitution of 1788 and Section 3 lacked such basic communication skills.

In both cases, involving governors and the President, Baude and Paulsen did not hide the apex official in a mousehole. They listed the apex official separately, because they knew readers would not naturally include it in the more general phrase, "state executive or administrative officials." Or maybe they listed the apex official separately because they were not sure, and they wanted to eliminate any doubts.

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[368] Google returns over 600,000 results for "directors and officers insurance" and "directors and officers liability insurance." By contrast, Google returns under 10 results for "directors and other officers insurance" and "directors and other officers liability insurance." Directors are elected apex officials; officers are appointed by and work for directors. It is no surprise that corporate law and constitutional law share this linguistic tradition–both areas of law have a common genealogical heritage.

[369] Baude & Paulsen, *supra* note __ at 23.

If Baude and Paulsen are not entirely sure about whether a Governor is a "state executive," then they should exhibit caution when concluding whether the President is an "Officer of the United States." Why? Because, as Attorney General Stanbery explained circa 1868, efforts to restrict the scope of democratic participation by positive law require us to be sure, and if in doubt, we give the benefit of that doubt to letting the candidate participate and letting the voter vote for the candidate of his choice.[370] The Democracy Canon demands no less.[371]

In writing this analysis of the phrase "officers of the United States," we find ourselves disagreeing with two scholars we know and admire. It is conceivable that they are correct, and we, wrong. It is also conceivable that we are right, and they, wrong. It is also possible that we are both wrong. That said: we cannot both be correct. The Constitution and Section 3 must have meant something in 1788 and 1868, or, at the very least, one discovered or constructed meaning is better.

Early in their paper, Baude and Paulsen made use of a reasonably well known quotation, absent a citation, and absent quotation marks.[372] Here, we return the favor.

> [T]he Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has nothing whatever to do with the merits or demerits of the measure.
>
> Such a function has led us all[,] I think[,] to believe that close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.

Is our reading of the Constitution's "office"- and "officer"-language "excessively legalistic"? We plead guilty.

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Our position is that the phrase "Officers of the United States," as used in the Constitution of 1788, does not refer to elected positions. Baude and Paulsen have put forward little substantial evidence that the meaning changed by 1868, and that the specific phrase in Section 3 includes the elected president. If we are right that the President is not a Section 3 "Officer of the United States," then the courts and Congress will, or at least, should be spared the need to decide if President Trump engaged in insurrection or rebellion for Section 3 purposes.

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370 Henry Stanbery, The Reconstruction Acts, 12 Op. Att'y Gen. 141, 160 (1867).
371 *See generally* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).
372 *See supra* Part IV.B.

Conclusion

We conclude this article where we began: establishing the original public meaning of Section 3 is difficult. Is it true that "essentially all the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ."? No.

First, the question of whether Section 3 of the Fourteenth Amendment is self-executing cannot be resolved by pointing to Section 1 of the Fourteenth Amendment or to other provisions of the Constitution. The caselaw in those areas does not support any presumption that constitutional provisions are self-executing. Trump has not been disqualified pursuant to any federal enforcement legislation. If Section 3 requires federal enforcement legislation, then States cannot unilaterally remove Trump from the ballot.

Second, in *Griffin's Case*, Chief Justice Chase wrote that Section 3 could only be implemented through federal enforcement legislation. This decision, handed down within a year of the Fourteenth Amendment's ratification, was, and remains, reasonably probative evidence with regard to whether Section 3 is self-executing. Indeed, this decision was repeatedly cited for much of the past 150 years, and it only became subject to criticism in 2020 or so. Furthermore, the *Case of Jefferson Davis* can be reconciled with *Griffin's Case*. If Chase was correct, then States cannot unilaterally remove Trump from the ballot.

Third, a Section 3 disqualification is triggered by a covered person who (i) engages in insurrection or rebellion against the United States or who (ii) gives aid or comfort to the enemies thereof. A state cannot allege that Trump gave aid and comfort to enemies, since there was no actual war. And, *contra* Baude and Paulsen, no one can be disqualified for giving aid or comfort to an insurrection because Section 3 lists no such offense. Disqualification can only result from the direct substantive offense: *engaging in insurrection*. And failing to stop an insurrection is not the same as actually engaging in insurrection. As far as we know, as of today, neither Trump, nor anyone else, has been charged with any offense concerning insurrection in regard to January 6. If Trump did not actually engage in insurrection, then States cannot unilaterally remove Trump from the ballot under the authority of Section 3.

Fourth, we have put forward substantial evidence that the President is not an "officer of the United States" for purposes of Section 3. Numerous sources that we cited discussed this issue; no one spoke in a "secret code," as Baude and Paulsen charge. If we are correct, Trump is not subject to Section 3 at all. If we are right, then States cannot unilaterally remove Trump from the ballot under the authority of Section 3. Moreover, if we are correct, then there is no need to decide whether Section 3 is self-executing, or whether Trump's conduct amounted to engaging in insurrection or rebellion.[373]

What about Baude and Paulsen's article? The theoretical defects and other errors are not insubstantial and span multiple independent issues. We see no sound basis for their Article's startling conclusion: "In the end, essentially *all* the evidence concerning the original textual

[373] Blackman and Tillman, NYUJLL at 54 ("In 2020, the U.S. Supreme Court was able to avoid resolving any of the major election disputes. But 2024 may be different. A Supreme Court ruling on this issue could make *Bush v. Gore* seem mild by comparison. There are many prudential reasons for the Court to avoid deciding whether Trump engaged in insurrection, or whether Trump can be—or perhaps was already—disqualified. The Court should stay out of that MAGA thicket. A narrow finding that the President is not an "officer of the United States" ends the case. That opinion would be entirely consistent with Supreme Court authority from *Mouat* to *Free Enterprise Fund*. It would track the text of Section 3. It would be consistent with the Constitution of 1788. And, most importantly, it allows the people to elect the next President, and not the courts, much less partisan election boards.").

meaning of Section Three . . . points in the same direction . . . ." Indeed, we cannot remember having seen such a conclusion in any academic publication before–at least, none comes readily to mind. We cannot remember having seen an academic article repeatedly making hyperbolic claims–at least, none comes readily to mind. Baude and Paulsen's article tells only one side of a complex story, and it does not fully respond to (and sometimes fails to see) contrary evidence. Their article is now a draft posted on the Social Science Research Network. We suggest that scholars, litigants, elections administrators, and judges allow their article to percolate in the literature before placing too great a reliance on its novel claims.

Still, however Baude and Paulsen's article should evolve, we worry about the impact it has already had. We think the effect of their article is to take the focus off voters and traditional election law administrators and to transfer, in substantial part, the responsibility for Section 3 enforcement to a whole host of high level government officials, including elected officials, who have no clear duties related to traditional election law proceedings. We don't say that their article articulates precisely that result, but we think it will be and, perhaps, already has been understood that way.

Inevitably, this issue will be thrust into the courts, and in the end, quite possibly the Supreme Court. We recently observed that "[a] Supreme Court ruling on [Trump and Section 3] could make *Bush v. Gore* seem mild by comparison."[374] But instead of potentially disqualifying thousands of ballots in South Florida, the Court would potentially disqualify a candidate who received tens of millions of votes across the country. Perhaps that step could be justified if "essentially *all* the evidence concerning the original textual meaning of Section Three . . . points in the same direction . . . ." But it doesn't.

[374] NYUJLL at 54.