BACKGROUND AS FOREGROUND: SECTION THREE OF THE FOURTEENTH AMENDMENT AND JANUARY 6TH

*Gerard N. Magliocca**

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

Griffin's Case[1]

The fallout from the January 6th insurrection may require the Supreme Court to interpret Section Three of the Fourteenth Amendment for the first time.[2] Public officials connected to the violence at the Capitol, including former President Trump, may well be subject to Section Three's exclusion from holding office for engaging in insurrection after swearing an oath to support the Constitution.[3] Though Section Three was applied to thousands

* Samuel R. Rosen Professor, Indiana University Robert H. McKinney School of Law. I thank the student organizers of the Symposium for giving me this opportunity and Bruce Ackerman, Josh Blackman, and others for their comments on the draft.

1 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815) (Chase, C.J.).

2 *See* 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, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."); H. REP. NO. 117-663, at 690 (2022) (offering that "those who took an oath to protect and defend the Constitution and then, on January 6th, engaged in insurrection can appropriately be disqualified and barred from holding government office . . . pursuant to Section 3 of the Fourteenth Amendment.").

3 *See, e.g.*, New Mexico *ex rel.* White v. Griffin, No. D-101-CV-2022-00473, slip op. at 45 (N.M. Dist. Sept. 6, 2022) (holding that a county commissioner who participated in the January 6th insurrection violated Section Three and ordering his immediate removal and disqualification from office), *appeal dismissed*, No. S-1-SC-39571 (N.M. Nov. 15, 2022).

of former Confederates and was discussed by the first opinions on the Fourteenth Amendment, the provision is still largely a blank slate.[4]

This Essay argues that in interpreting Section Three the Supreme Court must avoid an error made in its earliest Fourteenth Amendment cases. The error was the Court's elevation of background constitutional principles, most notably states'-rights, at the expense of the Fourteenth Amendment's text and purpose.[5] Chief Justice Salmon P. Chase made a similar mistake, in his capacity as a circuit justice, when he contended that the text of Article One and of the Due Process Clause support a restrictive construction of Section Three.[6] Now the Court is at risk of making a related error by interpreting Section Three narrowly in the name of democracy. Democracy is a bedrock constitutional principle. But democracy does not provide the right framing for the January 6th cases given Section Three's text and purpose.[7] The Fourteenth Amendment's background must not control its foreground again.

Thinking about the possible application of Section Three today also provides new insights into how constitutional interpretation can go astray. The nineteenth century Supreme Court is criticized for its cramped view of the Fourteenth Amendment, but that criticism understates the difficulty of

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4 *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment,* 36 CONST. COMMENT. 87 (2021) (providing a comprehensive overview of Section Three); *see also* United States v. Powell, 27 F. Cas. 605, 607 (C.C.D. N.C. 1871) (No. 16,079) (charging a jury that Section Three's language on "engaged in insurrection or rebellion" required a voluntary act by the allegedly disqualified official); *Griffin*, 11 F. Cas. at 27 (concluding that Section Three did not warrant *habeas corpus* relief for a petitioner convicted in a trial presided over by an ineligible judge); Worthy v. Barrett, 63 N.C. 206, 207, 211 (1869) (holding that an individual who served as a county sheriff before and during the Civil War was disqualified by Section Three); *In Re* Tate, 63 N.C. 308, 308–09 (1869) (holding that a state solicitor who was a county attorney before the Civil War and served in the Confederate Army was disqualified by Section Three). In 2023, there was a burst of thoughtful academic commentary on Section 3. *Compare* William Baude and Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. (forthcoming 2024) (arguing that Section 3 disqualifies Donald Trump from the presidency), *with* Josh Blackman and Seth Barrett Tillman, *Sweeping and Forcing the President Into Section 3: A Response to William Baude and Michael Stokes Paulsen*, available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568771 [https://perma.cc/L52Y-LMR9] (rejecting Baude and Paulsen's thesis); *see also* John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 BRIT. J. AM. LEGAL STUD. (forthcoming 2024) (evaluating whether Section applies to the presidency and to a former President such as Donald Trump).

5 *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Cruikshank, 92 U.S. 542 (1876); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

6 *See Griffin*, 11 F. Cas. at 26; *supra* text accompanying note 1; *see also* U.S. CONST. art. I, § 9, cl. 3 (barring Congress from passing an ex post facto law or a bill of attainder); *id.* at § 10, cl. 1 (barring the states from doing the same); *id.* at amend. V (guaranteeing due process); *cf.* Cawthorn v. Amalfi, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring in the judgment) (describing *Griffin's Case* as "confused and confusing").

7 *See infra* Part II; *cf.* U.S. CONST. amend XIV, § 3 (providing that Congress may, by a two-thirds vote of each House, grant disqualification waivers).

correctly reading new or unfamiliar text that is open-ended and would produce controversial results. The instinct to fall back on older and more established principles is powerful and may, in the end, be irresistible even for judges and scholars acting in good faith.

PART I—THE SHADOW OF THE PAST

Outside of the Supreme Court, there is a consensus that the Court's initial interpretations of the Fourteenth Amendment were deeply flawed.[8] One factor in that dismal performance was that the Court gave too much weight to states'-rights in its analysis.[9] After providing proof for that claim and some thoughts about why that mistake occurred, I turn to Chief Justice Chase's equally misguided construction of Section Three in *Griffin's Case*. In that circuit opinion, the Chief Justice gave undue weight to the Ex Post Facto Clauses, the Bill of Attainder Clauses, and the Fifth Amendment Due Process Clause in concluding that Section Three could be enforced only by an Act of Congress.[10] Both sets of mistakes—by the Court and by the Chief Justice—serve as cautionary tales for the January 6th cases.

A. The Federalism Bogeyman

The Supreme Court's first Fourteenth Amendment case stated that the new text must be read against the backdrop of traditional federalism. In the *Slaughterhouse Cases*,[11] the Court construed the Privileges or Immunities Clause of Section One narrowly in rejecting a claim by butchers that a state law

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8 The Court has not always acknowledged these errors. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 756–58 (2010) ("[D]eclin[ing] to disturb the *Slaughterhouse* holding" but conceding that the dicta in the case is widely regarded as incorrect).

9 This is not the only way to understand how the Court went wrong. There are many other internal and external explanations. For example, one is that the Court was swayed by white public opinion, which turned against Reconstruction by the 1870s. *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 130–31 (2019) (acknowledging this view but countering that "[t]he justices did not simply reflect popular sentiment—they helped to create it"). Another is that the Court's approach to the Fourteenth Amendment was too formal. *See, e.g.*, *The Civil Rights Cases*, 109 U.S. at 33 (Harlan, J., dissenting) ("The opinion in these cases proceeds, as it seems to me, upon grounds entirely too narrow and artificial."). A third is that the Court was insensitive to the Fourteenth Amendment's original public meaning. *See generally* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021). I emphasize the states'-rights angle here because that is the most illuminating aspect for Section Three and January 6th.

10 *See supra* text accompanying note 1. For a longer discussion of *Griffin's Case*, see Magliocca, *supra* note 4, at 102–08. Chief Justice Chase's opinion was full of questionable assumptions and claims, but I will not repeat my prior analysis here.

11 83 U.S. (16 Wall.) 36, 60, 74–83 (1873).

violated their right to pursue their livelihood free from unreasonable regulation.[12] Why was this narrow reading adopted? The Court explained that the Fourteenth Amendment was not intended to accomplish a result that "radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[13] To conclude otherwise would be "so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character."[14] As a result, the Court said that the Privileges or Immunities Clause did not apply to most rights and listed only a handful of relatively insignificant items as national privileges or immunities secured by the Fourteenth Amendment.[15] Justice Field's dissent argued that this left the clause a "vain and idle enactment, which accomplishe[s] nothing," and the Court's dicta on states'-rights and fundamental rights has not withstood the test of time or scholarship.[16]

Ten years later, the Court invalidated most of the Civil Rights Act of 1875 and said that a broad Section Five enforcement power in Congress would eviscerate state sovereignty.[17] Why was that? Because such a power

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12 *See* U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens . . . ."); *see generally* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughterhouse Cases, 109 YALE L.J. 643 (2000) (offering a superb overview of the decision).

13 *Slaughterhouse*, 83 U.S. (16 Wall.) at 78.

14 *Id.*

15 *See id.* at 78–81 (offering examples such as the right of free access to seaports and subtreasuries). *Slaughterhouse*'s holding, which was that the right to pursue a livelihood free from unreasonable state regulation was not a privilege or immunity of citizenship, is defensible given the Court's eventual rejection of the "liberty of contract" doctrine. *See* West Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937) ("The Constitution does not speak of freedom of contract.").

16 *Slaughterhouse*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting); *see, e.g.*, Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n. 178 (2001) ("Virtually no serious modern scholar—left, right, and center—thinks that this is a plausible reading of the Amendment."). The Court held in 1900 (citing *Slaughterhouse*) that the Privileges and Immunities Clause did not include all the guarantees in the first eight amendments. *See* Maxwell v. Dow, 176 U.S. 581, 587–691, 600–01 (1900). But the Court later used the Fourteenth Amendment's Due Process Clause to apply most of the Bill of Rights to the States; an interpretation at odds with the states'-rights spirit of *Slaughterhouse*. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (applying the Excessive Fines Clause of the Eighth Amendment to the states).

17 *See* The Civil Rights Cases, 109 U.S. 3, 25 (1883); *see also* U.S. CONST. amend XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). The parts of the Act that were struck down barred racial discrimination in inns, public conveyances, and public amusements. *See The Civil Rights Cases* 109 U.S. at 9. For a blow-by-blow account of the *Civil Rights Cases*, see PETER S. CANELLOS, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA'S JUDICIAL HERO 10–32, 256–70 (2021).

would let Congress "establish a code of municipal law regulative of all private rights between man and man in society. It would be to make congress take the place of the state legislatures and to supersede them."[18] And this outcome would be "repugnant to the tenth amendment of the constitution."[19] Justice Harlan's dissent replied: "Not so."[20] A broader construction "does not in any degree intrench upon the just rights of the States in their control of their domestic affairs. It simply recognizes the enlarged powers conferred by the recent amendments upon the general government."[21] Though the "state action" doctrine of the *Civil Rights Cases* was reaffirmed in 2000,[22] the Court's dicta that using federal authority to prohibit racial discrimination in public accommodations would wrongfully "supersede" state legislatures is no longer accepted.[23]

Why did the Court turn to states'-rights to construe a text that increased congressional power and placed new limits on the states? A reasonable (if somewhat dull) answer is that this was the triumph of the familiar over the unfamiliar.[24] Judges are creatures of habit and of precedent. They are not inclined to embrace fresh ideas that upset the status quo. Caution is often wise for a judge, but that posture can deny new or novel textual provisions their proper scope. This was the fate of Sections One and Five of the Fourteenth Amendment in the 1870s and 1880s. Even before that, however, the same reflexive emphasis on background principles was used to limit the reach of Section Three.[25]

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18 *The Civil Rights Cases*, 109 U.S. at 23. *United States v. Cruikshank*, another infamous early Fourteenth Amendment decision, made similar statements in reading Congress's enforcement powers restrictively. *See* United States v. Cruikshank, 92 S. Ct. 542, 551–52 (1876) (denying that Congress could enact a criminal statute to protect the rights of assembly, petition, or bearing arms from private interference and stating that these rights were subject to only the state's police power under the Constitution).

19 *The Civil Rights Cases*, 109 U.S. at 24; *see* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

20 *The Civil Rights Cases*, 109 U.S. at 55 (Harlan, J., dissenting).

21 *Id.* at 56 (Harlan, J., dissenting). Justice Harlan argued that the objects of the Civil Rights Act of 1875 were state actors at common law, therefore his disagreement with the Court was not whether there was a state action limit in the Fourteenth Amendment. *See id.* at 58–59 (Harlan J., dissenting).

22 *See* United States v. Morrison, 529 U.S. 598, 624 (2000).

23 *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding the Civil Rights Act of 1964 as an exercise of the commerce power).

24 This could be described as an availability heuristic, though my observation is much simpler.

25 The same was true in the 1880s. When the Attorney General was asked to interpret Section Three in 1885, he cited *Slaughterhouse* for the proposition that

B. Griffin's Case

Few people realize that the first significant judicial opinion on the Fourteenth Amendment was about Section Three.[26] Caesar Griffin was a Black man convicted by a Virginia court of assault with intent to kill.[27] He brought a federal *habeas corpus* petition contending that his conviction was invalid because the judge who presided over his trial was ineligible under Section Three to serve in office.[28] *Griffin's Case* was decided by Chief Justice Chase, acting in his capacity as a circuit justice.[29] The Chief Justice stated that an Act of Congress was required to enforce Section Three.[30] Since no such Act of Congress applied to Virginia when Griffin's trial occurred, the trial judge was eligible to preside and the petition must be rejected.[31]

The Chief Justice's determination that Section Three should be read restrictively (as not self-enforcing) rested in part on the premise that the new constitutional text must be strongly informed by background textual principles.[32] He asked: "What was the intention of the people of the United

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> the court refused to adopt the full meaning of certain general words in the first section of the fourteenth amendment in order to avoid an interpretation that would have involved 'so great a departure from the structure and spirit of our institutions' as, in the absence of explicit language, could not be presumed to have been intended.

See Lawton's Case, 18 Op. Att'y Gen 149, 151 (1885). What followed was a narrow (and incorrect) reading that a presidential pardon issued prior the Fourteenth Amendment's ratification gave a person an exemption from Section Three. *See* Magliocca, *supra* note 4, at 124–26. The Pardon Clause was the background principle swallowing Section Three in that case.

26 *See* Griffin's Case, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815) (Chase, C.J.). There were also state judicial opinions on Section Three in 1869. *See, e.g.*, Worthy v. Barrett, 63 N.C. 206 (1869); State *ex rel.* Downes v. Towne, 21 La. Ann. 490 (1869).

27 *Griffin's Case*, 11 F. Cas. at 22.

28 *Id.* at 22–23.

29 *Id.* at 22.

30 *Id.* at 26. The Chief Justice did not explain why state law could not enforce Section Three, except to argue implausibly that Congress's exclusive power to grant disqualification waivers meant that only Congress could enforce disqualifications. *See id.* One reading of *Griffin's Case* is that an Act of Congress was required because state law was unavailable for enforcement. In 1869, Virginia was an unreconstructed state and thus lacked the ordinary powers of a state. *See id.* at 27 (noting a congressional joint resolution referring to "the provisional governments of Virginia and Texas"). Moreover, the Chief Justice may not have considered state law an option because Virginia did not yet recognize the Fourteenth Amendment's legitimacy. *Compare Chief Justice Chase's Decision in the Caesar Griffin Case*, N.Y. TIMES, May 25, 1869, at 1, *with Virginia: Ratification of the Fourteenth and Fifteenth Amendments to the Constitution*, N.Y. TIMES, Nov. 9, 1869, at 3. In states that were readmitted in 1869 and had ratified the Fourteenth Amendment, Section Three was enforced by state law. *See Worthy,* 63 N.C. at 207.

31 *Griffin's Case*, 11 F. Cas. at 27.

32 This could be described as an example of intertextualism. *See generally* Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326 (2022) (discussing the influence of prior constitutions or constitutional provisions on subsequent ones).

States in adopting the fourteenth amendment? What is the true scope of the prohibition to hold office contained in the third section?"[33] To answer these questions, he used an interpretive canon that

> [o]f two constructions, either of which is warranted by the words of the amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution.[34]

Then, in the passage quoted at the beginning of this Essay, Chief Justice Chase argued that Section Three was a retroactive punishment without trial that must be read strictly given Article One's bar on ex post facto laws and bills of attainder and the Fifth Amendment's guarantee of due process of law.[35] Let's unpack this claim. First, Chase's assertion that Section Three is a punishment was contradicted by many of the Fourteenth Amendment's drafters.[36] Second, due process of law was available to men subject to Section Three because anyone could argue that he was not part of the Confederacy.[37] That said, the Chief Justice was right that Section Three was retroactive with respect to Confederates who engaged in disqualifying conduct before the Fourteenth Amendment's ratification.

The problem with the Chief Justice's reliance on these background principles is that he ignored the foreground point that those same concerns

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33 *Griffin's Case*, 11 F. Cas. at 24.

34 *Id.* at 25. The Chief Justice also discussed what he saw as the harmful consequences of viewing Section Three as self-enforcing. He argued that many official acts taken in the ex-Confederate States since the Fourteenth Amendment's ratification would be invalidated and that this would cause chaos. *See id.* at 24–25. The truth of this assertion and its relevance were both highly dubious. For example, Chase said that the acts of elected or appointed officers were still valid under the "de facto officer" doctrine even if their election or appointment was invalid. *Id.* at 27. But if that was true, then no chaos would result from holding that officeholders were ineligible. Thus, *Griffin's Case* was internally incoherent on this point.

35 *See supra* text accompanying note 1. Strictly speaking, Section Three is not a bill of attainder because the disqualification is imposed by the Constitution rather than by the legislature. *See* United States v. Brown, 381 U.S. 437, 441–46 (1965) (providing background on the Bill of Attainder Clauses). But Chase was invoking the spirit of the provision. *See Griffin's Case*, 11 F. Cas. at 26 (stating that a construction that "is repugnant to the first principles of justice and right embodied in other provisions of the constitution, is not to be favored, if any other reasonable construction can be found").

36 *See* Magliocca, *supra* note 4, at 96 (noting that there was division of opinion in 1866 about whether Section Three was more properly viewed as a punishment or a qualification). In 1870, Congress said that Section Three could be enforced by a civil *quo warranto* action, *see* First Ku Klux Klan Act, ch. 114, 16 Stat. 140, § 14 (1870), which was support (after *Griffin's Case*) for the proposition that this was not a criminal punishment.

37 *See, e.g.*, Worthy v. Barrett, 63 N.C. 206 (1869); *In Re* Tate, 63 N.C. 308 (1869); State *ex rel.* Downes v. Towne, 21 La. Ann. 490 (1869).

were raised and rejected when Congress proposed Section Three.[38] Many members opposed Section Three as a bill of attainder and an ex post facto law, or as a denial of a fair trial.[39] Section Three was proposed and ratified as an *exception* to these ideas. As one senator explained:

> They tell us that it is a bill of attainder. Suppose it were; are the people in their sovereign capacity prohibited from passing a bill of attainder? . . . It is said that the law is *ex post facto* in its character; what if it is? Have not the people the right, by a constitutional amendment, to enact such a law?[40]

This exception was warranted by the extraordinary circumstances presented when officials who swore an oath to support the Constitution then engage in insurrection against the Constitution.[41] And Congress fully considered the implications of that exception in crafting an exception that applied to only current and former civil officials and military officers (not private citizens) and let two-thirds of each House grant any disqualified individual a waiver.

Why did Chief Justice Chase fall back on background principles that Congress rejected? Again, one answer is that familiar beats unfamiliar. Section Three was unprecedented, not only for our Constitution but for any constitution.[42] And the Chief Justice was the first federal judge who was called upon to write an extended opinion on this new text. In the absence of precedent, the allure of traditional constitutional ideas was too great to resist. *Griffin's Case* was a harbinger for *Slaughterhouse* and for the *Civil Rights Cases*.[43] It may also be a harbinger for the January 6th cases.

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38 The same point could be made for the Supreme Court's analysis of Sections One and Five in *Slaughterhouse* and the *Civil Rights Cases*.

39 *See, e.g.*, CONG. GLOBE, 39th Cong. 1st. Sess. 2915 (1866) (statement of Senator Doolittle); *id.* at 2989–90 (statement of Senator Cowan); *id.* at 2467 (statement of Representative Boyer); *id.* at 879 (statement of Senator Hendricks); *id.* at app. 241 (statement of Senator Davis).

40 *Id.* at 3036 (statement of Senator Henderson).

41 *See Speech of Hon. John A. Bingham*, N.H. STATESMAN, Aug. 24, 1866, at 1 (stating that Section Three meant that "no man who broke his official oath with the nation or State, and rendered service in this rebellion shall, except by the grace of the American people, be again permitted to hold a position, either in the National or State Government").

42 Section Three was unprecedented in the sense that prior restrictions on serving in office were bright-line rules (age and citizenship, for example) instead of standards.

43 The point of my original Section Three article, which was drafted before January 6th, 2021, was that the application of that provision "was a microcosm for the arc of the Fourteenth Amendment during Reconstruction." *See* Magliocca, *supra* note 4, at 88. I did not, though, discuss the *Civil Rights Cases* in that paper.

PART II—THE DEMOCRACY CANON

The upcoming Section Three cases will present many challenging questions.[44] Was the January 6th attack on the Capitol an insurrection within the meaning of the Fourteenth Amendment?[45] What standard should the courts use to evaluate if someone engaged in insurrection?[46] Does the House of Representatives have exclusive jurisdiction over Section Three's application to a House candidate?[47] Is the presidency among the offices subject to Section Three?[48] But I shall pass over these issues in favor of a

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44 The only case that addresses the insurrection and engagement issues in connection with January 6th is New Mexico *ex rel.* White v. Griffin, No. D-101-CV-2022-00473, slip op. (N.M. Dist., Sept. 6, 2022) (concluding that January 6th was an insurrection under Section Three and that a county commissioner convicted of a misdemeanor for trespassing on the Capitol grounds engaged in the insurrection), *appeal dismissed*, No. S-1-SC-39571 (N.M. Nov. 15, 2022). A Georgia administrative proceeding (in which I participated as an expert witness) assumed without deciding that January 6th was a Section Three insurrection but concluded that the evidence presented was insufficient to prove that Representative Marjorie Taylor-Greene engaged in insurrection. *See* Greene v. Secretary of State for Georgia, 52 F. 4th 907, 909–10 (11th Cir. 2022) (summarizing the state proceeding before dismissing the parallel federal case as moot).

45 For a thoughtful definition of insurrection, see *In re* Charge to Grand Jury, 62. F. 828, 830 (D.C.N.D. Ill. 1894) ("Insurrection is a rising against civil and political authority,—the open and active opposition of a number of persons to the execution of law in a city or state. . . . It is not necessary that there should be bloodshed; it is not necessary that its dimensions should be so portentous as to insure [sic] probable success, to constitute an insurrection. It is necessary, however, that the rising should be in opposition to the execution of the laws of the United States and should be so formidable as for the time being to defy the authority of the United States.").

46 *See* Worthy v. Barrett, 63 N.C. 206, 209 (defining engage for purposes of Section Three as voluntary aid "by personal service or by contributions, other than charitable, of anything that was useful or necessary"); *cf.* United States v. Powell, 27 F. Cas. 605, 607 (C.C.D. N.C 1871) (No. 16,709) (instructing a jury in a Section Three criminal case: "We are of opinion, gentlemen, that the word 'engage' implies, and was intended to imply, a voluntary effort to assist the insurrection or Rebellion, and to bring it to a successful termination . . . .").

47 *Compare* Cawthorn v. Amalfi, 35 F. 4th 245, 261–66 (4th Cir. 2022) (Wynn, J., concurring) (concluding that the House of Representatives does not have exclusive jurisdiction over House candidates), *with id.* at 266–85 (Richardson, J., concurring in the judgment) (reaching the opposite conclusion); *see also Greene*, 52 F. 4th. at 910–16 (Branch, J. concurring) (reasoning that the House does have such exclusive authority). The same question could be asked about the Senate with respect to a Senate candidate, though no case has addressed that issue.

48 In my prior Section Three article, I quoted a Senate colloquy indicating that Section Three included the presidency as one of the offices subject to exclusion. *See* Magliocca, *supra* note 4, at 93. My research since then shows that President Andrew Johnson repeatedly referred to himself as "the chief executive officer of the United States" in his proclamations establishing provisional governments in many of the ex-Confederate States. *See* Andrew Johnson, Proclamations Reorganizing a Constitutional Government, *in* 7–8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3510–14, 3516–23, 3524–29 (James D. Richardson, ed., 1897) (reprinting President Johnson's proclamations for North Carolina, Mississippi, Georgia, Texas, Alabama, South Carolina, and Florida). These references, combined with others made in Congress

background principle that may well end up doing more work in the disqualification cases. This principle is "the democracy canon."[49]

The democracy canon is shorthand for the argument that Section Three should be construed narrowly because disqualifying elected officials or candidates is undemocratic.[50] Voters should have the broadest possible freedom to pick their representatives.[51] Indeed, this idea explains why so few qualifications for office are in the Constitution.[52] Disqualifying people from running or serving would curtail that freedom and undermine the legitimacy of our elections. Many voters would feel disenfranchised. And then there is

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and in public while the Fourteenth Amendment was under consideration that described the President as an "executive officer of the United States," support the view that the President is an "officer of the United States" for purposes of Section Three. *See, e.g.*, *Major General Butler: His Address to the Citizens in Court House Square Last Evening*, CHICAGO TRIBUNE, Oct. 18, 1866, at 4 (reprinting a campaign speech by Representative Benjamin Butler stating that "the President is, in himself, one department of the Government, and when he speaks, he speaks as the Chief executive officer of the United States"). For the contrary view, see Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" For Purposes of Section Three of the Fourteenth Amendment*, 15 N.Y.U. J.L. & LIBERTY 1 (2021). Assuming that the presidency is an office subject to Section Three, a state has the authority to exclude constitutionally ineligible presidential candidates from appearing on the ballot. *See* Hassan v. Colorado, 495 F. App'x 947, 948–49 (10th Cir. 2012) (Gorsuch, J.) (upholding Colorado's authority to exclude a presidential candidate because he was not a natural-born citizen).

49 *See* Blackman & Tillman, *supra* note 48, at 47 (arguing that the democracy canon counsels against construing Section Three as applying to the presidency); *see also* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009) (describing the concept more generally). This argument lacks force for appointed officials. But none of the current or likely Section Three cases involves appointed officials.

50 The democracy canon could be implemented in many ways. For instance, one would be to hold that a criminal conviction is required to invoke Section Three, even though that was never the case during Reconstruction. Another would be to say that "insurrection" refers only to the Civil War, even though that is not the method used to interpret the general terms in Section One of the Fourteenth Amendment. Yet a third would be to say that only violent conduct constitutes engagement in insurrection, even though that was not the standard applied during Reconstruction. In all three of these examples, the democracy tail is wagging the constitutional dog.

51 *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 547 (1969) ("A fundamental principle of our representative democracy is, in Hamilton's words 'that the people should choose whom they please to govern them.'").

52 *See, e.g.,* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 793–95 (1995) (stressing this point); THE FEDERALIST NO. 57, at 385 (James Madison) (Jacob E. Cooke ed., 1961) ("Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, or birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people."); THE FEDERALIST NO. 52, at 354–55 (James Madison) (Jacob E. Cooke ed., 1961) (listing the age, citizenship, and residence requirements for a House member and stating "[u]nder these reasonable limitations, the door of this part of the Federal Government, is open to merit of every description").

danger that disqualification will become a common tactic and lead to a cancel culture for political opponents.[53]

The democracy canon may seem like an appropriate lens for reading Section Three, but now pause and consider why this sounds reasonable. One answer is that democracy is a familiar concept. Courts and scholars regularly use the idea to explain their understanding of the Constitution.[54] Section Three, by contrast, is unfamiliar. Until the attack on the Capitol in 2021, hardly anyone was aware of the provision.[55] To interpret this novel part of the Fourteenth Amendment, a court might think that the reading "that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended."[56] And part of the general terms and spirit is states'-rights . . . oops . . . I mean democracy.

My not-so-subtle claim is that using the democracy canon to read Section Three in a restrictive fashion is an analytical error comparable to the ones made in the initial Fourteenth Amendment cases. The difference rests with the background premise that is swallowing the foreground. Clear thinking about Section Three starts with the recognition that our democratic *zeitgeist* might not fit that constitutional provision. Now a skeptic can rightly say that just because an argument is familiar does not mean that it is wrong. The deeper problem with using federalism to limit Sections One and Five of the Fourteenth Amendment was that the purpose of those provisions was limiting state authority and increasing federal power. Likewise, the use of Article One and the Due Process Clause to construe Section Three narrowly was erroneous because Congress considered and rejected those objections when

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53 A narrower version of this claim would be that there is special force to the democracy canon for the President because the President (and the Vice-President) are the only people elected by the entire nation. But this argument is contradicted by the text of Article II, which imposes more stringent qualifications for the White House than for any other position. *See, e.g.*, U.S. CONST. art II, § 1, cl. 5. Likewise, the Twenty-Second Amendment denied people the option to vote for, say, Ronald Reagan or Barack Obama for a third term in a way that applies to no other federal office.

54 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022) ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."); BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT 5 (2022) ("Given his strong belief in the democratic political process, Frankfurter was extremely skeptical about judicial vetoes of state and federal legislation."); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (using democracy as a master interpretive principle).

55 Prior to January 6th, the last use of Section Three to exclude someone from office occurred during World War I. *See* 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 52–63 (1936) (discussing Victor Berger, a member-elect excluded by the House for giving aid and comfort to Germany).

56 Griffin's Case, 11 F. Cas. 7, 25 (C.C.D. Va. 1869) (No. 5,815) (Chase, C.J.).

the provision was proposed. Are there comparable flaws in using the democracy canon to read Section Three more narrowly?

Yes. The democracy canon is an unsound rule of thumb for construing Section Three for several reasons. First, Section Three is a constitutional standard that must be satisfied for an individual to hold federal or state office, and all such rules or standards can be described as limiting democracy. If someone cannot run because she is too young or does not obtain enough signatures to get on the ballot, then the people who want to vote for her are denied their choice.[57] But that denial does not render those requirements invalid. In other words, limiting democracy is an inevitable result of applying Section Three, which makes using the democracy canon to apply that provision inapt.[58]

Second, Section Three provides a special democratic safeguard by authorizing a supermajority in Congress to waive disqualifications, as was done for most ex-Confederates four years after the Fourteenth Amendment was ratified.[59] This safeguard alleviates some of the concerns expressed by the democracy canon. Moreover, the structure of Section Three implies that courts should decide disqualifications through neutral legal reasoning and that politicians should decide if other factors—including democratic legitimacy—justify exceptions. A sharp line between formal and pragmatic thinking may not be appropriate for other parts of the Constitution, but for Section Three the text and its early application make that distinction proper. The courts would be straying out of their lane if they use the democracy canon to substitute their own policy judgments for those embodied in the Fourteenth Amendment.

Third, Section Three disqualifications can be viewed as supporting democracy. Engaging in insurrection or rebellion against the Constitution after having sworn to uphold it is a grave offense. Reasonable people could conclude that barring individuals who betrayed their constitutional oaths from serving in office is necessary or desirable to preserve, protect, and defend our democracy from those insurrectionists or as a deterrent. As one

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57 *See* Griffin v. White, No. 22-0362 KG/GJF, 2022 WL 2315980, at *12 (D.N.M. June 28, 2022) ("Section Three of the Fourteenth Amendment narrows the First Amendment right to run for office . . . .").

58 Indeed, Section Three was even incorporated by some state constitutions and by the Military Reconstruction statutes as a standard to disenfranchise ex-Confederates, *see* Magliocca, *supra* note 4, at 97–98, which is indicative of its antidemocratic spirit.

59 *See* Amnesty Act of 1872, ch. 193, 17 Stat. 142 (1872); Cawthorn v. Amalfi, 35 F. 4th 245 (4th Cir. 2022) (holding that the "Amnesty Act did not prospectively remove any political disabilit[ies] imposed by [Section Three of the] Fourteenth Amendment").

Senator explained in 1866, Section Three was "intended as a prevention against the commission of future offenses."[60] Whether disqualification for insurrection is pro-democratic is debatable, but that uncertainty means that using the democracy canon to read Section Three restrictively is wrong.[61]

Finally, using democracy to think about Section Three is anachronistic. When the provision was discussed during Reconstruction, the focus was almost always on the excluded individuals rather than on voters.[62] For example, when a North Carolina sheriff tried (unsuccessfully) to obtain Supreme Court review of his exclusion, he argued that Section Three was "an assault upon an immunity and privilege granted to us by the 1st section of that same amendment."[63] When Congress debated using its power to grant Section Three waivers, one of the leading arguments in favor of amnesty was that exclusion violated the spirit of equality before the law by treating citizens differently as to their ability to hold office.[64]

Viewing Section Three from the perspective of the officeholder or the candidate rather than the voter changes the analysis. The center of gravity is directed (as the text commands in its opening phrase: "No person shall") on individual conduct. To determine if that conduct merits exclusion from office, the Supreme Court must make a general legal determination—was January 6th an insurrection within the meaning of Section Three—and then apply the facts about a given person's conduct to determine if he engaged in the insurrection.[65] One point to keep in mind is that exclusion from office is a mild remedy, unlike criminal sanctions like incarceration or fines. As a result, the standard of proof can be lower and concepts from the criminal law

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60 CONG. GLOBE, 39th Cong., 1st Sess. 2916 (1866) (statement of Sen. Grimes).

61 There is also a "heads-I-win, tails-you-lose" quality to the democracy argument. If the insurrectionist stands little chance of winning, the claim can be that we should let her run because there is no harm in allowing voters the option of choosing her. But if the insurrectionist stands a good chance of winning, then the claim can be that we should let her run because not doing so would render the election illegitimate. When would barring the insurrectionist be acceptable? Probably never.

62 This makes sense given that democracy did not have as much purchase in this period. Women could not vote, senators were not popularly elected, and so on.

63 Worthy v. Commissioners, 76 U.S. (9 Wall.) 611, 613 (1869) (holding that the federal constitutional claim was not properly before the Court).

64 *See, e.g.*, CONG. GLOBE, 42nd Cong., 2d Sess. 245 (1871) (statement of Sen. Trumbull); *id.* at 246 (statement of Sen. Alcorn); CONG. GLOBE, 41st Cong., 3d Sess. 203 (1870) (statement of Rep. Bingham).

65 My view is that January 6th was an insurrection within the meaning of Section Three, in part because the mob disrupted a constitutionally required act—the formal counting of the electoral votes under the Twelfth Amendment—and attempted to prevent the lawful transfer of authority.

are irrelevant. And the impact of an exclusion on democracy, whatever that may or may not be, is also irrelevant.

In sum, the democracy canon is a seductive but mistaken way of reading Section Three of the Fourteenth Amendment. To do so elevates a background constitutional principle in a way that is inconsistent with the text, purpose, and history of Section Three. Evaluating the democratic interest in any exclusions based on the events of January 6th is a task reserved exclusively to Congress.

CONCLUSION

Forewarned is forearmed. The Supreme Court was at a great disadvantage in interpreting the Fourteenth Amendment in the 1870s and 1880s. Weaving a new and transformative constitutional text into a prior one was unprecedented.[66] The Court tried to solve that problem by relying on the familiar idea of states'-rights as a lodestar for Sections One and Five. Chief Justice Chase made a related move by looking to settled principles in Article One and in the Due Process Clause for guidance to construe Section Three. Their errors make sense in context. The Court cannot make the same excuse now when it interprets Section Three for the first time. In the January 6th disqualification cases, the claim will be made that democracy—another tried-and-true concept—requires a narrow construction of Section Three. The Court should learn from the past and reject this argument.

The Fourteenth Amendment is the Constitution's crown jewel. It declares that all citizens are born equal. It declares that all persons are entitled to basic rights and equal protection under law. And the Supreme Court may soon have the chance to affirm that Section Three declares that in America, no official—even a former President—is indispensable.

66 *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 88–89, 159–62 (1991) (describing the problem of intergenerational synthesis).