

**THE MEANING AND AMBIGUITY OF  
SECTION THREE OF THE FOURTEENTH AMENDMENT**

KURT T. LASH

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## THE MEANING AND AMBIGUITY OF SECTION THREE OF THE FOURTEENTH AMENDMENT

KURT T. LASH\*

### INTRODUCTION

The Fourteenth Amendment established the constitutional conditions for the readmission of those states which had attempted to secede from the Union during the American Civil War. Section Three of that amendment, when enforced under the powers granted by Section Five, prevented the leaders of the recent rebellion from returning to Congress, holding any state level office, or receiving any appointment by Democrat President Andrew Johnson, absent congressional permission. Its focus, in other words, was on rebellious disruption of state level decisionmaking and the potentially disruptive appointments by President Johnson.<sup>1</sup> Whether

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1. Section Three reads in its entirety:

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.

Section Three accomplishes anything more remains unclear as a matter of history and ambiguous as a matter of constitutional text.<sup>2</sup>

The text of Section Three does not expressly (1) apply to future rebellions or insurrections, (2) apply to persons elected as President of the United States, (3) apply to persons seeking to qualify as a candidate for the Presidency, or (4) indicate whether the enforcement of Section Three requires the passage of enabling legislation. And these are just some of the deep textual ambiguities of Section Three.<sup>3</sup>

Although scholars have attempted to resolve these ambiguities in a variety of ways, no work to date has presented a systematic investigation of the history of the framing and ratification of Section Three.<sup>4</sup> As a result, scholars (and judges) have been working in the historical dark, insufficiently informed about how the draft developed over months of debate, uninformed of the constitutional

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U.S. CONST. amend. XIV, § 3.

2. By “ambiguous,” I mean a word or phrase capable of more than one meaning. See Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 286 (2017).

3. A robust scholarly debate has emerged regarding the proper reading of Section Three terms such as “office” and “officer” and those who have “previously taken an oath . . . as an officer of the United States.” See, e.g., Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part I: An Introduction*, 61 S. TEX. L. REV. 309 (2022) (first article of a series published in the South Texas Law Review); William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. (forthcoming 2024); Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350 (forthcoming 2024). See also Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87 (2021); Mark A. Graber, *Disqualification From Office: Donald Trump v. the 39th Congress*, LAWFARE (Feb. 23, 2023, 4:40 PM), <https://www.lawfaremedia.org/article/disqualification-office-donald-trump-v-39th-congress> [<https://perma.cc/HCS8-2XM6>]; Steven Calabresi, *President Trump Can Not Be Disqualified*, WALL ST. J. (Sept. 12, 2023, 4:30 PM), <https://www.wsj.com/articles/trump-can-not-be-disqualified-14th-amendment-calabresi-16657a1b> [<https://perma.cc/M3YR-Z7BT>]. Because these articles primarily involve a textual analysis that does not directly engage the framing and ratification history of Section Three, I take no position on their arguments or conclusions.

4. Professor Gerard N. Magliocca has explored some aspects of the legislative and ratification history. See Magliocca, *supra* note 3. His article, however, does not explore the drafting debates or the discussions of Section Three during the ratifying phase. Other works contain discussions of parts of the framing history, but do not do so in a comprehensive or systematic manner.

precedents against which the final draft would be understood, and without any understanding whatsoever of how ratifiers engaged the proposed text.

For example, since some prior drafts of Section Three expressly limited the provision to the “late rebellion,” some scholars claim that the absence of such language in the final draft means Section Three applies to future rebellions.<sup>5</sup> What has gone unrecognized, or undiscussed, is that there were multiple prior drafts of Section Three. Some of these drafts expressly declared that the provision would apply to future rebellions.<sup>6</sup> The final draft, however, omits any such reference, rendering the text ambiguous in regard to its application to future rebellions or insurrections.<sup>7</sup> Another prior draft of Section Three expressly declared “[n]o person shall be qualified or shall hold the office of President or Vice President of the United States.”<sup>8</sup> The final amendment omits both the reference to “qualif[y]ing” and the reference to “the office of President or vice president.” Instead, the amendment expressly names only persons

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5. See Baude & Paulsen, *supra* note 3, at 10 n.12 (“Indeed, for what it is worth, the legislative history of Section Three confirms that this is what the authors of the Fourteenth Amendment did. Earlier drafts had limited the Section’s application to the ‘late insurrection.’ Later versions dropped this limitation and generalized Section Three’s application to ‘insurrection’ and ‘rebellion.’” (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2767–68, 2770, 2869, 2921 (1866)). See also Mark A. Graber, *Treason, Insurrection, and Disqualification: From the Fugitive Slave Act of 1850 to Jan. 6, 2021*, LAWFARE (Sept. 26, 2022, 8:01 AM), <https://www.lawfaremedia.org/article/treason-insurrection-and-disqualification-fugitive-slave-act-1850-jan-6-2021> [<https://perma.cc/6Z89-X8QR>] (“The original version of Section 3 would have disenfranchised in federal elections held before July 4, 1870, ‘all persons who voluntarily adhered to the late insurrection, giving it aid and comfort.’ Reps. Samuel McKee of Kentucky and James Garfield of Ohio proposed bans on officeholding that would have been limited to ‘all persons who voluntarily adhered to the late insurrection.’ The final version of Section 3, however, speaks of insurrections generally, making no reference to the ‘late insurrection.’ No public debate took place on this textual choice, but the plain inference is that past and present officeholders who engaged in any insurrection were disqualified from holding office in the present and future.”).

6. See *infra* notes 165–168 and accompanying text.

7. U.S. CONST. amend. XIV, § 3.

8. See CONG. GLOBE, 39th Cong., 1st Sess. 919 (1866) (emphasis added). See *infra* notes 57–67 and accompanying text.

serving as “Senator or Representative in Congress, or elector of President and Vice-President.”<sup>9</sup>

In sum, comparing the final draft of Section Three to the full set of prior drafts renders it unclear whether the drafters intended the final language to include the office of President of the United States, or to bar persons from seeking to “qualify” for that office. Future ratifiers following the framing debates in the daily newspapers could reasonably conclude that the framers had intentionally omitted the language of prior drafts.

Any framer or ratifier with legal training had particularly good reason to presume the final draft of Section Three did not include the office of President of the United States. Longstanding precedent and the leading legal authority excluded the President from the category of civil officers “under the United States.” In the impeachment proceeding of William Blount (“Blount’s Case”) in 1799, the Senate ruled that senators were not included in the Impeachment Clause’s reference to “[t]he President, Vice President and all civil officers of the United States.”<sup>10</sup> As Representative James A. Bayard, Sr. explained, “it is clear that a Senator is not an officer *under* the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it.”<sup>11</sup> In his massively influential *Commentaries on the Constitution*, Justice Joseph Story agreed with Bayard’s argument, noting that “the enumeration of the president and vice president, as impeachable officers, was indispensable” because they were not constitutionally “civil officers of the United States.”<sup>12</sup>

Members of the Reconstruction Congress knew about Blount’s Case, and they repeatedly relied on Justice Story’s *Commentaries*

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9. U.S. CONST. amend. XIV, § 3.

10. See 8 ANNALS OF CONG. 2248–2318 (1799), <https://perma.cc/ME6Q-7TVD>. See also U.S. CONST. art. II, § 4 (impeachment clause).

11. See 8 ANNALS OF CONG. 2258 (1799).

12. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 259–260, § 791 (Boston, Hilliard, Gray & Co. 1833) (emphasis added).

during the Fourteenth Amendment drafting debates.<sup>13</sup> In the previous Congress, Senator Reverdy Johnson had reminded his colleagues that, according to Senator Bayard's argument in Blount's Case, "it is clear that a Senator is not an officer *under* the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it."<sup>14</sup>

Given the likelihood that judges would accept the precedent of Blount's Case and Justice Story's authority on the matter, it would have been foolish to the point of negligence for the framers to expect that courts would read Section Three's reference to "any office, civil or military" as impliedly including the office of President of the United States. More plausibly, they accepted both precedent and legal authority and instead expressly named the apex political offices they specifically wanted to be covered by the clause: senators and representatives. The same holds true for any legally trained ratifier with a copy of Justice Story's Commentaries.

In addition to precedent and legal authority, any ratifier applying a commonsense approach to the text and structure of Section Three could have reasonably concluded it did not include the President of the United States. Section Three begins by expressly addressing the three apex political institutions of the federal government: the House, the Senate, and the electors of the President and Vice President of the United States. These express references to high federal offices are followed by a general catch-all provision covering "any office, civil or military, under the United States, or under any state." That structure intuitively suggests that high offices are expressly named, while the innumerable lower offices, including everything from postmaster to turnpike toll collector, are covered by the catch-all provision. Lawyers call this commonsense rule of construction *expressio unius est exclusio alterius* (the expression of one thing means the exclusion of others).<sup>15</sup>

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13. See *infra* notes 57–68 and accompanying text.

14. CONG. GLOBE, 38th Cong., 1st Sess. 329 (1864) (quoting Mr. Bayard).

15. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 25–26 (1997) (canons such as *noscitur a sociis* and *expressio unius est exclusio alterius* are "commonsensical").

This intuitive approach to reading legal texts led one of the most sophisticated lawyers in the Senate to conclude that Section Three excluded the office of President. In a speech exploring the meaning and scope of Section Three, Senator and former United States Attorney General Reverdy Johnson remarked: “[former rebels] may be elected President or Vice President of the United States, and why did you omit to exclude them?”<sup>16</sup> When Senator Lot Morrill interrupted Senator Johnson and pointed to Section Three’s words, “or hold any office, civil or military, under the United States,”<sup>17</sup> Senator Johnson replied, “[p]erhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives.”<sup>18</sup>

What had “misled” Senator Johnson was the commonsense reading of Section Three according to the *expressio unius canon*. The former attorney general had made this “mistake” (if he was mistaken) as part of a carefully prepared speech specifically devoted to an analysis of Section Three and the rest of the Fourteenth Amendment. If the text and structure of Section Three “misled” the former Attorney General of the United States into thinking Section Three excluded the office of President of the United States, then ordinary ratifiers bringing the same commonsense approach to the text would have been just as easily “misled.” Nor would the public have known about Senator Morrill’s “correction”: although multiple newspapers published substantial portions of the framing debates, no newspaper seems to have reported the Johnson-Morrill exchange. In fact, no scholar has identified a single example of a ratifier describing Section Three as including the office of President.<sup>19</sup>

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16. CONG. GLOBE, 39th Cong., 1st Sess. 2899 (1866).

17. *Id.*

18. *Id.*

19. Although one scholar, John Vlahoplus, has claimed to have discovered a single example to the contrary, an examination of the original document does not support the claim. *See infra* notes 239–240 and accompanying text. It is possible, of course, that someone somewhere may have held this view. The discovery of scattered examples, however, would neither establish consensus in understanding or resolve textual ambiguity, especially in light of long-standing congressional precedent and legal authority to the contrary.

Despite text, structure, precedent, legal authority, and commonsense canons of interpretation, some scholars insist that Section Three cannot be reasonably read as excluding the office of President of the United States. Such an omission would be “absurd,” they insist, since it would allow rebels like Jefferson Davis to become President of the United States.<sup>20</sup> These claims reflect concerns of the present, not those in play at the time of the Fourteenth Amendment. No one during the framing debates referenced the need to prevent loyal Americans from electing the wrong person as the President of the United States. Nor is there any evidence that the ratifiers had any such concern. Instead, both framers and ratifiers discussed the very real need to prevent states from sending rebels like Jefferson Davis to Congress.<sup>21</sup>

Section Three addressed the serious risk of rebellious disruption of state-level decisionmaking, not the decisions of the American electorate as a whole. This is why the text expressly enumerated the state selected positions of senator, representative, and electors of the President and Vice President of the United States. Leaders of the recent rebellion would not be allowed to leverage their remaining local popularity into holding any of these key positions. Moderate Republicans believed this would make room for the restoration of a loyal political class in the former rebel states. As Senator Daniel Clark explained during the Section Three debates, once leading rebels were removed, “those who have moved in humble spheres [would] return to their loyalty and to the Government.”<sup>22</sup> Representative William Windom similarly believed that “if leading

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20. See Baude & Paulsen, *supra* note 3, at 111 (discussing the “seeming absurdity of the prospect of exclusion of the offices of President and Vice President”).

21. See e.g., *Information for the People. Proposed Amendment to the Constitution. The Union Republican Platform*, EVENING TEL. (Phila.), Sept. 26, 1866, at 4 (“The intention of [Section Three] is to give the offices to the Union men of the South, so that we shall have perpetual peace, and so that Jefferson Davis and other traitors like him shall never again control this Government, and thus endanger its liberties. *If those leading Rebels should continue to hold the offices in the South*, we shall have no peace, but, on the contrary, perpetual strife.”) (emphasis added); *Proposed Amendment to the Constitution. The Union Republican Platform*, SMYRNA TIMES (Del.), Oct. 10, 1866, at 2 (same).

22. CONG. GLOBE, 39th Cong., 1st Sess. 2771 (1866).



rebels are to be excluded from office, State as well as Federal, there is a reasonable probability that the loyal men of the South will control [local office].”<sup>23</sup>

In sum, far from absurd, it was perfectly reasonable to leave the national electorate unimpeded in their choice of President of the United States. The text targeted the only positions leading rebels could realistically hope to hold: the offices of senator, representative, presidential elector, presidential appointment, or state office. By targeting membership in the electoral college, rather than the office of President, Republicans prevented influential southern Democrats from joining their votes with their northern counterparts and electing an obstructionist Democrat President. The strategy worked. In the election of 1868, despite the scattered participation of former rebel officers as presidential electors, southern electors provided the votes necessary to give the election to the Republican Ulysses S. Grant.<sup>24</sup>

Finally, none of the multiple drafts of Section Three addressed whether the text could be enforced in the absence of congressional enabling legislation.<sup>25</sup> Instead, key framers insisted that the text was not self-executing. For example, Joint Committee member Thaddeus Stevens explained that Congress would have to pass enabling legislation since the Joint Committee’s draft of Section Three would “not execute itself.”<sup>26</sup> Once Congress had finalized the language of Section Three, Representative Stevens again noted the need for Congress to pass enabling legislation.<sup>27</sup> Newspapers published

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23. *Id.* at 3170.

24. *See, e.g.*, CHARLESTON DAILY NEWS (S.C.), Dec. 3, 1868, at 1 (reporting “The Alabama Presidential Electors met yesterday and cast eight votes for Grant and Colfax” and “The North Carolina Presidential electors met yesterday and cast the vote of the State for Grant and Colfax”).

25. A power granted under the Section Five of the Fourteenth Amendment.

26. CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866). Representative Stevens was a member of the Joint Committee on Reconstruction, which submitted the original draft of the Fourteenth Amendment. *See Joint Committee on Reconstruction, Membership* (1865–1867), reprinted in 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 24 (Kurt T. Lash ed., 2021).

27. CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (“I see no hope of safety unless in the prescription of proper enabling acts . . . [L]et us no longer delay; take what we can

both of Stevens' declarations.<sup>28</sup> At least some participants in the ratifying debates believed enabling legislation would be necessary,<sup>29</sup> and no one claimed otherwise. When Congress moved to enact such legislation, Senate Judiciary Chair Lyman Trumbull explained that doing so was necessary since the text "provides no means for enforcing itself."<sup>30</sup>

In sum, text, structure, congressional precedent, commonsense interpretation, and the available historical record all suggest it would have been reasonable for the ratifiers to understand Section Three as excluding the position of President of the United States.

It is, of course, textually possible to read Section Three as impliedly including the President in the phrase "any office, civil or military, under the United States."<sup>31</sup> It also is possible to read the text as permitting a single, low-level state official to disqualify a presidential candidate prior to any adjudicated guilt and in the absence of congressional enforcement legislation. It also is possible to read a clause created in response to a civil war involving millions of soldiers and causing the deaths of over 600,000 Americans as somehow applying to a future transient riot. But none of this is required by either the text or the historical record.

In fact, the only thing that is clear about the text of Section Three is that it accomplished the only purposes Reconstruction-era Republicans cared about: When combined with Section Five, Section Three empowered Congress to prevent leading rebels from returning to Congress, skewing local slates of presidential electors, or

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get now, and hope for better things in further legislation; in enabling acts or other provisions.").

28. See *Closing a Debate*, AMERICAN CITIZEN (Butler Pa.), May 30, 1866, at p. 1 (quoting Stevens' statement on the Joint Committee draft of Section Three that the section "will not execute itself."); *Proceedings of Congress*, CHICAGO TRIBUNE, (Ill.), June 14, 1866, at p. 1 (quoting Stevens' statement regarding the final draft of Section Three that he "saw no hope of safety unless in the prescription of proper enabling acts").

29. See *infra* notes 232–244 and accompanying text.

30. *Remarks of Mr. Trumbull*, CRISIS (Columbus, Ohio), May 5, 1869, at 2 (reporting on the Senate debates of April 8, 1869).

31. U.S. CONST. amend. XIV, § 3.

receiving appointments to federal or state offices absent permission from two-thirds of both Houses of Congress.

All else remains, at best, historically unclear or textually ambiguous.

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Part I presents the traditional understanding of the term “civil officer under the United States” at the time of the adoption of the Fourteenth Amendment. Even if people at the time commonly understood the President as holding an “office,” the background understanding of “civil office under the United States” was more complicated. According to the congressional precedent of Blount’s Case, the Impeachment Clause’s reference to all “civil officers of the United States” should not be read to include the office of senators.<sup>32</sup> According to Justice Story in his influential Commentaries, this was because none of the apex political offices of senator, representative, or President were “civil offices” of or “under” the United States.<sup>33</sup> This is why it was “indispensable” to enumerate the office of President of the United States in the Impeachment Clause, since this was not a “civil office” “under the United States.”<sup>34</sup> Members of the Thirty-Ninth Congress were aware of both Blount’s Case and Commentaries, and it is reasonable to presume they drafted Section Three understanding how the phrase would be likely read by legally trained ratifiers and courts of law.

Part II explores the framing history of Section Three. The historical evidence, much of which is presented here for the first time, reveals a variety of approaches to dealing with the issue of the rebels-in-waiting. The earliest draft, one proposed by Samuel McKee, expressly prohibited certain persons from qualifying or holding the office of the President of the United States if they had engaged in the past rebellion or any rebellion “hereafter.”<sup>35</sup> The final draft of Section Three maintained the ban on holding office but expressly

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32. See 8 ANNALS OF CONG. 2258 (1799).

33. STORY, *supra* note 12, at § 791.

34. *Id.*

35. CONG. GLOBE, 39th Cong., 1st Sess. 919 (1866).

named only the House, Senate and electors of the President and Vice President of the United States. All references to future rebellions were removed. Section Three's final language led one of the most respected lawyers in the House, Senator Reverdy Johnson, to presume that the office of the President was not included.<sup>36</sup> Although another member appears to have convinced Senator Johnson otherwise,<sup>37</sup> the exchange went unreported in the press, leaving the public in the position of making the same reasonable assumption as had Johnson.<sup>38</sup> They had good reason to do so: The commonsense rule of construction known as *expressio unius est exclusio alterius* suggests that the text of Section Three expressly names those apex political offices the framers meant to include.<sup>39</sup> The ratifiers could have also reasonably concluded that the text required enforcement legislation. As Representative Thaddeus Stevens had publicly declared regarding the Joint Committee's draft of Section Three, it would "not execute itself."<sup>40</sup>

Part III examines the public commentary on Section Three, both during its framing and during the ratification debates. Much of this section also contains previously unpublished historical evidence. During the public debates, not a single ratifier suggested that Section Three included the office of President of the United States. Instead, ratifiers focused on Section Three's exclusion of former rebels like Jefferson Davis from returning to Congress. The subject of future application rarely arose. On those rare occasions when it did, opinions differed. Some ratifiers believed that the text included future rebellions, while others criticized the provision's failure to address rebellions in the hereafter.

As far as enabling legislation was concerned, no one disagreed with Representative Stevens's point about the need for enabling legislation. Instead, in Stevens's home state of Pennsylvania, Representative Thomas Chalfant presumed that no person could

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36. *Id.* at 2899.

37. *Id.*

38. *Id.*

39. See SCALIA, *supra* note 15.

40. CONG. GLOBE, *supra* note 26.

properly be disqualified under Section Three except by way of a legislatively created tribunal.<sup>41</sup> In *Griffin's Case*,<sup>42</sup> Chief Justice Salmon Chase agreed and declared that no one could be disqualified from office in the absence of enabling legislation.<sup>43</sup> Only months after the ratification of the Fourteenth Amendment, Senator Lyman Trumbull supported the enactment of such legislation since, as he explained, the constitutional text “provides no means for enforcing itself.”<sup>44</sup>

Part IV analyzes the above evidence. I conclude that the historically verifiable public understanding of Section Three is quite narrow. The evidence overwhelmingly supports a reading of Section Three that applied to thousands of then-living rebels who realistically threatened to hijack the agenda of the Reconstruction Congress or receive ill-advised appointments by Democrat President Andrew Johnson. Beyond this narrow meaning, the text was capable of multiple reasonable interpretations, including whether it applied to candidates seeking to qualify for office, whether it applied to persons seeking the office of the President of the United States, whether it applied to future as well as past rebellions, and whether its enforcement required prior passage of enabling legislation. Although some commentators claim it would have been absurd not to prohibit former rebels like Jefferson Davis from being elected President of the United States,<sup>45</sup> there is no evidence any framer or ratifier feared such an unlikely possibility. Instead, Republicans prevented states from adding leading rebels to their slate of presidential electors. This, moderate republicans believed, would be sufficient.

The Article concludes with an appendix containing the textual precursors of Section Three of the Fourteenth Amendment.

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41. See discussion *infra* text accompanying notes 246–248.

42. 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815).

43. *Id.* at 26.

44. CRISIS, *supra* note 30.

45. See Baude & Paulsen, *supra* note 3, at 111 (discussing the “seeming absurdity of the prospect of exclusion of the offices of President and Vice President”).

## METHODOLOGY

A brief word about this paper's interpretive methodology. Constitutional amendments derive their authority not from the intentions of their framers, but from the considered judgment and approbation of their ratifiers. Accordingly, this essay seeks to recover the likely public understanding of Section Three of the Fourteenth Amendment. Regardless of one's view of originalist interpretation of the Constitution, constitutional scholars broadly concede the relevance of original public understanding.

Although originalist scholars often (though not always) distinguish the relevance of the original framers' intent from that of original public understanding, in the case of the Fourteenth Amendment the categories substantially overlap. Unlike the secret debates attending the drafting of the original Constitution, the framing debates on the Fourteenth Amendment were remarkably public. Newspapers across the United States, both local and national, published daily accounts of the congressional framing debates including, as we shall see, the various proposed drafts of Section Three. The public was informed of the arguments in favor of and in opposition to such drafts, and they were kept continuously up to date on whether radical or more moderate proposals had gained the upper hand.

It makes sense, therefore, that scholars have stressed the relevance of various drafts of Section Three, including the framers' decision to omit certain language found in early drafts.<sup>46</sup> These decisions inform not just the framers' evolving intentions, but also the public's likely understanding of the final draft, as they too knew what had been considered and ultimately omitted.

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46. See, e.g., Mark A. Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers* 14 (U. Md. Francis King Carey Sch. L. Legal Stud. Research Paper No. 2023-16, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4591133](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591133) [<https://perma.cc/TE9A-8FX9>] ("At the crucial stage of the drafting process, Republicans rejected language that spoke of 'the late rebellion' in favor of language that referred to 'insurrections and rebellions' more generally.").

Although Section Three scholarship often ranges across the entire field of American history, from the Founding to the twentieth century, I have focused my analysis on the framing and ratification debates. These are the most relevant discussions for determining the likely public understanding of the text at the time of its ratification in 1868. Although other Section Three scholars rely on post-ratification commentary,<sup>47</sup> I focus on what all scholars agree is the most relevant period for determining the original understanding of the Fourteenth Amendment.

I. “CIVIL OFFICE UNDER THE UNITED STATES,” CONGRESSIONAL PRECEDENT, AND LEGAL AUTHORITY

Section Three begins by listing the offices prohibited to certain persons absent congressional permission. According to the text, “No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State . . . .”<sup>48</sup> There is no debate over the meaning of the expressly enumerated offices of senator, representative, and presidential elector. The meaning and scope of the general catch-all reference to “office[s], civil or military, under the United States” is undefined.

Today, courts and commentators have little reason to distinguish the term “office” from “civil office” or offices “under the United States.” At the time of the Founding and during Reconstruction, however, these small differences in language made a critical difference in the legal meaning of constitutional texts.

In *Blount’s Case*,<sup>49</sup> for example, the Senate had to determine whether Tennessee Senator William Blount was a “civil officer”

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47. See, e.g., Baude and Paulsen, *supra* note 3, at 12 n. 22 and accompanying text (discussing as relevant statutes pass in 1872).

48. U.S. CONST. amend. XIV, § 3.

49. See 8 ANNALS OF CONG. 2248–2318 (1799). *Blount’s Case* created a precedent that prevails to this day—senators cannot be impeached. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 115 (1995) (“Further support for this officer/legislator distinction comes from the Impeachment Clause, which makes ‘all civil Officers of the United States’ subject to removal. In

subject to impeachment under Article II, Section Four. That clause declares:

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.<sup>50</sup>

Senator Blount’s defense counsel maintained that senators were not “civil officers” as that term was used in the Constitution. According to Representative James Asherton Bayard, Sr., “it is clear that a Senator is not an officer *under* the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it.”<sup>51</sup> The Senate agreed and voted down a resolution stating that “Blount was a civil officer of the United States . . . and, therefore, liable to be impeached by the House of Representatives.”<sup>52</sup> Instead, the Senate dismissed the case for want of “jurisdiction.”<sup>53</sup>

In his influential Commentaries on the Constitution, Justice Story discussed Blount’s Case and the constitutional meaning of “civil officer.”<sup>54</sup> According to Story, the early Senate had likely concluded that “civil officers of the United States” were those who “derived their appointment from, and under the national government.”<sup>55</sup> “In

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the William Blount impeachment case in 1798, the Senate correctly rejected the idea that its members were ‘civil Officers’ within the meaning of the Constitution, and thus subject to impeachment.”) See also 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, 526–28 (2023) (discussing Blount’s Case).

50. U.S. CONST. art. II, § 4.

51. 8 ANNALS OF CONG. 2258 (1799).

52. *Id.* at 2318.

53. *Id.* at 2319.

54. See STORY, *Supra* note 12, at 259–60, §791.

55. *Id.* at 259. See also 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 [sic] during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”) (emphasis added).



this view,” Justice Story explained, “the enumeration of the president and vice president, as impeachable officers, was indispensable; for they derive, or may derive, their office from a source paramount to the national government.”<sup>56</sup>

The framers of the Fourteenth Amendment accepted the authority of Justice Story’s Commentaries, and they cited and quoted his work during congressional debates.<sup>57</sup> Members of the Reconstruction Congress were particularly aware of Blount’s Case and Justice Story’s analysis of it. In the Thirty-Eighth Congress, Senator Reverdy Johnson had reminded his colleagues that, according to Representative Bayard’s argument in Blount’s Case, “it is clear that a Senator is not an officer under the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it.”<sup>58</sup> In 1868, Charles Sumner relied on Senator Bayard arguments in Blount’s Case, which Sumner described as having been “adopted by no less an authority than our highest commentator, Judge Story.”<sup>59</sup>

Republican usage in the Thirty-Ninth Congress was consistent with both the Blount precedent and Justice Story’s analysis. Although Republicans sometimes referred to the President as the

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56. STORY, *supra* note 12, at 259–60.

57. See, e.g., US House, Debate Continued, “Privileges and Immunities” Amendment, Speeches of John Bingham and Giles Hotchkiss, Vote to Postpone Consideration (Feb. 28, 1866), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 115.

58. CONG. GLOBE, *supra* note 14, at 329.

59. CHARLES SUMNER, EXPULSION OF THE PRESIDENT: OPINION OF HON. CHARLES SUMNER, OF MASSACHUSETTS, IN THE CASE OF THE IMPEACHMENT OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES 5 (Washington, Gov’t Printing Off. 1868). For more ratification period commentary involving Blount’s Case and Justice Story’s analysis, see *infra* notes 62–68 and accompanying text. Not every member of Congress was certain Justice Story’s analysis was correct. For example, one month after the passage of the Fourteenth Amendment, a four-member committee issued a report in which they suggested Justice Story was “incautious” in his analysis of Blount’s Case. See CONG. GLOBE, 39th Cong., 1st Sess. 3940 (1866) (the “Conkling Report.”). The committee nevertheless left Justice Story’s analysis unchallenged and encouraged Congress to avoid making any new “precedent” on the issue. *Id.* (committee suggesting resolution). Congress accepted the committee’s recommendation. *Id.* at 3942 (accepting the committee’s recommendation). No newspaper published the report’s criticism of Justice Story’s analysis.

“chief executive officer of the Government,”<sup>60</sup> no Republican in the Thirty-Ninth Congress ever referred to the President of the United States as a “civil officer under the United States.” In fact, when Democrat President Andrew Johnson referred to himself as “chief civil executive officer of the United States,”<sup>61</sup> Republicans mocked his ignorance of constitutional terminology. According to Senator Jacob Howard, President Johnson had added “what is not contained in the Constitution or the laws of the land.”<sup>62</sup> Only a few days after denouncing President Johnson’s language, the punctilious Senator Howard co-authored the final version of Section Three.<sup>63</sup>

Blount’s Case remained in the public eye throughout the ratification period. What might seem an obscure precedent today was, at the time, directly relevant to debates over presidential impeachment<sup>64</sup> and whether Senator Benjamin Wade was a “civil officer” eligible to become president in the case of President Johnson’s impeachment and removal.<sup>65</sup> For example, on April 15, 1868, the Louisville Daily Journal published an extended editorial discussing whether the President was “an officer of the United States.”<sup>66</sup> In

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60. See CONG. GLOBE, 39th Cong., 1st Sess. 775 (1866) (Senator Roscoe Conkling quoting the report of Attorney General James Speed). Abraham Lincoln appointed Attorney General Speed, who continued in office for a short time under President Johnson.

61. *Id.* at 2551.

62. *Id.* Senator Howard would not have objected to President Johnson referring to himself as “chief executive officer.” After all, the Republican Attorney General James Speed used this phrase in official documents. See *id.* at 775. President Johnson’s error was his referring to the President of the United States as a “chief *civil* executive officer.” As Senator Howard noted, no such language existed in the Constitution, and it ran counter to congressional precedent and legal authority. See *id.*

63. See 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 185.

64. See *supra* note 59.

65. See, e.g., *The Presidential Succession—Mr. Churchill’s Bill*, DAILY NAT’L INTELLIGENCER (D.C.), Apr. 8, 1868, at 2 (citing Blount’s Case and Justice Story’s analysis of the same); Editorial, *The Eligibility of the President Pro Tempore of the Senate to be Acting President*, DAILY NAT’L INTELLIGENCER (D.C.), Apr. 18, 1868, at 2 (discussing Senator Wade’s eligibility, and citing George Paschal, Joseph Story, and Francis Wharton’s position concerning Senator Blount’s Case); *Congressional—Senate*, THE EVENING STAR (D.C.), Dec. 6, 1867, at 1 (citing both Blount’s Case and Justice Story’s *Commentaries*).

66. *A Raking Shot at Some Accepted Doctrines*, LOUISVILLE DAILY J. (K.Y.), Apr. 15, 1868, at 1.

their essay, the editors expressly pointed to the Impeachment Clause and Justice Story's analysis of Blount's Case:

Is the President an officer of the United States? What is an officer of the United States? . . . Our answer is that an officer of the United States is one who derives his appointment from the government of the United States; and the answer, we think, is unanswerable. It is generally admitted. . . . Says the fourth section of the second article: "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." Herein, be it noted, the President and Vice-President are not included among "civil officers of the United States", [sic] but on the contrary, are distinguished from them, the language of the Constitution being, "The President, Vice-President, and all civil officers of the United States," not, "The President, Vice President, and all other civil officers of the United States." The language implies that the President and Vice-President are not officers of the United States. It fairly admits of no other construction. In the words of Mr. Justice Story, it "does not even affect to consider them officers of the United States." See section 793 of Story's Commentaries. The argument is thus supported by the authority of the most celebrated commentator on the Constitution as well as by the language of the Constitution itself.<sup>67</sup>

In sum, at the time of the framing and ratification of the Fourteenth Amendment, the precedent of Blount's Case and Justice Story's analysis were accepted and well known both in and out of Congress.<sup>68</sup>

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67. *Id.*; see also John J. Connolly, Did *Anyone* in the Late 1860s Believe the President Was Not an Officer of the United States? (Dec. 20, 2023) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4658473](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4658473) [https://perma.cc/TY4J-NQN8].

68. In addition to Justice Story's *Commentaries*, see JOHN NORTON POMEROY, AN INTRODUCTION TO CONSTITUTIONAL LAW OF THE UNITED STATES 481 (New York, Hurd and Houghton 1868) ("In 1797, upon the trial of an impeachment preferred against William Blount, a Senator, the Senate decided that members of their own body are not 'civil officers' within the meaning of the Constitution. . . . The term 'civil officers' embraces, therefore, the judges of the United States courts, and all subordinates in the Executive Department."); GEORGE WASHINGTON PASCAL, THE CONSTITUTION OF THE UNITED

## II. FRAMING SECTION THREE

The Thirty-Ninth Congress who framed and passed the Fourteenth Amendment first met in December of 1865.<sup>69</sup> The Civil War had only recently ended and the country remained in mourning for the assassinated Abraham Lincoln. Although now-President Andrew Johnson had appointed provisional governments in the former rebel states, congressional Republicans refused to allow the return of representatives from the southern states.<sup>70</sup>

The ratification of the Thirteenth Amendment freed four million enslaved Americans. In doing so, however, it created an enormous political problem for congressional Republicans. These now-free Americans no longer would be counted as “three fifths” of a person for the purposes of determining state representation in the House of Representatives. At the next census, these Americans would count as a full five fifths, resulting in the congressional amplification of southern Democratic political power—the same rebels who had betrayed the country and caused the deaths of 600,000 Americans. Even more galling, the South had had the audacity to send former confederate civil and military leaders to Congress as their chosen state representatives, including the Vice President of the Confederacy, Alexander Stephens.<sup>71</sup>

The Republicans of the incoming Thirty-Ninth Congress responded by making two key moves at the beginning of the session. First, they refused to admit any representative from a former rebel

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STATES DEFINED AND CAREFULLY ANNOTATED 185 (2d ed., W.H. & O.H. Morrison 1876) (1868) (“A senator or representative in Congress is not such [sic] civil officer.”) (citing “Blount’s Trial” and Justice Story’s *Commentaries* sections 793 and 802). Paschal cites the two-volume version of Justice Story’s *Commentaries*, which contains the exact quote from the three-volume edition: “In this view, the enumeration of the President and Vice-President, as impeachable officers, was indispensable.” 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 (Thomas M. Cooley, ed., Boston, Little, Brown & Co. 4th ed. 1873) (1833).

69. See 2 THE RECONSTRUCTION AMENDMENTS, *Supra* note 26, at 5.

70. *Id.*

71. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 196 (1988).

state.<sup>72</sup> Second, they created the fifteen-member Joint Committee on Reconstruction and tasked that committee with determining whether constitutional amendments should be adopted prior to the readmission of the southern states.<sup>73</sup>

Over the course of the first three months of 1866, the Joint Committee considered multiple strategies for dealing with the eventual return of southern representatives. One approach involved changing the method by which the Constitution apportioned representatives in the House.<sup>74</sup> This was supplemented by proposals to deny either the vote or federal office to any person who had participated in the rebellion. The latter approach first appeared in a proposed amendment offered by Representative Samuel McKee.

An Unconditional Unionist from Kentucky, Representative McKee had aligned himself with the radical wing of the Republican party.<sup>75</sup> On February 19, 1866, he submitted the following proposed amendment:

No person shall be qualified<sup>76</sup> or shall hold the office of President or Vice President of the United States, Senator or Representative in the national Congress, or any office now held under appointment from the President of the United States, and requiring the confirmation of the Senate, who has been or shall hereafter be

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72. See *US House, Opening Day of Thirty-Ninth Congress, Exclusion of Former Rebel States, Appointing Joint Committee on Reconstruction* (Dec. 4, 1865) reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 20–21.

73. See *US Senate, Appointing Joint Committee on Reconstruction* (Dec. 12, 1865), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 23.

74. See *Joint Committee, Proposed Apportionment Amendment, Exclusion of "Insurgent States"* (Jan. 9, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 33.

75. To the disgust of Kentucky Democrats. See *Letter to the Editor, Brilliant Democratic Victory—General Palmer's Military Interference Against Rebuked*, *DAILY ENQUIRER* (Cin.), Jan. 17, 1866, at 2 ("If the race for Congress could be run over, Samuel McKee, whose ultra radicalism at Washington has disgusted every body, would be beaten two thousand votes."); see also *Personal Characteristics of the Thirty-Ninth Congress (Washington Letter to the Troy Times)*, *MIRROR & FARMER* (Manchester, N.H.), Mar. 24, 1866, at 3 ("The most radical man from the border states is Samuel McKee of Kentucky.").

76. Newspapers read this term as meaning "nominated." See *Thirty-ninth Congress—1st Session: House of Representatives, Amendment*, *THE DAILY AGE* (Phila.), Feb. 20, 1866, at 1.

engaged in any armed conspiracy or rebellion against the Government of the United States, or has held or shall hereafter hold any office, either civil or military, under any pretended government or conspiracy set up within the same, or who has voluntarily aided, or who shall hereafter voluntarily aid, abet or encourage any conspiracy or rebellion against the Government of the United States.<sup>77</sup>

Representative McKee's proposal expressly named the office of President of the United States, prohibited being "qualified" for as well as "hold[ing]" the office, and applied to both past and future rebellions (those "hereafter"). This is followed by a general catch-all reference to "any office under appointment from the President of the United States."

Representative McKee apparently assumed that a general reference to participating in "conspiracy or rebellion" would not be read as applying to future events, so he included a specific reference to future rebellions—and did so three separate times. Note also that Representative McKee begins by expressly addressing each of the high federal branches of government and then moves to a general catch-all reference to appointed offices "under" the appointment of the President.

On March 3, 1866, Representative McKee delivered a lengthy speech explaining the meaning and scope of his proposal.<sup>78</sup> He condemned the idea that "red-handed traitors, if they have taken an oath to support the Constitution, have as much right to come into this Capitol and legislate for the people as the gallant soldier who

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77. CONG. GLOBE, 39th Cong., 1st Sess. 919 (1866). In his recent book, *Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform after the Civil War* (2023), Professor Mark Graber paraphrases Representative McKee's proposal as "[n]o person shall be qualified or shall hold [various federal offices] who has been or shall hereafter be engaged in any armed conspiracy or rebellion against the United States." *Id.* at 152. In a recent paper, Professor Graber again presents a different but still severely edited version of Representative McKee's proposal. See Graber, *supra* note 46, at 22 (McKee's proposal "included 'the office of President or Vice President of the United States' as among the 'office(s) under the Government' to which he would disqualify former confederates").

78. CONG. GLOBE, 39th Cong., 1st Sess. 1162–1165 (1866).

bore the flag of his country amid the smoke and thunder of battle.”<sup>79</sup> He then reminded the House of the horrific crimes committed by the men who now demanded readmission to Congress:

Go tell it to the survivors of the twelve thousand heroes who in the low, flat marsh of Belle Isle, passed the terrible winter of 1863 and 1864, and the ghosts of the starved and freezing dead of that pen of misery will confront you with the living heroes; and if shame itself does not compel you to call back the assertion, then you have not the heart of a man.<sup>80</sup>

Representative McKee’s speech repeatedly stressed its application to still living mass-murderers who had led the rebellion against the Union. His amendment would ensure

that those, and those only, who are true to the nation, and who fight against treason, shall have the reward given them to rule the land, and by this prove that the hundreds of thousands who have gone down to their graves in the death-grapple with treason have not died in vain.<sup>81</sup>

“Let us adopt this amendment,” he declared, “and the men who have proved unfaithful, the men who made war upon us, can never assume control of this Government again.”<sup>82</sup> Newspapers across the country published Representative McKee’s proposed constitutional amendment.<sup>83</sup> Meanwhile, the House referred the proposal

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79. *Id.* at 1163.

80. *Id.*

81. *Id.*

82. *Id.* at 1164.

83. See, e.g., BOS. DAILY ADVERTISER, Mar. 14, 1866, p. 4 (full proposal); THE EVENING POST (N.Y.C.), Mar. 3, 1866, at 4 (paraphrasing amendment as “no person should be qualified to hold the office of President or Vice President . . . who had voluntarily aided the rebellion, or who should hereafter be guilty of similar offences”); ALBANY EVENING J. (N.Y.), Mar. 3, 1866, at 3 (same); HARTFORD DAILY COURANT (Conn.), Mar. 5, 1866, at 3 (same). See also SEMI-WEEKLY TELEGRAPH (Salt Lake City, Utah), Feb. 22, 1866, at 2; IDAHO TRI-WEEKLY STATESMAN (Boise), Mar. 1, 1866, at 3 (“February 19-- . . . Mr. McKee introduced a joint resolution, amending the Constitution of the United States so as to exclude from all offices of Government those who have, or may hereafter, engage in rebellion or conspiracy against the Government.”); EVENING POST (N.Y.C.), Feb. 19, 1866, at 4; ALBANY EVENING J. (N.Y.), Feb. 20, 1866, at 1; ARGUS (Albany, N.Y.), Feb. 20, 1866,

to the Judiciary Committee, having already voted to allow members to send their proposed amendments directly to the Joint Committee on Reconstruction without the need for a referral vote.<sup>84</sup>

The Joint Committee, meanwhile, focused on other matters. The Committee's proposed amendment dealing with congressional apportionment had been defeated in a crossfire of conservative and radical criticism.<sup>85</sup> Joint Committee member John Bingham's proposed amendment protecting basic rights had been debated and returned to the Committee for redrafting.<sup>86</sup> By late April, the Joint Committee had failed to get the requisite two-thirds congressional approval for any of its proposed amendments.

A breakthrough came on April 21, 1866, when Joint Committee member Thaddeus Stevens asked the Committee to consider a draft constitutional amendment submitted by Republican activist Robert Dale Owen.<sup>87</sup> Owen's proposal bundled together several separate proposals into a single multi-sectioned amendment.<sup>88</sup> Although none of Owen's proposed sections dealt with the readmission of southern rebels, Owen also submitted a separate set of proposed supplementary bills ("provisos"), one of which disqualified former rebels from holding federal office:

Provided, That no person who, having been an officer in the army or navy of the United States, or having been a member of the Thirty-sixth Congress, or of the Cabinet in the year one thousand

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at 2; NEW YORK COM. ADVERTISER (N.Y.C.), Feb. 19, 1866, at 4.; JACKSON DAILY CITIZEN (Mich.), Feb. 19, 1866, at 1.; EVENING BULLETIN (S.F.), Feb. 20, 1866, at 3.

84. CONG. GLOBE, 39th Cong., 1st Sess. 919 (1866). See also H. JOURNAL, 39th Cong., 1st Sess. 205 (1866).

85. See 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 7; US House, *Proposed Apportionment Amendment Referred Back to Joint Committee* (Jan. 30, 1866), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 79.

86. US House, *Debate Continued, "Privileges and Immunities" Amendment, Speeches of John Bingham and Giles Hotchkiss, Vote to Postpone Consideration* (Feb. 28, 1866), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 108.

87. See "News of Proposed Amendments in the Joint Committee on Reconstruction," *Chi. Trib.* (Apr. 16, 1866), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 151; see also *id.* at 10.

88. See BENJAMIN BURNS KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 83-84 (New York, Negro Universities Press 1969) (1914).



eight hundred and sixty, took part in the late insurrection, shall be eligible to either branch of the national legislature until after the fourth day of July, one thousand eight hundred and seventy-six.<sup>89</sup>

Owen's "proviso" focused expressly and solely on protecting Congress ("either branch of the national legislature").<sup>90</sup> Although Owen's proviso would have prevented Jefferson Davis from returning to the Senate, it clearly allowed any former rebel, including Jefferson Davis, to hold the office of President. Either Owen did not care about a rebel President (not likely) or he trusted the American electorate enough not to worry about such a ludicrous possibility. Nor did Owen care about the future: his proposition was expressly limited to the "late insurrection."

The Joint Committee held a number of meetings discussing Owen's proposed amendment and his "provisos."<sup>91</sup> By April 23, Owen's original proviso had been substantially expanded. However, the text remained focused solely on participants in the "late rebellion" attempting to return to the "national legislature." Here is the "expanded" proviso:

Provided, That until after the fourth day of July, 1876, no persons shall be eligible to either branch of the National Legislature who is included in any of the following classes, namely:

First. Persons who, having been officers of the army or navy of the United States, or having been members of the 36th Congress, or having held in the year 1860 seats in the Cabinet, or judicial offices under the United States, did afterwards take part in the late insurrection.

Second. Persons who have been civil or diplomatic officers of the so-called confederate government, or officers of the army or navy of said government above the rank of colonel in the army and of lieutenant in the navy.

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89. *Id.* at 84. Stevens explained to the committee that Owen's "provisos" would be submitted separately as proposed legislation. *Id.* at 85.

90. *Id.* at 84.

91. See 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 152–57.

Third. [Persons who mistreated prisoners of war.]

Fourth. Persons in regard to whom it shall appear that they are disloyal.<sup>92</sup>

Like Owen's original proposal, the Joint Committee draft prohibited Jefferson Davis from returning to "the national legislature," but it did not prevent Jefferson Davis, or any other rebel, from being elected President.

Interestingly, especially in light of the background precedent of Blount's Case, Massachusetts Representative George S. Boutwell apparently did not understand the phrase "civil or diplomatic officers of the so-called confederate government" to include the office of the Confederate President and Vice President. Accordingly, Representative Boutwell successfully moved that the Committee alter the proviso to expressly name the "President and Vice-President of the Confederate States of America."<sup>93</sup> The change suggests that the Joint Committee very much wanted the provision to apply to the Confederate Vice President Alexander Stephens (whom Georgia Democrats had audaciously chosen as their first post-Civil War senator).<sup>94</sup> The changes suggests that the Joint Committee wanted to make sure that precedents like Blount's Case did not exclude the "President and Vice President" of the Confederacy because they were not "civil officers."

The change shows how careful the Joint Committee was about drafting and it shows they were perfectly willing to expressly name the office of "President or Vice President" if they thought the matter was important. But nothing in the original or altered text suggests anyone in the Joint Committee thought it was important to prevent the unlikely election of either Jefferson Davis or Alexander Stephens as President of the United States.

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92. Kendrick, *supra* note 88, at 92.

93. *Id.* at 103.

94. Jefferson Davis was already covered by the original provision targeting members of the Thirty-Sixth Congress. Alexander Stephens had served as a Representative from Georgia during the Thirty-Fifth Congress.

On April 28, Committee member and New York Senator Ira Harris successfully proposed adding language to the official amendment prohibiting any persons who had aided the “late insurrection” from voting for congressional representatives or any presidential elector:

Until the fourth day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice-President of the United States.<sup>95</sup>

This approach differs from that of the proviso by denying former rebels the right to vote, as opposed to denying them the right to hold office. This is also the first indication that the Joint Committee wanted to protect the office of the presidency from rebel disruption. Rather than choosing the proviso approach of denying former rebels the right to hold the office of President, they denied former rebels the right to vote for presidential electors.

Meanwhile, the Joint Committee continued to tinker with the “proviso.” By April 28, the Committee had finalized a draft proviso which declared:

[N]o person shall be eligible to any office under the Government of the United States who is included in any of the following classes, namely:

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95. Kendrick, *supra* note 88, at 104–105. The proposal had been initially drafted by the members of the New York Congressional Caucus. See ALBANY EVENING J. (N.Y.), Apr. 28, 1866, at 2. See also Earl M. Maltz, *The Entire Fourteenth Amendment* 60 n. 323 (Sept. 21, 2023) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4564980](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4564980) [<https://perma.cc/AEZ4-F3LT>]. As reported in the *National Aegis*, “The proposition was ordered to be presented to the Reconstruction Committee, as one generally acceptable to the New York delegation. It is said Senator Harris and Representative Conkling, and Mr. Boutwell of Massachusetts will urge its adoption.” *New Plan of Reconstruction*, NAT’L AEGIS (Worcester, Mass.), Apr. 28, 1866, at 3 (citing reports from “The Times’s Washington special”). After an initially unsuccessful vote, Iowa Senator James W. Grimes moved for reconsideration and the Committee adopted Senator Harris’s proposed addition to the Fourteenth Amendment. See Kendrick, *supra* note 8888, at 105.

1. The President and Vice-President of the Confederate States of America, so-called, and the heads of departments thereof.
2. Those who in other countries acted as agents of the Confederate States of America, so-called.
3. Heads of Departments of the United States, officers of the Army and Navy of the United States, and all persons educated at the Military or Naval Academy of the United States, judges of the courts of the United States, and members of either House of the Thirty-Sixth Congress of the United States who gave aid or comfort to the late rebellion.
4. Those who acted as officers of the Confederate States of America, so-called, above the grade of colonel . . . .
5. Those who have treated officers or soldiers or sailors of the Army or Navy of the United States, captured during the late war, otherwise than lawfully as prisoners of war.<sup>96</sup>

According to both Blount's Case and Justice Story's analysis in his Commentaries, the phrase "any office under the Government of the United States" included any presidentially appointed office in the national government.<sup>97</sup> Thus, the proviso would prevent President Johnson from continuing to issue ill-advised pardons and appointments.

Because the Journal of the Joint Committee does not include notes of their discussions, we do not know whether they thought the proviso's language impliedly included the office of President of the United States. Since the Committee had not left to implication whether the proviso included the office of President or Vice President of the Confederacy, it seems reasonable to think they would have been equally clear regarding the office of the nation's President. The proviso's language, however, remained ambiguous.

That same day, the Joint Committee voted to submit the following proposed five-sectioned amendment to the Constitution:

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96. Kendrick, *supra* note 88, at 119–120.

97. See *supra* text accompanying notes 54–68.

Sec. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.

Sec. 3. Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress, and for electors for President and Vice-President of the United States.

Sec. 4. Neither the United States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for loss of involuntary service or labor.

Sec. 5. The Congress shall have power to enforce by appropriate legislation the provisions of this article.<sup>98</sup>

Neither the Committee's proposed amendment nor the attached proviso expressly applied to future rebellions (or, in the language of Representative McKee's draft, rebellions "hereafter"). The text, as well as the speeches that followed, focused on the leaders of the past rebellion. The overall goal, as explained in the Report of the Joint Committee on Reconstruction, was "the exclusion from

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98. Kendrick, *supra* note 88, at 117–18.

positions of public trust of, at least, a portion of those whose crimes have proved them to be enemies to the Union, and unworthy of public confidence.”<sup>99</sup> Although the Joint Committee’s explanation sounds broad enough to exclude a rebel from the office of President, the actual text proposed by the Committee did not. Instead, the Committee thought its purposes sufficiently achieved by prohibiting rebels from voting for congressional representatives and “electors for President and Vice President of the United States.”

A. *The House Debates*

On May 8, 1866, Representative Thaddeus Stevens introduced the proposed Fourteenth Amendment to the House of Representatives.<sup>100</sup> Representative Stevens lamented that the proposal “falls far short of my wishes,” but conceded that he “did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this.”<sup>101</sup> Section One allowed Congress to “correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.”<sup>102</sup> Section Two, which Representative Stevens regarded as the “most important,” solved the problem introduced by the Thirteenth Amendment.<sup>103</sup> Representative Stevens believed that “[t]he effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive.”<sup>104</sup>

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99. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION 12 (S.F., Union State Central Committee 1866).

100. See *US House, Thaddeus Stevens Introduces Proposed Five-Section Fourteenth Amendment* (Apr. 30, 1866), in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 155.

101. See *US House, Proposed Fourteenth Amendment, Speech of Thaddeus Stevens Introducing the Amendment, Debate* (May 8, 1866), in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 158.

102. *Id.* at 159.

103. *Id.* at 160.

104. *Id.*

As for Section Three, Representative Stevens noted that section “may encounter more difference of opinion here.”<sup>105</sup> For his part, he thought it “too lenient” and “the mildest of all punishments ever inflicted on traitors.”<sup>106</sup> He would have “increased the severity of this section,” extending its application to 1876 and making it “include all State and municipal as well as national elections.”<sup>107</sup> Nevertheless, he insisted he would “move no amendment, nor vote for any, lest the whole fabric should tumble to pieces.”<sup>108</sup> Representative Stevens did not mention any concern about Section Three’s failure to address possible future rebellions, nor did he express any concern about the amendment’s protecting the presidency by way of the electoral college. Nor did any other member voice such concerns.

Several members were deeply critical of the proposed third section, though, for very different reasons. Representative Blaine wondered if the section could be reconciled with the numerous grants of Presidential pardons.<sup>109</sup> Representative William Finck mocked what he viewed as a baldly partisan proposal that made the “most wonderful discovery” that certain rebels are currently too dangerous to vote but that they will be “converted into a true and loyal citizen” two years after the next presidential election.<sup>110</sup>

Representative James A. Garfield echoed Representative Blaine’s concern about the possible conflict with previously issued pardons.<sup>111</sup> He could not accept an amendment that presumed that someone who was “not worthy to be allowed to vote in January of 1870” somehow became worthy “in July of that year.”<sup>112</sup> This, Representative Garfield noted, would be opposed as “purely a piece of political management in reference to a presidential election.”<sup>113</sup> He

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* See also CONG. GLOBE, 39th Cong., 1st Sess. 2460 (1866).

109. CONG. GLOBE, 39th Cong., 1st Sess. 2460 (1866).

110. *Id.* at 2461.

111. *Id.* at 2463.

112. *Id.*

113. *Id.*

also predicted that the provision would be unenforceable in the southern states absent “a military force at every ballot box in eleven States of the Union.”<sup>114</sup>

The drumbeat of criticism against the Joint Committee’s draft of Section Three was relentless. Representative Martin Russell Thayer objected that the third section “imperil[ed] the whole measure under consideration” by unduly delaying the restoration of political rights to southern voters.<sup>115</sup> Thayer agreed that it was “proper that you should fasten a badge of shame upon this great crime of rebellion by rendering ineligible to office under the United States those who have been leaders in the insurrection against the Government.”<sup>116</sup> But, he argued, “this third section goes much further.”<sup>117</sup> New York Democrat Benjamin Boyer denounced Section Three as so punitive that no “sane man” could expect the southern states to accept “such a degradation.”<sup>118</sup> It amounted to an unjust *ex post facto* law in conflict with the federalist vision of the Ninth and Tenth Amendments.<sup>119</sup>

Not every member was critical. Ohio Republican Robert Schenck, for example, supported the provision even if it might not have the precise language he would have preferred.<sup>120</sup> Schenck also brushed off criticism that the proposed text had only a brief period of operation. He stated:

It has also been objected that it is exceptional to incorporate into the Constitution any condition depending on lapse of time or a term of years—a period within or beyond which something is to be allowed or denied . . . Any gentleman familiar with the Constitution will recall the provision that the slave trade, existing at

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114. *Id.*

115. *Id.* at 2465.

116. *Id.*

117. *Id.*

118. *Id.* at 2466. Others echoed doubts about southern willingness to ratify an amendment with such a provision. *See id.* at 2503.

119. *Id.* at 2467.

120. *Id.* at 2470.



the time of its adoption, should be permitted to run on for twenty years, but might be forbidden at the end of that time.

There is no principle violated, nothing which should prevent us from making the exclusion for two, three, four, ten, or twenty years, or during the natural lives of the insurgents, who seek to be admitted again to the exercise of the elective franchise.<sup>121</sup>

Much of the criticism focused on the Electors Clause. Several members pointed out that this provision would be easily defeated by states that chose to appoint, rather than elect, presidential electors. Representative John Longyear, for example, noted that Section Three would be “easily evaded by appointing electors of President and Vice President through their Legislatures, as South Carolina has always done.”<sup>122</sup> Ohio Representative John Bingham agreed that, as written, the clause was “useless.”<sup>123</sup> Rebels could vote for state legislators, and those legislators could then simply appoint rebels to be electors for President and Vice President of the United States.<sup>124</sup> Newspaper essays echoed the same criticism, castigating the Joint Committee for their ignorance of how electors were chosen in the southern states.<sup>125</sup>

Representative McKee, who had previously submitted a draft to the House Judiciary Committee naming the office of President and covering both the past and future rebellions, now proposed a less expansive version of his earlier disqualification amendment:

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121. *Id.* at 2471.

122. *Id.* at 2537.

123. *Id.* at 2543.

124. *Id.* Ohio newspapers reported Bingham’s objections. See THE CLEVELAND DAILY PLAIN DEALER, May 17, 1866, at 3. A frustrated Representative Stevens castigated Representative Bingham for his opposition to Section Three. See CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866).

125. See, e.g., DAILY NATIONAL INTELLIGENCER (D.C.), May 5, 1866, at 2 (essay criticizing the Joint Committee for the “grossest ignorance of constitutional law” which allows states to appoint electors of the President and Vice President of the United States); *The Third Clause*, THE DAILY PICAYUNE (New Orleans), May 19, 1866, at 6 (“[T]his part of the proposed amendment could be annulled in practice by any state choosing to evade it.”).

All persons who voluntarily adhered to the late insurrection, giving aid and comfort to the so-called southern confederacy, are forever excluded from holding any office of trust or profit under the Government of the United States.<sup>126</sup>

Abandoning his earlier effort to expressly include future rebellions, Representative McKee now limited his proposal to participants in “the late insurrection.”<sup>127</sup> “By this means,” he explained, “we will affix the brand of treason upon the traitor’s brow; and there I would have it remain until the snows of winter covered their graves.”<sup>128</sup>

McKee also removed language in his earlier draft that had specifically named the office of the President of the United States. McKee did not claim that his new draft included the office of President. Instead, McKee explained that the purpose of his new draft was to prevent disloyal members of Congress from “com[ing] back and assum[ing] their places here again.”<sup>129</sup> Although McKee described his proposal as ensuring rebels voted for “none but those who have been loyal,”<sup>130</sup> McKee defined loyalty as a matter of political party. As McKee put it, “I desire that the loyal heart of the nation shall continue in power the great party which sustained our armies in the field.”<sup>131</sup>

McKee did not explain his reasons for removing his prior express reference to the office of President of the United States. It is possible he sought nothing more than to constitutionalize the phrase in the Joint Committee draft that “no person shall be eligible to any office under the Government of the United States.” Whatever his reasons, the language was just as ambiguous here as it was in the proviso.

If McKee was attempting to move the Joint Committee’s draft in a more radically expansive direction, he faced insurmountable headwinds from the majority of his congressional colleagues. The

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126. CONG. GLOBE, 39th Cong., 1st Sess. 2504 (1866).

127. *Id.* at 2504.

128. *Id.* at 2505.

129. *Id.*

130. *Id.*

131. *Id.*

general tendency during the first session of the Thirty-Ninth Congress ran away from more radical proposals and towards more moderate drafts that were more likely to secure the needed two-thirds vote.<sup>132</sup> This was particularly true for the Joint Committee's draft of Section Three. Massachusetts Republican Thomas Eliot viewed the proposal as accomplishing little beyond symbolic condemnation, and thus could be omitted entirely.<sup>133</sup> There was no reason to waste time debating its proper wording. As Mr. Eliot noted, "Mr. Speaker, this section is not vital to this amendment. It may be stricken out, and the affirmative value of the amendment will yet be retained."<sup>134</sup>

A quick and easy alternative involved replacing the proposed amendment with the proposed proviso. This would close the loophole in the Joint Committee's draft which allowed state legislatures to appoint presidential electors. And it had the additional advantage of applying language already hammered out by the Joint Committee. On May 10, Michigan Republican Fernando C. Beaman announced that he would "move to strike out the third section and insert in lieu thereof a section which I have taken in substance from the bill introduced from the committee by the gentleman from Pennsylvania [Stevens]." <sup>135</sup> Beaman's proposal basically tracked the Joint Committee's proviso:

No person shall hereafter be eligible to any office under the Government of the United States who is included in any of the following classes namely:

1. The president and vice president of the confederate States of America so called, and the heads of departments thereof.
2. Those who in other countries acted as agents of the confederate States of America so-called.

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132. See KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 81 (2014). See also EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869* 60 (1990).

133. CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866).

134. *Id.*

135. *Id.* at 2537.

3. Heads of Departments of the United States, officers of the Army and Navy of the United States, and all persons educated at the Military or Naval Academy of the United States, judges of the courts of the United States, and members of either House of the Thirty-Sixth Congress of the United States who gave aid and comfort to the late rebellion.<sup>136</sup>

This, Beaman explained, “would at least prevent the intrusion of arch traitor Jefferson Davis into the Senate of the United States, and would exclude permanently from this Hall the rebels who left it in 1861 for the field of blood.”<sup>137</sup> Beaman expressed no interest in preventing the unlikely event of electing Jefferson Davis as President of the United States. His effort was designed to prevent Jefferson Davis from either the Senate or the House (“this Hall”).

The Radical Republican Thaddeus Stevens did all he could to fight off criticism of his Committee’s draft of Section Three. Johnson declared the danger had nothing to do with someone like Jefferson Davis becoming President—the danger was rebel Democrats electing themselves to Congress where they would combine their votes with northern Democrats and disrupt Republican Reconstruction. Without Section Three, Stevens warned, “[t]hat side of the House will be filled with yelling secessionists and hissing copperheads. Give us the third section or give us nothing.”<sup>138</sup>

In response to John Bingham’s complaint that Section Three was unenforceable, Stevens reminded his colleagues that Section Three required the passage of enabling legislation. “[I]f this amendment prevails,” Stevens explained, “you must legislate to carry out many parts of it,” including legislation “for the purpose of ascertaining the basis of representation.”<sup>139</sup> So to in regarding to Section Three.

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136. *Id.*

137. *Id.*

138. *Id.* at 2544. Stevens, whose health was deteriorating, spoke in such a weak voice that his colleagues would leave their seats and gather around Stevens in order to hear him. This triggered objections on the Democratic side of House that “members are crowding the aisles on the other side and the open space in the center of the House so that we can neither see nor hear what is going on.” The Speaker then called on members to resume their seats. *Id.*

139. *Id.*

“It will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do. So that objection falls to the ground.”<sup>140</sup> No one at that time, or any time prior to final passage, disagreed with Stevens’s declaration that the provision would not execute itself, or suggested it be re-drafted so that it could be enforced even in the absence of congressional legislation.

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An aside on whether the final language of Section Three rendered Stevens’s views on self-execution irrelevant.

Professors Will Baude and Michael Paulsen insist that the mandatory language of Section Three makes the provision self-executing, regardless of congressional legislation. According to these scholars,

“No person shall be” directly enacts the officeholding bar it describes where its rule is satisfied. It lays down a rule by saying what shall be. It does not grant a power to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself. Section Three directly adopts a constitutional rule of disqualification from office.”<sup>141</sup>

Baude and Paulsen do not address Thaddeus Stevens’s statement about the Joint Committee’s draft, but their logic seems to equally apply to this draft. The draft that Stevens announced “will not execute itself” declared:

“[A]ll persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.”<sup>142</sup>

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140. *Id.* Stevens would make the same point about the need for enabling legislation in regard to the final version of Section Three.

141. Baude and Paulsen, *supra* note 3, at 17–18.

142. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

In terms of self-execution, there is no relevant difference between a text that declares “all persons who voluntarily adhered to the late insurrection . . . shall be excluded,” and one that declares “[n]o person shall be a Senator . . . [if they] engaged in insurrection or rebellion.” If the former “will not execute itself,” neither would the latter.

*B. House Passage*

Just prior to the final House vote, Ohio Republican James A. Garfield proposed substituting the embattled Section Three with a broad disqualification provision:

“All persons who voluntarily adhered to the late insurrection, giving aid and comfort to the so-called southern confederacy, are forever excluded from holding any office of trust or profit under the Government of the United States.”<sup>143</sup>

In an earlier speech, Garfield had objected to the Joint Committee’s decision to exclude rebels from voting for only a “limited period.”<sup>144</sup> Garfield would have preferred a provision which “forever” excluded rebels from “the right of elective franchise.”<sup>145</sup> Garfield’s last minute proposal applied “forever” but, instead of disenfranchising rebels, it excluded any participant in the rebellion from “holding any office of trust or profit under the Government of the United States.” Garfield did not explain the reasoning behind his latest proposal and it was quickly defeated. Congress instead immediately voted 128 to 37 to approve the Joint Committee’s draft in its entirety.<sup>146</sup> Debate then moved to the Senate.

At no time during the House debates on the Joint Committee draft of Section Three did any representative mention the need to prevent rebels from being elected President. The language in McKee’s initial draft targeting the office of the President disappeared without a trace—or a comment. Instead, debate focused on the actual danger of former rebels either being elected to one of the branches

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143. *Id.* at 2545.

144. *Id.* at 2463.

145. *Id.*

146. *Id.* at 2545.

of Congress or somehow influencing the selection of presidential electors. A widespread sense that the electoral college needed to be better secured ultimately prompted the adoption of an entirely new draft of Section Three.

C. *The Senate Debates*

On May 23, 1866, standing in for an ailing William Pitt Fessenden, Senator Jacob Howard of Michigan introduced the Joint Committee's proposed Fourteenth Amendment.<sup>147</sup> After describing and defending the first two sections, Howard addressed Section Three. "I did not favor [the third] section of the amendment in the committee," Howard admitted.<sup>148</sup> It would not prevent rebels from voting for state representatives or prevent state legislatures from choosing rebels as presidential electors.<sup>149</sup> Instead, Howard preferred a clause disqualifying from office "the great mass of the intelligent and really responsible leaders of the rebellion."<sup>150</sup>

Note Howard's concerns about the electoral college. He echoed concerns raised in the House that, as drafted, Section Three left open a loophole whereby states could appoint, rather than elect, presidential electors. The final draft of Section Three closed this loophole.

Howard's criticism of his own committee's proposal signaled open-season on Section Three. Member after member subsequently rose to complain about the third section. Mr. Wilson, for example, proposed striking out the third section altogether and replacing it with a new section barring from any office "under the United States" any person who resigns from federal office and then "takes part in rebellion," now or in the future:

"[N]o person who has resigned or abandoned or may resign or abandon any office under the United States, and has taken or may

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147. *Id.* at 2764–65.

148. *Id.* at 2767–68.

149. *See id.* at 2768.

150. *Id.*

take part in rebellion against the Government thereof, shall be eligible to any office under the United States or of any State.”<sup>151</sup>

Like McKee’s second proposal, Wilson’s proposal used language that, according to Blount’s Case and Story’s analysis, would include only appointed offices, and not include the offices of President, Senator, or Representative. Wilson’s proposal also reflected an effort to target only those who had played an especially culpable role in the rebellion. Other echoed this narrower focus on leading rebels. Mr. Wade, for example, proposed striking out the third section altogether and replacing it with a provision “excluding those who took any leading part in the rebellion from exercising any political power here or elsewhere.”<sup>152</sup> “I hope,” Wade continued, “another clause will be placed there by the amendment suggested by the Senator from New Hampshire.”<sup>153</sup>

The “Senator from New Hampshire,” was Daniel Clark. Clark proposed replacing Section Three with a draft barring from certain offices any person who “engaged in insurrection or rebellion” after having taken an oath to support the Constitution of the United States:

“No person shall be a Senator or Representative in Congress, or be permitted to hold any office under the Government of the United States, who, having previously taken an oath to support the Constitution thereof, shall have voluntarily engaged in any insurrection or rebellion against the United States, or given aid or comfort thereto.”<sup>154</sup>

Senator Clark’s provision accomplished the Republican’s repeatedly expressed goal of protecting Congress from the disruptive return of leading rebels. Clark’s draft did so, however, in a manner that complied with the precedent of Blount’s Case by expressly naming the offices of Senator and Representative.

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151. *Id.* at 2770.

152. *Id.* at 2769.

153. *Id.*

154. *Id.* at 2770.



Clark's proposal also omitted Wilson's express reference to future rebellions and instead targeted participants in the late rebellion. According to Clark, it was important to adopt something

looking toward the exclusion of many of those who participated in the rebellion from participation in the administration of our Government . . . . I much prefer that you should take the leaders of the rebellion, the heads of it, and say to them, "You never shall have anything to do with this Government" and let those who have moved in humble spheres return to their loyalty and to the Government.<sup>155</sup>

Although Senator Jacob Howard generally supported Clark's proposal, he suggested removing the term "voluntarily."<sup>156</sup> According to Howard,

Any person who has taken an oath to support the Constitution as a member of Congress or as a Federal officer must be presumed to have intelligence enough if he entered the rebel service to have entered it voluntarily. He cannot be said to have been forced into it by pressure.<sup>157</sup>

Clark accepted Howard's suggestion, noting that he would "adopt any other suggestion that seems proper in regard to this amendment. I throw it out merely as a general idea or proposition. It may not be satisfactory to all minds; it may need amendment; it may possibly go too far."<sup>158</sup>

Throughout these discussions, not a single member mentioned the need to prevent rebels from qualifying for, or holding, the office of the President of the United States. Instead, the proposals had moved from expressly naming the office of President (McKee) to general prohibitions on holding office (Wilson) and to a proposal expressly naming the offices of Senator and Representative, and offices "under the government of the United States" (Clark).

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155. *Id.* at 2771.

156. *Id.*

157. *Id.*

158. *Id.*

*D. The Republican Caucus*

At this point, it is helpful to pull back a bit and consider the various Republican factions in the Thirty-Ninth Congress. This is important in determining whether the final version should be read through the lens of a radical, moderate, or conservative Republican.

From the opening of the session, Radical Republicans had faced a series of defeats and forced retreats. The initial proposals to enfranchise black Americans had been repeatedly defeated in committee and on the floor.<sup>159</sup> Radicals outside Congress condemned the final draft of the Fourteenth Amendment as a total “surrender” and “the offspring of cowardice.”<sup>160</sup> The disenfranchisement provision, so passionately defended by Thaddeus Stevens (“[g]ive us the third section or give us nothing!”), was soon to be replaced with a less comprehensive and far milder prohibition—to the dismay of Thaddeus Stevens.<sup>161</sup>

Recognizing that Democrats would take advantage of Republican divisions if floor debate continued, Jacob Howard and his fellow Senate Republicans decided not to continue this discussion in the open chamber. Instead, over the next week (May 29–30, 1866), Republicans met in a series of private caucuses.<sup>162</sup> It was during these caucuses (reported on by multiple newspapers) that the final version of Section Three emerged.

There are no transcripts of the caucus debates. Newspaper reporters, however, attended the meetings and provided daily reports about the caucus debates and proposals. According to these reports, the only thing Republicans could agree on, at least initially, was the need to strike the entirety of Section Three and go back to the drawing board. According to one report,

[t]here was almost as much disagreement in the caucus as there was in the Senate. The difficulty seemed to be to agree upon a

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159. See MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE* 182–83 (1974).

160. *Id.* at 182 (quoting Wendell Phillips and editor Joseph Medill, respectively).

161. See *infra* note 198 and accompanying text.

162. See BENEDICT, *supra* note 159, at 185. See also JOSEPH BLISS JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 140–41 (1956).

proposition as a substitute for the third section of the constitutional amendment, the radical Senators insisting that all the leading rebels shall forever be disenfranchised from holding any federal office. The probabilities are that they will compromise by putting in a certain class of leading men who made themselves generally obnoxious.<sup>163</sup>

Reporters sensed a general desire to target a smaller segment of rebel leaders who had violated their oaths of office.<sup>164</sup> According to the *New York Herald*, “[t]he general opinion is that the restriction will extend to those who have held certain civil and military offices under the federal government.”<sup>165</sup>

When initial discussions failed to produce any consensus beyond the need to strike the current third section,<sup>166</sup> the caucus appointed a subcommittee comprised of the Republican Senators who served on the Joint Committee, William Pitt Fessenden, Jacob Howard, James Grimes, Ira Harris, and George Williams.<sup>167</sup> When this

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163. *Senatorial Caucus on Reconstruction*, CLEV. DAILY PLAIN DEALER, May 29, 1866, at 3 (citing reports from the “World”).

164. *Id.* (“Nearly all the Republicans agree that the third section of the proposed constitutional amendment will be stricken out in caucus, and the disenfranchisement of a specific class of rebels substituted in its place. It is also found upon discussion that a larger number of the of the members favor restricting this class as much as possible than was generally supposed two weeks ago.”).

165. *The Republican Senatorial Caucus*, N.Y. HERALD, May 29, 1866, at 1.

166. *Id.* (“Nearly all the republican Senators agree that the third section of the proposed constitutional amendment will be stricken out in caucus . . .”).

167. *Id.* (reporting that “discussion continued until late in the afternoon without arriving at any definite conclusion. The whole matter under consideration was finally referred by the caucus to the Senatorial portion of the Reconstruction Committee, consisting of Senators Fessenden, Grimes, Howard, Harris and Williams. Senator Johnson was also on the committee, but being a democrat he could not participate in the republican Senatorial caucus. . . . It is also found upon discussion that a larger number of the of the members favor restricting this class as much as possible, than was generally supposed two weeks ago. The general opinion is that the restriction will extend to those who have held certain civil and military offices under the federal government, although it is by no means improbable that it may turn upon those who have taken and violated certain oaths to the federal government”). See also CLEV. DAILY PLAIN DEALER, *supra* note 163, at 3 (“The whole matter was referred to the Senatorial portion of the Reconstruction Committee, consisting of Senators Fessenden, Grimes, Howard, Harris and Williams. Senator Johnson was also on the committee but being a Democrat he could

subcommittee returned, they submitted a draft of what became the final version of Section Three. According to Boston Daily Advertiser, although Fessenden delivered the work of the subcommittee, “he concedes to Messrs. Howard and Grimes the chief credit of its admirable phraseology.”<sup>168</sup> According to reports, “[w]hen perfected by two or three verbal changes, it was adopted by the unanimous vote of the caucus.”<sup>169</sup>

The final draft of the Fourteenth Amendment, including Section Three, represented a victory for congressional moderates. Stevens and the radicals had failed in the efforts to give black Americans an equal right to vote in Section Two, and Steven’s preferred version of Section Three had been removed and replaced by one with a far more narrow restriction on southern political power. As reported by the Philadelphia Inquirer, “[w]hile many would have desired more radical measures, they are willing to yield their desires for the sake of harmony in the Union [Republican] party and giving the President an opportunity to agree with Congress.”<sup>170</sup> According to Michael Les Benedict, all of the changes proposed by the caucus tilted in a conservative direction. As Benedict puts it, “[t]he radicals defeat was total.”<sup>171</sup>

#### *E. Final Congressional Debates on Section Three*

On May 29, the Senate continued its discussion of the proposed Fourteenth Amendment. Debate began with a successful motion by Reverdy Johnson to strike out the third section.<sup>172</sup> Jacob Howard

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not participate in the caucus.”). See also *The Senatorial Caucus*, ALBANY EVENING JOURNAL, May 29, 1866, at 2 (reporting the same).

168. *Reconstruction. The Plan of the Union Senators*, BOS. DAILY ADVERTISER, May 30, 1866, at 1. This same report describes the subcommittee as consisting of only Fessenden, Grimes and Howard. See *id.* (“Mr. Fessenden submitted the amendment to the Constitution as agreed to by the committee consisting of himself and Messrs. Grimes and Howard.”). It may be that the caucus authorized all three Joint Committee Senators to work on the amendment, but ultimately only these three did so.

169. *Id.*

170. *The Vote upon the Reconstruction Committee’s Amendment*, THE PHILA. INQUIRER, May 30, 1866, at 1.

171. BENEDICT, *supra* note 159, at 186.

172. See *Congressional Summary*, THE CLEV. DAILY PLAIN DEALER, May 30, 1866, at 1.

then introduced a number of proposed alterations to the Joint Committee's draft—alterations already reported by newspapers who had been following the work of the Republican Caucus.<sup>173</sup> As Howard explained,

The third section has already been stricken out. Instead of that section, or rather in its place, I offer the following: SEC 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.<sup>174</sup>

Unlike McKee's initial draft which expressly named the office of President of the United States, and unlike proposed drafts like Senator Wilson's, which contained nothing but a general reference to "offices under the United States," this final draft adopted the approach of Senator Clark and expressly named the offices of Senator and Representatives.

Section Three begins by expressly naming Senators, Representatives and electors of the President of the United States—positions involving the three apex political positions in the federal government. These expressly enumerated positions are followed by a general catch-all provision referring to "all offices, civil or military, under the United States." It was common at the time of the Fourteenth Amendment to refer to Senators, Representatives and electors as holding an "office."<sup>175</sup> Nevertheless, the framers did not leave the

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173. The public was aware of the new provision even before Howard introduced the changes. See *Thirty-Ninth Congress*, THE DAILY AGE (Phila.), May 30, 1866, at 1.

174. CONG. GLOBE, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2869 (1866).

175. For the "office of Senator" see *In Memory of Senator Foot*, N.Y. TRIB., April 13, 1866, at 1 (reporting a speech by Charles Sumner delivered on April 12, 1866, noting that his late colleague Sen. Foot "was happy in the office of Senator"); see also VT. WATCHMAN & ST. J. (Montpelier), April 20, 1866, at 2 (reporting same speech); BOS. DAILY

inclusion of these positions to implication (as “civil offices”), but expressly named them as included offices.

Like the Joint Committee draft, the new version of Section Three expressly addressed presidential electors. However, instead of prohibiting rebels from voting for electors, the new draft prohibited leading rebels from serving as presidential electors (whether those electors were elected or appointed). This closed the loophole left open in the Joint Committee draft that so many members had complained about. Following these expressly named positions involving the three apex political positions in the federal government, the draft added a catch-all reference to “civil or military” offices “under the United States, or under any State.”

The language and structure of this new version prompted one of the most sophisticated lawyers in the House to presume the office of the President of the United States was excluded. In an extended speech discussing in detail every provision in the proposed Fourteenth Amendment, former United States Attorney General Reverdy Johnson noted:

I do not see but that any one of these gentlemen may be elected President or Vice President of the United States, and why did you omit to exclude them? I do not understand them to be excluded from the privilege of holding the two highest offices in the gift of the nation. No man is to be a Senator or Representative or an elector for President or Vice President—<sup>176</sup>

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ADVERTISER, July 31, 1866, at 1 (reporting news from N.H.) (“George G. Fogg of Concord will be appointed by Gov. Smyth to fill the vacancy in the office of Senator to be occasioned by the anticipated resignation of Senator Clark”); PHILA. INQUIRER, July 27, 1866, at 1 (reporting on U.S. Senate, July 26, 1866, that “the credentials of Mr. Patterson were returned to the Judiciary Committee, with instructions to inquire into his qualifications for the office of Senator.”). For the “office of Representative,” see *Official Proceedings of the Republican Convention*, CHIC. REPUBLICAN, June 14, 1866, at 8 (“[T]he Hon. Elihu B. Washburne was declared the unanimous nominee of the convention for the office of Representative in Congress.”). For the “office of presidential elector,” see LOUISVILLE DAILY COURIER, February 18, 1868, at 1 (reporting on Republican Convention in Louisville that “Resolved, That Col. W. A. Bullitt be recommended for the office of Presidential elector for this district.”).

176. CONG. GLOBE, 39th Cong., 1st Sess. 2899 (1866).

At this point, Republican Senator Lot Morrill interjected: “Let me call the Senator’s attention to the words ‘or hold any office, civil or military, under the United States.’”<sup>177</sup> Johnson then demurred, “Perhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives.”<sup>178</sup>

It is unclear whether Johnson really believed he had erred or was uninterested in debating the point and simply wanted to move on to more important points in his speech. Johnson planned on voting against the entire amendment, including Section Three, regardless of Morrill’s “correction.”<sup>179</sup> More likely, Johnson continued to believe that his original interpretation was the more natural reading of the clause.

Notice that Johnson does not blame his error on inattentiveness or an unduly casual reading of the clause. Neither seems likely given that he was delivering a prepared speech exploring in depth every provision in the Fourteenth Amendment. Instead of blaming himself, Johnson expressly blames the language and structure of Section Three: “I was misled by noticing the specific exclusion in the case of Senators and Representatives.”<sup>180</sup>

We already know that Johnson was familiar with Blount’s Case, and he was especially familiar with Bayard’s argument that “[t]he Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot

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177. *Id.*

178. *Id.* But see Graber, *supra* note 46, at 21–22 (partially quoting Johnson, but omitting Johnson’s explanation as to why he was misled).

179. CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866) (recording Johnson’s negative vote on Section Three and Johnson’s negative vote against the amendment as a whole).

180. *Id.* But see Graber, *supra* note 46, at 21–22 (partially quoting Johnson, but omitting Johnson’s explanation as to why he was misled).

be said to be under it,"<sup>181</sup> having quoted it to his colleagues in the previous Congress.<sup>182</sup>

But even apart from the familiar precedent of Blount's Case, commonsense suggested Section Three did not include the office of the President of the United States. The structure of the provision begins by naming the apex political positions of Senator and Representative, and the electors for the apex executive office of President and Vice President of the United States. These enumerated positions are then followed by a general catch-all phrase. This structure intuitively suggests that the drafters enumerated every apex positions they meant to include.

The latin phrase for this unitive reading of a legal text is *expressio unius est exclusio alterius*<sup>183</sup>—the inclusion of one thing means the exclusion of another. By specifically naming only the high offices of Senator and Representative, the text can be reasonably read as excluding unnamed high federal offices like that of the President and Vice President of the United States. As a trained lawyer, Reverdy Johnson would have known such a "well-established rule of construction."<sup>184</sup> Thus he was "misled" by the "specific exclusion in the case of Senators and Representatives."<sup>185</sup> Any member of the public applying the same commonsense approach to the text would have

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181. Argument of James Asherton Bayard, Sr. on Jan. 3, 1799. See 8 ANNALS OF CONG. 2258 (1799). No one in the Thirty-Ninth Congress would have considered a reference to "offices under the United States" to be any different than a reference to "offices under the Government of the United States." John Bingham, for example, expressly described section three as prohibiting any person who had violated their oath from "hold[ing] any office of trust or honor, either under the United States or any State in the Union". *Speech of Hon. John A. Bingham*, ALBANY EVENING J., September 5, 1866, at 1.

182. CONG. GLOBE, 38th Cong., 1st Sess. 329 (1864) (quoting Mr. Bayard).

183. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)"); *Bittner v. United States*, 143 S. Ct. 713, 720–21 (2023); William Baude and Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1107–08 (2017); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1440 (1987).

184. Amar, *supra* note 183, at 1440.

185. CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).



come to the same reasonable conclusion, even if they did not know the Latin.<sup>186</sup>

The inference is further supported by Section Three's general reference to "any office, civil or military, under the United States." This clearly included lower-level appointed offices in the federal government. It seems inappropriate to hide the highest office in the land in a general phrase that included the lowest offices in the land, while simultaneously believing it necessary to expressly enumerate not just members of the House and Senate but also locally selected electors of the President and Vice President of the United States. Such a reading violates the common canons of interpretation known as "noscitur a sociis" and "ejusdem generis" — generally meaning that "a word should be construed according to the company it keeps," and that it should be read to be "of the same nature" as surrounding terms.<sup>187</sup>

In sum, if the language and structure of Section Three "misled" the man that historians consider "the most respected constitutional lawyer in Congress,"<sup>188</sup> then it is quite likely that less learned ratifiers were similarly "misled." Nor would any ratifier have learned of Morrill's "correction" — this particular exchange with Johnson was not reported in the press.<sup>189</sup>

In terms of the text's application to future rebellions, the historical record is mixed. Missouri Senator John Henderson believed that "this section is so framed as to disenfranchise from office the leaders of the past rebellion as well as the leaders of any rebellion

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186. Given that many, if not most, of the ratifiers were either lawyers or participated in the drafting of legal texts, there is good reason they would be familiar this common rule of construction.

187. See SCALIA, *supra* note 15, at 25–26 (stating that canons such as *noscitur a sociis* and *expressio unius est exclusio alterius* are "commonsensical").

188. PHILLIP SHAW PALUDAN, *A PEOPLE'S CONTEST: THE UNION & CIVIL WAR 1861-1865* 29 (1996). See also Earl M. Maltz, *The Fourteenth Amendment as Political Compromise — Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 957 (1984) (Reverdy Johnson was "[a] noted constitutional authority" who "remained a respected figure in the Senate.").

189. See, e.g., BOS. DAILY ADVERTISER, May 31, 1866, at 1 (noting Johnson's proposals but not his exchange about the inclusion of the President).

hereafter to come.”<sup>190</sup> Similarly, West Virginia Senator Peter Van Winkle believed that Section Three applied to “future insurrection as well as the present.”<sup>191</sup> Oddly, Van Winkel’s colleague, West Virginia Senator Waitman T. Willey, supported Section Three because “[i]t looks not to the past, but it has reference, as I understand it, wholly to the future. It is a measure of self-defense. . . . [I]t is intended to operate as a preventative of treason hereafter . . . .”<sup>192</sup> Upon hearing this, Delaware Senator William Saulsbury interjected,

[M]y friend from West Virginia . . . says that he means something in the future; he does not mean anything that has transpired. Now sir, what does this provision mean? Does it not mean, is it not intended to apply, to that which has transpired? Are you going, and is that the object of your legislation, to provide for some contingency in the future? Is it not apparent to everybody, does not everybody know that this is not a measure to have an operation in futuro, but it is a measure to have an operation in praesenti, to apply to existing cases?<sup>193</sup>

Had Congress the time and interest, they might have engaged in yet another round of redrafting in order to ensure better clarity. At this point in the debates, however, Senate Republicans had no interest in additional changes to Section Three. Every proposed alteration was shot down by almost the same unified Republican vote.<sup>194</sup> As the debates came to a close, Lyman Trumbull succinctly explained that the proposed text accomplished its very narrow purpose. In a statement published in multiple newspapers, Trumbull explained Section Three “is intended to put some sort of stigma, some sort of odium upon the leaders of this rebellion, and no other way is left to do it but by some provision of this kind.”<sup>195</sup> As did the

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190. CONG. GLOBE, 39th Cong., 1st Sess. 3035–36 (1866).

191. CONG. GLOBE, 39th Cong., 1st Sess. 2900 (1866).

192. CONG. GLOBE, 39th Cong., 1st Sess. 2918 (1866). These remarks do not appear to have been reported in press.

193. *Id.* at 2920. In his most recent paper, Graber quotes Willey, but not Saulsbury’s rejoinder. See Graber, *supra* note 46, at 16.

194. CONG. GLOBE, 39th Cong., 1st Sess. 2899–2900 (1866).

195. *Id.* at 2901. Paraphrased in *Congressional: Senate*, DAILY CONSTITUTIONAL UNION (D.C.), May 31, 1866, at 2 (“Mr. Trumbull said it was necessary to affix some stigma

vast majority of framers and ratifiers, Trumbull viewed Section Three in light of its application to participants in the past rebellion.

On June 8, the Senate voted in favor of the new version of Section Three and then passed the amendment as a whole.<sup>196</sup> It was left to the House to vote on final passage of the Fourteenth Amendment.<sup>197</sup>

*F. The Final House Debate*

On June 13, in his introductory remarks on the final draft, Thaddeus Stevens acknowledged his personal disapproval of Section Three. Lamented Stevens:

The third section has been wholly changed by substituting the ineligibility of certain high offenders for the disenfranchisement of all rebels until 1870. This I cannot look upon as an improvement. It opens the elective franchise to such as the States choose to admit. In my judgment it endangers the Government of the country, both State and national; and may give the next Congress and President to the reconstructed rebels. With their enlarged basis of representation, and exclusion of the loyal men of color from the ballot box, I see no hope of safety unless in the prescription of proper enabling acts, which shall do justice to the freedmen and enjoin enfranchisement as a condition-precedent.<sup>198</sup>

It is not clear why Stevens believed that the final draft might “give the next . . . President to the reconstructed rebels.” Stevens might have shared Reverdy Johnson’s initial understanding that the text did not include the office of the President, or he believed rebels might join with northern Democrats to defeat a Republican candidate, or both. Whatever the nature of his objections, Stevens believed they could be addressed through the passage of “enabling acts” that would give the vote to black Americans in the former rebel states. Stevens thus echoed his earlier assertion that the Joint Committee’s draft of Section Three would require enabling

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upon the leaders of the rebellion.”). *See also Congressional*, EVENING STAR (D.C.), May 31, 1866, at 1 (same).

196. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).

197. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866).

198. CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866). *See also* 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 219.

legislation since “it will not execute itself.”<sup>199</sup> Nothing in the final draft of Section Three lessened the original need for enabling legislation.<sup>200</sup>

G. *Public Commentary During Framing and Initial Passage*

All the above debates took place in public. Unlike the 1787 Philadelphia Convention, the framing of the Fourteenth Amendment was a remarkably public event. Newspaper reporters attended every congressional debate and generally published transcripts of major congressional speeches within days of their delivery.<sup>201</sup> For example, multiple newspapers published reports of McKee’s initial draft of Section Three.<sup>202</sup> The “private” Republican caucus that replaced the Joint Committee’s draft Section Three with their own draft was not “private” at all. At least not in the sense of the public not being informed of the subjects and proposals under discussion. As noted above, newspapers like the Herald and Plain Dealer kept close tabs on the activities of the Republican Caucus. Multiple newspapers reported that the Joint Committee’s disenfranchisement provision would be completely stricken out and replaced by a completely new section focused on disqualification for office.<sup>203</sup>

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199. See *supra* note 140 and accompanying text.

200. Those scholars who claim that the final draft is self-executing emphasize the mandatory nature of the disqualification: “No person shall be . . . .” See Baude and Paulsen, *supra* note 3, at 17 (“Section Three’s language is language of automatic legal effect . . . .”). But the Joint Committee draft that Stevens insisted could not execute itself contained the same mandatory language (“all persons . . . shall be excluded”). The more plausible explanation is that Stevens thought neither version could “execute itself.”

201. See 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 6 (introductory notes).

202. See newspapers cited *supra* note 83.

203. See, e.g., *Senatorial Caucus on Reconstruction*, CLEV. DAILY PLAIN DEALER, May 29, 1866, at 3 (“The Herald says of the Senatorial Caucus yesterday: No definite conclusion was reached. The whole matter was referred to the Senatorial portion of the Reconstruction Committee, consisting of Fessenden, Grimes, Howard, Harris and Williams. Senator Johnson was also on the committee but being a Democrat he could not participate in the Caucus. Nearly all of the Republicans agree that the third section of the proposed constitutional will be stricken out in caucus, and the disenfranchisement of a specific class of rebels substituted in its place. It is also found upon discussion that a larger number of the members favor restricting this class as much as possible than was generally supposed two weeks ago. The general opinion is that the restriction will extend

When Senate Republicans completed and passed the new version of Section Three, newspapers apprised their readers of the substance and meaning of the new provisions. These accounts repeatedly described the text as dealing with the leaders of the past rebellion. According to the Chicago Republican,

The provisions of the several sections may be stated substantially thus: . . . No person shall hold any civil or military office under the United States or any State who, having previously taken an oath of office, has been engaged in the rebellion. Congress, however, by a vote of two thirds of each House, may remove this disability.<sup>204</sup>

The Galveston Texas “Flake’s Daily Bulletin” paraphrased the new Section Three as declaring “[n]o person shall be eligible [sic] to any Federal or State office who has previously taken the oath to support the Constitution of the United States, and shall have engaged in the rebellion, or given aid or comfort thereto. But Congress may, by two-thirds vote, remove such disability.”<sup>205</sup> The New Hampshire Patriot and Gazette praised the caucus for excising the Joint Committee’s radical approach. “In place of this iniquitous provision,” the newspaper reported, “they have inserted a section declaring all State and national officers who engaged in the rebellion, who had even sworn to support the constitution, to be ineligible to any office, State or national[,] civil or military — this disability to be removable by two-third vote of Congress.”<sup>206</sup> New York’s Evening

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to those who have held certain civil and military offices under the Federal Government, although it is by no means improbable that it may turn upon those who have taken and violated certain oaths to the Federal Government.”). Other newspapers reference the original Section Three as having been “stricken out” and replaced with a “substitute.” See, e.g., *The Reconstruction Propositions*, DAILY STATE GAZETTE (Trenton, N.J.), May 31, 1866, at 2; *Congressional News. Senate*, N.Y. COMMERCIAL ADVERTISER, May 30, 1866, at 1; *The Republican Senatorial Caucus*, N.Y. TRIB., May 30, 1866, at 1 (describing the third section as “stricken out” and “[t]he caucus adopted for this a section declaring that no person shall be a Senator or Representative”); *Thirty-ninth Congress. First Session. Senate. Reconstruction Resolution*, THE DAILY AGE (Phila., Pa.), May 30, 1866, at 1 (“Section three being stricken out, the following is proposed in lieu of it . . .”).

204. *The Senate Plan of Reconstruction*, CHI. REPUBLICAN, June 11, 1866, at 4.

205. D. Flanery, *Telegraphic*, FLAKE’S DAILY BULLETIN (Galveston), June 10, 1866, at 5.

206. *Reconstruction*, N.H. PATRIOT & GAZETTE, June 6, 1866, at 2.

Post noted that the Joint Committee's initial draft of Section Three had been "generally condemned by the country" and had been properly stricken from the amendment.<sup>207</sup> Instead, a new provision would be added

forbidding all who had previous to the rebellion taken an official oath to support the Constitution, and who afterwards engaged in rebellion, to hold any office whatever, either under the state or general governments. A proviso adds that two-thirds vote of Congress may repeal this section at any time.<sup>208</sup>

Again, all of these descriptions describe the text in terms that relate solely to the recent rebellion.

In fact, the editors of the *Evening Post* criticized the final draft because it applied only to the "late rebellion" and therefore lacked the kind of enduring principle more appropriate for a constitutional amendment:

What, then, is to be gained by incorporating this amendment in the Constitution—a measure of so temporary a character, by the acknowledgement of its authors, that they are ready to allow Congress to repeal it at any time? So grand and enduring an instrument should not be lightly amended; it should not contain among its provisions any merely temporary expedients. Whatever appears there should be for all time. The late rebellion and all that relates to it are only incidents, of which the Constitution need bear no trace.<sup>209</sup>

In sum, even before Congress officially sent the Fourteenth Amendment to the states for possible ratification, the American public had been well informed—for months—about the various drafts, the arguments in favor and in opposition to those proposals, the decision to strike the Joint Committee disenfranchisement

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207. *The Reconstruction Amendment*, EVENING POST (N.Y.C.), June 5, 1866, at 2.

208. *Id.*

209. *Id.* Although it is possible that the Post editors viewed the possible congressional lifting of the disability as making the clause "temporary," the full text suggests otherwise. According to the editors, it was because the measure was "of so temporary a character" that its framers were willing to allow Congress to "repeal it at any time." Congress had no power to "repeal it" if the clause included possible future rebellions.

proposal, and the decision to replace it with a disqualification provision. They also knew that the final draft was a less radical proposal than others Congress had considered, including the Joint Committee draft, and that it focused on a limited group of leaders of the late rebellion. Finally, they knew that, although some proposals expressly named the office of the President or expressly applied the provision to future rebellions, all of this language had been omitted from the final draft. As the public was concerned, no framer had expressed any interest in binding the office of the President and no framer had described the text as having done so.<sup>210</sup> Instead, the final text closed a publicly condemned loophole in the Joint Committee draft and secured the Presidency by way of a sufficiently trustworthy electoral college.<sup>211</sup>

### III. RATIFICATION

Initial public debate on the proposed Fourteenth Amendment coincided with the Fall congressional elections of 1866. Those elections became a kind of public referendum on the Fourteenth Amendment as Republicans and Democrats made the amendment a major part of their congressional campaign speeches.<sup>212</sup>

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210. In a speech delivered a few days after congressional passage of the Fourteenth Amendment, Indiana Congressman George Julian complained that “the plan reported by the joint committee leaves the ballot in their [rebel] hands. . . . Gen. Lee cannot be President of the United States, nor Governor of Virginia; but he can march to the polls . . . .” See *Radicalism The Nation’s Hope*, RIGHT WAY (Bos.), July 21, 1866, at 2. Although it seems Julian was addressing Section Three, he does not expressly say so. Again, one presumes at least a few people shared the same understanding of Lot Morrill. The paucity of such evidence, however, cannot sustain any claim that such was the consensus understanding.

211. Thus, whether one shared Morrill’s reading of Section Three as implicitly prohibiting a rebel from holding the office of the President, or whether one reasonably believed no loyal elector of the now-protected electoral college would cast their vote for a rebel traitor, one could still share the opinion of Representative George Julian of Indiana who believed that, under the recently passed Fourteenth Amendment, one way or another, “General Lee cannot be President of the United States.” See CONG. GLOBE, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3210 (1866). Julian himself did not explain the basis of his opinion.

212. According to Eric Foner, “[m]ore than anything else, the election became a referendum on the Fourteenth Amendment. Seldom, declared the *New York Times*, had a political contest been conducted ‘with so exclusive reference to a single issue.’” FONER,

On the occasions that candidates specifically addressed Section Three, they generally focused on the need to punish the leaders of the past rebellion and prevent their disrupting Congress. As Michigan Senator Zachariah Chandler explained, Section Three established the principle that “a perjured rebel traitor is not fit to sit beside a loyal man in the Congress of the United States.”<sup>213</sup> John Sherman pointed out that Section Three disqualified “some 20,000 people in the Southern States. . . . They might be all whitewashed and reconstructed, but we did not want to see Toombs, Davis and Wigfall back in Congress again.”<sup>214</sup> Similarly, General John P. Shanks explained to an Indiana crowd that Section Three “provides that the men who have raised the arm of rebellion against the Government, shall not be admitted to the councils of the nation.”

There is no discoverable ratifier consensus regarding Section Three’s potential impact beyond the “late rebellion.” The vast majority of public comments addressed nothing more than the clause’s application to the still-living leaders of the rebellion and their particular responsibility for a catastrophic rebellion. As Indiana Governor Morton declared “these men have piled treason upon perjury, and covered treason with blood; I ask you whether you can trust them?”<sup>215</sup> John Bingham likewise defended the clause as necessary in light of the “great mass” of southern rebels seeking to reassert their political power. According to Bingham, Section Three ensured that oath-breakers who had “engaged in the late atrocious rebellion against the republic, shall ever hereafter except by the special grace of the American people, for good cause shown to them, and by special enactment, be permitted to hold any office of honor, trust or profit, either under the Government of the United States, or under

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*supra* note 71, at 267. See also Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 *GEO. L.J.* 1275, 1313–1327 (2013).

213. See Speech of Michigan Senator Zachariah Chandler (Oct. 22, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY, AS PUBLISHED IN THE CINCINNATI COMMERCIAL* (1866) at 56 (on file with author) (hereinafter “*SPEECHES*”).

214. *Speech of John Sherman* (Sept. 28, 1866), in *SPEECHES*, *supra* note 213 at 39.

215. *Speech of Gov. Morton*, Sept. 22, 1866, in *SPEECHES*, *supra* note 213 at 35.



the government of any State in the Union.”<sup>216</sup> The provision ensured that the American people would first be able to take “securities for the future” before restoring political power to “the population of those southern States lately in arms against the Government.” In Ohio, Governor Jacob Cox similarly noted that “[t]he third section of the amendment is that which provides for the disqualification for holding office of a class regarded as peculiarly responsible for the rebellion.”<sup>217</sup>

Southern opponents of the Fourteenth Amendment were equally unconcerned about future applications. They repeated the general Democratic Party insistence that it was inappropriate (if not unconstitutional) to propose amendments in the absence of all the states.<sup>218</sup> As far as the merits were concerned, most southern critics denounced Section Three as an *ex post facto* law<sup>219</sup> which wrongly interfered with the rights of local self-government. For example, a

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216. *Speech of John A. Bingham*, August 24, 1866, in *SPEECHES*, *supra* note 213 at 19.

217. *Ohio, Gov. Jacob Cox's Message to the Legislature, Ratification of the Fourteenth Amendment* (Jan. 2 and 4 1867), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 336. See also *W. Va., Gov. Arthur Boreman's Message to the Legislature, Ratification of the Fourteenth Amendment* (Jan. 16, 1867), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 339–40 (“The ruling spirits of the South determined no longer to submit to the government, and defied its authority and set up for themselves, within its jurisdiction, a separate and alien organization[.] Some claimed the right to do so under the constitution. . . Whatever the opinions of men in the South were, the triumph of the government has decided that they were engaged in a rebellion and are rebels, and are liable to be treated as such. In fact, thousands of them have themselves acknowledged this by suing for pardon as such.”).

218. See 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 227.

219. See, e.g., *Mississippi, Legislative Committee Report, Rejection of the Fourteenth Amendment* (Jan. 30, 1867), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 360 (the proposal is an “odious and tyrannical . . . *ex post facto* law”); *Texas, Senate Report and Rejection of Proposed Fourteenth Amendment* (Oct. 22, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 285 (Section Three “is clearly *ex post facto*”); *New Jersey, Legislative Debates and Ratification*, reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 273 (the third section “provide[s] for an *ex post facto* law”). This had been Mr. Boyer’s objection during the congressional framing debates. See *US House, Proposed Fourteenth Amendment, Speech of Thaddeus Stevens Introducing the Amendment, Debate* (May 8, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 168 (“Treason is undoubtedly a crime and may be punished, but by no bill of attainder or *ex post facto* law such as is provided in the amendment before the House.”).

North Carolina Committee Report on the proposed amendment warned that the

immediate practical effect . . . of the Amendment, if ratified, will be to destroy the whole machinery of our State Government, and reduce all our affairs to complete chaos, by throwing out nearly every public officer, even to Justices of the Peace and Constables, and it would be hardly possible to find enough men qualified to fill those various offices, and reorganize our State Government.<sup>220</sup>

Among the most common southern complaints about Section Three was its symbolic impact on the men who had recently fought on behalf of their state during the civil war. In his remarks encouraging the Florida Legislature to reject the amendment, Governor David Walker condemned the proposals' targeting of "those who sacrificed themselves to serve their State[.] And will their State now turn round and repay their devotion by putting a mark of infamy upon them?"<sup>221</sup> The Florida House similarly condemned the amendment's assault on southern honor, declaring "the Congress of the United States and the people of the North [have] not only pronounced us infamous, but offered to us the alternative of passing upon ourselves the same judgment, or submitting to fire, to

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220. *North Carolina, Gov. Jonathan Worth's Message to the Legislature, Joint Committee Report, Rejection of the Fourteenth Amendment* (Nov. 20 and Dec. 6, 1866), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 311; see also *Florida, Legislative Committee Reports and Rejection of the Fourteenth Amendment* (Nov, 23, Dec. 1 and 3, 1866), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 307 ("In the consideration of the third section your committee can but express their entire disapprobation. Sweeping in its disfranchisements, were it a portion of the supreme law of the land, the country would deprive itself of the use of some of the most gifted minds of the age. The States would be unable from the number of their own citizens to select for any official position those whom they knew and whom they could trust."); *New Hampshire, House Committee Report (Majority and Minority), Ratification of the Fourteenth Amendment*, reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 238 ("[T]he third section, without the semblance of a trial or conviction for treason, disqualifies for state as well as national office, a numerous class of persons, now thoroughly loyal, who, from their capacity, and from the confidence reposed in them by the people, could most effectually aid in the restoration of the fraternal relationships essential to a permanent re-union, and deprives the mass of the Southern people of their services to that end . . .").

221. H. 14, 2d Sess., at 17 (Fla. 1866).

sword and to destruction.”<sup>222</sup> The Arkansas Committee Report on the Amendment also spoke for the wounded honor of the Confederacy, declaring that “[t]he committee cannot consent thus to brand by thousands the people of the State, who have struggled in a cause dear to them, like patriots, who have yielded to the fate of war as brave and magnanimous people only can do.”<sup>223</sup>

Imposing such a “brand,” of course, was precisely one of the major purposes of Section Three. Lyman Trumbull had specifically described Section Three as “intended to put some sort of stigma, some sort of odium upon the leaders of this rebellion.”<sup>224</sup> The South’s reaction suggests that the text had hit its intended mark. This is yet another example of how Section Three was understood by both supporters and critics as specifically designed to target a particular group of living individuals. As Tennessee Governor William Brownlow explained:

The third section is intended to prevent that class of rebel leaders from holding office, who, by violating their official oaths, added one great offense to another. It is meant as a safeguard against another rebellion, by keeping out of power those who brought on and are mainly responsible for that through which we have just passed. These men, in law and justice, forfeited their lives and property, but a benign and merciful Government inflicts no other punishment or disability upon them than such as is necessary to prevent them from repeating their crime. No loyal citizen will object to this section.<sup>225</sup>

Brownlow is not referring to “another rebellion” sometime in the distant future, but one that might be brought on by the thousands of still living unrepentant rebels who were “responsible for that

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222. *Florida, Legislative Committee Reports and Rejection of the Fourteenth Amendment* (Nov. 23, Dec. 1 and 3, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 306.

223. *Arkansas, Senate Committee Report, Rejection of the Fourteenth Amendment* (Dec. 10, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 313.

224. *CONG. GLOBE*, 39th Cong., 1st Sess. 2901 (1866).

225. *Tenn., Gov. William Brownlow’s Proclamation and Address, Ratification* (July 4–19, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 244.

through which we have just passed." "These men" had forfeited their right to office.

Very few ratifiers specifically addressed whether Section Three applied to future insurrections. Those that did came to different conclusions. Congressional candidate John Hannah reportedly told an Indianapolis crowd that Section Three "not only applies to the perjured officials who engaged in the recent rebellion, but to all such who, in time to come, may be guilty of a similar crime."<sup>226</sup> An essay in the *San Francisco Bulletin* similarly described the provisions of Section Three as being "prospective as well as retrospective."<sup>227</sup> A Minority Report authored by members of the Indiana Assembly, on the other hand, criticized Section Three because it applied only to the past rebellion:

[Section Three] disfranchises all of that class of persons therein named, who "shall have engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof," but denounces no penalties against those who may hereafter commit the same act. . . . It would be difficult, in our opinion, to frame a law more thoroughly the offspring of passion, and less in accordance with sound policy and statesmanship.

But to place such a provision as this in the Constitution—the organic law which is designed to last for ages, affecting, as it does, past offenses and offenders only, and containing no guarantees for the future, and that must become obsolete at the end of the present generation, is an act of folly that vengeance and not statesmanship could sanction.<sup>228</sup>

The Indiana minority thus echoed the editors of the *Evening Post* who had objected to the proposal's "temporary" nature.<sup>229</sup> It is not clear whether the majority of the Indiana Assembly disagreed with the minority's understanding or whether the majority had no

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226. *Speech of John Hannah* (Aug. 25, 1866), in *SPEECHES*, *supra* note 213, at 22.

227. *California's Share in Reconstruction*, *EVENING BULLETIN* (S.F.), August 6, 1867, at 2.

228. *Ind., Gov. Oliver P. Morton's Message to the Legislature, Majority and Minority Committee Reports, Ratification of the Fourteenth Amendment* (Jan. 11, 18 and 23, 1867), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 354.

229. See *supra* note 209 and accompanying text.

objection to a clause addressing only the past rebellion (or whether they found the matter not worth defeating the entire proposal regardless of the meaning of Section Three).<sup>230</sup>

Rather than meeting a theoretical future need, most advocates of Section Three believed it addressed a pressing and immediate problem posed by a still-living group of mass murderers. As Mr. Harrison declared during the Connecticut Senate Ratification Debates, “[t]he men who are to be disfranchised, are men who sustained the Andersonville and Salisbury prisons. They are the men who urged on the assassins at Fort Pillow! They are the men who sent spies to burn our cities and hounded on men to assassinate our beloved Lincoln.”<sup>231</sup> According to Tennessee Governor William Brownlow in his message to the state ratifying assembly,

These men, in law and justice, forfeited their lives and property, but a benign and merciful Government inflicts no other punishment or disability upon them than such as is necessary to prevent them from repeating their crime. No loyal citizen will object to this section.<sup>232</sup>

According to Brownlow, Section Three would prevent a future rebellion “by keeping out of power those who brought on and are mainly responsible for that through which we have just passed.”<sup>233</sup>

#### A. *The Presidency and the Electors Clause*

Scholars have yet to identify a single ratifier who described Section Three as applying to persons seeking the office of the President of the United States. Whether such a person exists, it is clear the issue was of little (or no) interest to the vast majority of ratifiers who discussed the third section of the Fourteenth Amendment. The

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230. The Indiana majority’s sole criticism about Section Three was that it should have used the word “and” instead of “or” “between the words ‘President’ and ‘Vice President.’” See *supra*, note 228, at 353.

231. *Connecticut Legislature*, COLUMBIAN WEEKLY REGISTER (New Haven), June 30, 1866, at 2.

232. *Tenn., Gov. William Brownlow’s Proclamation and Address, Ratification* (July 4–19, 1866), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 244.

233. *Id.*

evidence, or lack thereof, is what one would expect if neither the Framers nor the ratifiers thought the possibility important enough to make it part of the Fourteenth Amendment.

Ensuring rebel leaders could not vote for the President of the United States as members of the Electoral College, on the other hand, was important. An 1868 newspaper essay in *The Daily Austin Republican* called for the enforcement of Section Three in order to prevent electors in the State of Texas from casting their votes for “Jefferson Davis for President and Alexander Stephens for Vice President . . . or worse.”<sup>234</sup>

Of course, it was far more likely that the southern states would return Jefferson Davis to Congress rather than convince the entire country to make him President. Accordingly, when Davis’s name came up during the ratification debates, it most often involved his possible return to the national legislature.<sup>235</sup> As T. F. Withrow warned an Iowa gathering, Section Three was essential because, otherwise, “Jefferson Davis [may] be made eligible to the Cabinet or Senate, after he is pardoned, as he probably will be[.]”<sup>236</sup> Others scoffed at even this possibility. Speaking in opposition to the Fourteenth Amendment, T. J. Smith, of Wentworth, New Hampshire, dismissed Republican claims “that unless this amendment is adopted, that same Jefferson Davis will get back into Congress[.]”<sup>237</sup> Note that both advocates and opponents used former Confederate President Jefferson Davis as someone who might potentially return

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234. See *What does it Mean?*, *DAILY AUSTIN REPUBLICAN* (Tex.), September 1, 1868, at 2.

235. Davis had served as Representative (1845–46) and Senator (1857–61) from Mississippi prior to the Civil War.

236. *Speech of Hon. T. F. Withrow*, *IOWA ST. DAILY REGISTER* (Des Moines), Sept. 1, 1866, at 2.

237. *Speech of Hon. T. J. Smith, of Wentworth*, *UNION DEMOCRAT* (Manchester, N.H.), July 31, 1866, at 2 (speaking about his objections to Section Three: “But do you not say, that unless this amendment is adopted, that same Jefferson Davis will get back into congress? What if he does? Is his intellect so to be feared?”). See also *Speech of Hon. T. J. Smith, of Wentworth*, *N.H. PATRIOT & GAZETTE* (Concord), August 8, 1866, at 1 (same).

to Congress, not someone who might potentially hold the office of President of the United States.<sup>238</sup>

Some scholars claim to have identified scattered examples of ratification-period commentary describing Section Three as barring certain persons from holding the office of President. Most of these claims are simply inaccurate. For example, John Vlahoplus claims to have discovered an 1866 newspaper article arguing that removing Section Three would leave “ROBERT E. LEE . . . as eligible to the Presidency as Lieut. General GRANT.”<sup>239</sup> In fact, the writer of that article is not referring to Section Three, but is simply criticizing the South’s belief that “a rebel is as worthy of honor as a Union soldier; that ROBERT E. LEE is as eligible to the Presidency as Lieut. General GRANT.”<sup>240</sup>

Nevertheless, one can find scattered examples of non-ratifiers who believed the text applied to the President.<sup>241</sup> Time and continued research no doubt will discover others. But absent evidence that the Framers and ratifiers held such a view, such scattered references are of little significance. One can find scattered references to the Amendment giving Black Americans the right to vote (not accomplished prior to Fifteenth Amendment), and to Republican insistence that the Bill of Rights bound the States even without the Fourteenth Amendment (not accomplished until the ratification of Section One).<sup>242</sup> One can find scattered references to almost anything. What this case requires are examples of Framers and ratifier testimony sufficient to support a claim of consensus understanding. Such a body of evidence does not exist.

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238. See also Speech of John Hannah (Aug. 25, 1866), in *SPEECHES*, *supra* note 213, at 21. (implying Section Three would prevent “Davis and Breckinridge, Toombs and Wigfall” from being “welcome[d] back to the councils of the nation”) (emphasis added).

239. See John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 *BRIT. J. AM. LEGAL STUD.* 237, 244 (2023).

240. See *Democratic Duplicity*, *INDIANAPOLIS DAILY J.*, July 12, 1866, at 2.

241. See, e.g., *Speech by Maj. Gen. Rawlins at Galena*, *CHI. TRIB.*, June 22, 1867, at 2, 4; *Rebels and Federal Officers*, *GALLIPOLIS J. (Ohio)*, Feb. 21, 1867, at 2; *Shall We Have a Southern Ireland?*, *MILWAUKEE DAILY SENTINEL*, July 3, 1867, at 2.

242. See 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 227–34.

To the extent that anyone at the time seriously worried about Jefferson Davis, their concerns focused on possible disloyal votes in the Electoral College or Davis's return to Congress. For example, T. F. Withrow warned an Iowa gathering that Section Three was essential because, otherwise, "Jefferson Davis [may] be made eligible to the Cabinet or Senate, after he is pardoned, as he probably will be."<sup>243</sup> Similarly, T. J. Smith dismissed Republican fears "that unless this amendment is adopted, that same Jefferson Davis will get back into Congress[.]"<sup>244</sup>

In sum, no Reconstruction Republican was concerned about the American people electing Jefferson Davis President of the United States, much less believed the Constitution must be amended to prevent such a possibility. The very idea was no more than a punchline to a joke.<sup>245</sup>

*B. Blount's Case and Story's Analysis During the Ratification Phase*

An additional explanation for the ratifiers' silence regarding Section Three and the office of President may be due to the on-going influence of the rule in Blount's Case and Story's analysis in his Commentaries. Public commentary throughout this period repeatedly cited both as establishing that the President did not hold a civil office under the United States. Viewed through the lens of precedent and legal authority, nothing about the text would have prompted a ratifier to consider its application to the office of the President.

Congressional and public commentary on Blount's Case preceded and accompanied the drafting and ratification of the Fourteenth Amendment. In the Thirty-Eighth Congress, Senator Reverdy Johnson reminded his colleagues that, according to Bayard's argument in Blount's Case, "it is clear that a Senator is not an officer *under* the Government. The Government consists of the

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243. IOWA ST. DAILY REGISTER, *supra* note 236, at 2,

244. UNION DEMOCRAT, *supra* note 237, at 2.

245. See, e.g., *Speech of Hon. John A. Bingham*, TIFFIN TRIB. (Ohio), July 18, 1872, at 1 (indicating a joke about "President" Davis elicited "[l]aughter" from the crowd).



President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it.”<sup>246</sup>

In 1866, Blount’s Case and Story’s commentary appeared repeatedly in American newspapers.<sup>247</sup> During the 1868 impeachment proceedings against Andrew Johnson, Charles Sumner relied on James Bayard Sr.’s arguments in Blount’s Case, which he reminded his colleagues had been “adopted by no less an authority than our highest commentator, Judge Story.”<sup>248</sup> During those same impeachment proceedings, an issue arose as to whether Senator Benjamin Wade was a “civil officer” eligible to become President in the case of President Johnson’s impeachment and removal—an issue that prompted another round of newspaper references to the importance of Blount’s Case and Story’s analysis.<sup>249</sup>

As noted earlier, shortly before the ratification of the Fourteenth Amendment, the Louisville Daily Journal reminded its readers that according to congressional precedent and legal authority, neither

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246. CONG. GLOBE, 38th Cong., 1st Sess. 329 (1864) (quoting Mr. Bayard). I have not discovered any newspaper reporting the committee’s view that Story had been “incautious.”

247. See, e.g., *The Impeachment Question*, CHICAGO REPUBLICAN, Oct. 25, 1866, at 4 (discussing the impeachment of “Senator Blount in 1799” and quoting Story’s analysis in his Commentaries); *Impeachment of the President*, WILMINGTON J. (N.C.), Oct. 25, 1866, at 4 (“Judge Story, in his commentaries on the Constitution, describes at length the formalities observed in trials for impeachment. . . . There have been in all five cases of impeachment since the beginning of our government, namely, that of Wm. Blount, 1799 . . . . The law of impeachment trials, as stated by Judge Story, is founded on the precedents furnished by these five cases.”); *Impeachment of the President*, W. MIRROR (Cambridge, Ind.), Oct. 18, 1866, at 4 (publishing the same article as WILMINGTON J. and attributing it to N.Y. WORLD); *Impeachment of the President*, LANCASTER INTELLIGENCER (Pa.), Oct. 17, 1866, at 1 (same).

248. See EXPULSION OF THE PRESIDENT. OPINION OF HON. CHARLES SUMNER, OF MASSACHUSETTS, IN THE CASE OF THE IMPEACHMENT OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES 5 (Washington, Gov’t Printing Off. 1868).

249. See, e.g., *The Presidential Succession—Mr. Churchill’s Bill*, DAILY NAT’L INTELLIGENCER (D.C.), Apr. 8, 1868, at 2 (citing Blount’s Case and Story’s analysis of same); Letter to the Editor, *The Eligibility of the President Pro Tempore of the Senate to be Acting President*, DAILY NAT’L INTELLIGENCER (D.C.), Apr. 18, 1868, at 2 (discussing Sen. Wade’s eligibility, and citing Paschal, Story and Wharton’s analysis of Blount’s Case); *Congress Today — Impeachment*, EVENING STAR (D.C.) Dec. 6, 1867, at 1 (citing both Blount’s Case and Story’s Commentaries).

the President nor Senators were “civil officers of the United States.”<sup>250</sup> According to the authors,

[The text of the Impeachment Clause] fairly admits of no other construction. In the words of Mr. Justice Story, it “does not even affect to consider them officers of the United States.” See section 793 of Story’s Commentaries. The argument is thus supported by the authority of the most celebrated commentator on the Constitution as well as by the language of the Constitution itself.<sup>251</sup>

In sum, at the time of the framing and ratification of the Fourteenth Amendment, the precedent of Blount’s Case and Story’s analysis were accepted and well known both in and out of Congress.<sup>252</sup> Any ratifier reading Section Three against the background of these well-known precedents and authorities would have reasonably concluded the provision did not impliedly (and erroneously) refer to the office of the President of the United States as a “civil officer under the United States.”

### C. *The Need for Enabling Legislation*

During the congressional framing debates, Thaddeus Stevens twice suggested Section Three would require enabling legislation.<sup>253</sup> In response to concerns that Section Three would be unenforceable, Stevens noted that both Section Three and other provisions in the proposed amendment would require enabling

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250. *Raking Shot*, *supra* note 66, at 1.

251. *Id.*; see also Connolly, *supra* note 67, at 3 (citing this and other related sources).

252. In addition to Story’s Commentaries, see POMEROY, *supra* note 68, at 481 (“In 1797, upon the trial of an impeachment preferred [sic] against William Blount, a Senator, the Senate decided that members of their own body are not ‘civil officers’ within the meaning of the Constitution . . . . The term ‘civil officers’ embraces, therefore, the judges of the United States courts, and all subordinates in the Executive department.”); PASCHAL, *supra* note 68, at 185 (“A senator or representative in Congress is not such civil officer.”) (citing “Blount’s Trial” and §§ 793 and 802 of the first volume of Story’s Commentaries). Here Paschal cites the two-volume version of Stories Commentaries which contains the exact quote from the three-volume edition: “In this view, the enumeration of the President and Vice-President, as impeachable officers, was indispensable . . . .” See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 (Thomas M. Cooley ed., Boston, Little, Brown & Co. 4th ed. 1873) (1833).

253. See *supra* note 26, and accompanying text.

legislation. According to Stevens, “[i]t will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do.”<sup>254</sup> After passage of the final version, Stevens again noted the necessity of “proper enabling acts.”<sup>255</sup>

Some might argue that Stevens’s statement about the Joint Committee draft was no longer operable after that draft was abandoned and replaced by the final version. However, in terms of self-execution, there is no relevant difference between the Joint Committee draft which declares “all persons who voluntarily adhered to the late insurrection . . . shall be excluded,”<sup>256</sup> and the final draft which declares “[n]o person shall be a Senator . . . [if they] engaged in insurrection or rebellion.” If the former was not self-executing, then neither was the latter.

#### D. *The Concerns of Thomas Chalfant*

The necessity and form of enabling acts arose during the ratification debates in Stevens’s home state of Pennsylvania. On January 30, 1867, during the Pennsylvania Ratification Debates, Mr. Thomas Chalfant spoke in opposition to the proposed Fourteenth Amendment.<sup>257</sup> During his extended remarks, Chalfant explored in detail the necessity and form of congressional enforcement of Section Three.

Chalfant began this portion of his remarks by pointing out that the text could be read as self-executing and automatically disqualifying certain persons without the need for any prior deliberation and judgement:

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254. CONG. GLOBE, 39th Cong., 1<sup>st</sup> Sess. 2544 (1866).

255. *US House, Proposed Fourteenth Amendment, Speech of Thaddeus Stevens, Vote and Passage of Amended Senate Version* (June 13, 1866), 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 219.

256. KENDRICK, *supra* note 88, at 105.

257. *See* Hon. Thos. Chalfant, member from Columbia County, in the House, January 30, 1867, on Senate Bill No. 3 (the proposed amendment), in THE APPENDIX TO THE DAILY LEGISLATIVE RECORD CONTAINING THE DEBATES ON THE SEVERAL IMPORTANT BILLS BEFORE THE LEGISLATURE OF 1867 (George Bergner ed., 1867). Digitized copy on file with author.

[W]ho are they — what class of our citizens, by this section are rendered ineligible to office in the State or nation? You will observe that it is not those who have been legally convicted of the crime of treason (or, in the language of this section, of the crime of being engaged in insurrection or rebellion against the Government, or of giving aid and comfort to the enemies thereof).

No, no legal conviction is required before the disqualification attaches. If he has been guilty, he is disqualified for office, whether ever tried and convicted of the crime or not.<sup>258</sup>

At this point, Chalfant appears to share the “self-executing” interpretation of Section Three recently proposed by Professors William Baude and Michael Paulsen.<sup>259</sup> But Chalfant is not finished. He then declares that such a reading is ridiculous—of course there would have to be some kind of trial prior to a person’s disqualification: “But, you will say, and say properly, that in order to make this section of any effect whatever, the guilt must be established. I grant it. But here comes the difficulty. Here comes the danger.”<sup>260</sup>

Chalfant assumes his colleagues agree that disqualification under Section Three cannot take place absent some kind of a prior judgment regarding the person’s guilt. As he puts it, “in order to make this section of any effect whatever, the guilt must be established.” The text, however, did not establish any kind of tribunal, leaving the issue to be worked out down the road:

Look over this section carefully and tell me if you can find anything which requires that an individual shall not be ineligible to office until he has been tried and convicted of treason, or of the crime mentioned in said act, by a court of competent jurisdiction? There is nothing of the kind in it. How then is the person charged to be tried? Before what tribunal can he be required to appear to

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258. *Id.* at LXXX.

259. See Baude & Paulsen, *supra* note 3, at 17.

260. DAILY LEGISLATIVE RECORD, *supra* note 257.

meet the charge of treason or disloyalty? What opportunity is to be afforded to him to exculpate himself?<sup>261</sup>

The lack of textual guidance left the door open to some dangerous possibilities. By way of illustration, Chalfant proposed a hypothetical case in which someone appears before the House with his certificate of election, “but, as he about to take his oath, an honorable member rises in his place, and charges this member elect is ineligible under this section of the amendment by reason of his having given aid and comfort to the enemy during the rebellion.”<sup>262</sup> He continues, “Of course, this suspends all further proceedings until the question of guilt or innocence shall have been disposed of. But what court, what tribunal shall adjudicate the case?”<sup>263</sup>

Note that Chalfant presumed that Congress must “suspend[] all further proceedings” until a tribunal issues its decision. After all, all persons are innocent until proven guilty. As Chalfant explains, “[t]he house could only fairly try the charge and declare the applicant ineligible upon the proper evidence of his having been tried and convicted of the crime in a court of competent jurisdiction.”<sup>264</sup> But this, Chalfant suggests, could not possibly work. “Is it possible that the framers of the amendment intended to transform this legislative body into a criminal court, for the trial of its members on criminal charges, for crimes committed years before the election?”<sup>265</sup> Given current northern hostility towards the leaders of the rebellion, no person from the southern states could not possibly expect a fair trial from a Republican denominated partisan Congress.<sup>266</sup>

Chalfant then proposed a second hypothetical, this time supposing that a challenge might be raised to an elector of the President or Vice President of the United States. Again, Chalfant presumes his audience agrees that such a person could not be disqualified prior

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261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at LXXXI.

to a judgment by a competent tribunal. But “[w]hat court, what tribunal shall try the case? Shall the electoral college be constituted a criminal court to try one or twenty of its members on the charge of having given aid or comfort to the enemy during the rebellion?”<sup>267</sup> The danger of partisanship in such a case was unacceptably high. “Suppose the result of election for President or Vice President depended on the admission or rejection of any one member, what would be the chance in that body for a fair trial?”<sup>268</sup> Note that Chalfant’s hypothetical involving a presidential election involved a challenge to a Presidential elector, not a challenge to an elected President.

After posing a number of additional hypotheticals involving petty challenges to local postmasters and justices of the peace, Chalfant then considered the only possible solution to the raft of problems: Congressional enabling legislation.

“[S]omeone will answer that under the fifth section of this amendment Congress is authorized to provide, by appropriate legislation, for enforcing this amendment. . . . I can conceive of nothing, unless it be some act authorizing the appointment of a ‘commission’ to prescribe qualifications and investigate claims of all candidates and candidates for office. This would be one way.”<sup>269</sup>

This approach, however, was the most dangerous of all, for it would create “a court that can with impunity send forth the accused with the stigma of guilt indelibly stamped upon his character and not compelled to furnish him the means of self-vindication.”<sup>270</sup>

Chalfant concluded this portion of his remarks by warning Republicans that they would come to regret adopting the proposed amendment. “Tomorrow that same people, enlightened as to your designs, may hurl you from your proud position, and make you suppliants at the hands of those you have so wronged and persecuted.”<sup>271</sup>

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267. *Id.*

268. *Id.*

269. *Id.* at LXXXI

270. *Id.*

271. *Id.*

In sum, Chalfant presumed that every ratifier in the room agreed with him that that no person could properly be disqualified under Section Three prior to an adjudication by an impartial tribunal. In the hundreds of pages of debate in the Pennsylvania assembly, I have not found a single example of anyone who thought otherwise.

*E. The 1867 Reconstruction Acts*

The same month that Chalfant was criticizing Section Three for its lack of enforcement provisions in the Pennsylvania assembly, Thaddeus Stevens was pressing the House to enact the enabling legislation that he had previously insisted Section Three required. When the House passed the final version of Section Three in June of 1866, Stevens had called for enabling legislation that would give southern freedmen the right to vote. This would prevent undue rebel influence in the election of state representatives and selection of the state's presidential electors.<sup>272</sup> In early 1867, Stevens submitted a proposed "enabling act" that enfranchised black Americans in the southern states. According to Stevens, "if impartial suffrage is excluded in the rebel States then every one of them would be sure to send a solid rebel representative delegation to Congress, and cast a solid rebel electoral vote. They, with their kindred Copperheads of the North, would always elect the President and control Congress."<sup>273</sup>

A few months later, Congress passed the First and Second Reconstruction Acts. These acts required the former rebel states, as a condition of readmission, to hold new state constitutional conventions,

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272. See *supra* note 26 and accompanying text.

273. See CONG. GLOBE, 39th Cong., 2d Sess. 252 (1867); see also *House of Representatives, THE AGE*, (Phila.), Jan. 4, 1867, at 1. John Bingham opposed Stevens' bill on the grounds that it treated the southern states as conquered provinces and gave Congress perpetual oversight over state civil rights legislation. See *US House, Speech of John Bingham in Opposition to Bill for the Restoration of the Southern States, Exchange with Thaddeus Stevens* (Jan. 16, 1867), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 348. Bingham successfully had the bill recommitted to the Joint Committee where a less radical proposal formed the basis of the two 1867 Reconstruction Acts. See *US House, Bill for the Restoration of the Southern States, Vote to Recommit to Committee on Reconstruction* (Jan. 28, 1867), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 357–58.

establish new state governments, and ratify the Fourteenth Amendment—all accomplished by way of elections that included the votes of newly enfranchised freedmen.<sup>274</sup> The Acts also disenfranchised anyone otherwise disqualified from holding office under Section Three of the proposed Fourteenth Amendment.<sup>275</sup> Most of these reconstructed state governments subsequently ratified the Fourteenth Amendment, and their newly installed presidential electors provided the votes that put Republican candidate Ulysses S. Grant over the top in the presidential election of 1868.

The Reconstruction Acts provide an example of how the proper enforcement of Section Three could keep the presidency in loyal hands without having to disenfranchise the American people from choosing their President. A properly constructed electoral college sufficed. Here is how New York Governor Reuben E. Fenton described the Republican effort, just months before the official ratification of the Fourteenth Amendment:

It is well known that there was a large body of Union electors distributed throughout the South, consisting of those who were never in sympathy with the rebellion, and of those who, though numbered with the insurgents, were ready to accept the results of war and return to their old allegiance. These were, however, mainly powerless, because they were largely outnumbered by those with whom they shared the privilege of access to the polls. There was also a large body of men, composing two-fifths of the whole population, born on the same soil, equally true to the Government, and equally powerless, because they were disfranchised. If these two classes were allowed to act together in the use of the rights of our common manhood, it will be seen that the only obstacle was peaceably removed; as together, they outnumbered the rebel electors who prevented the work of reconstruction.<sup>276</sup>

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274. See 2 RECONSTRUCTION AMENDMENTS, *supra* note 26, at 231.

275. See *US Congress, First Reconstruction Act*, 14 Stat. 428 (Mar. 2, 1867), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 388; *US Congress, Second Reconstruction Act*, 15 Stat. 2 (March 23, 1867), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 391.

276. *Governor's Message*, N.Y. COM. ADVERTISER, Jan. 7, 1868, at 3, 4.



### F. Early Commentary

Although the 1867 Reconstruction Acts effectuated Section Three's protection of the electoral college, those acts did not create a process for determining whether a candidate was disqualified to run for office. Pennsylvania representative Chalfant had insisted on the need for such legislation, and the first and only Supreme Court Justice to opine on the meaning of Section Three agreed. In *Griffin's Case*,<sup>277</sup> Chief Justice Salmon Chase began his analysis of Section Three by noting that "it can hardly be doubted that the main purpose was to inflict upon the leading and most influential characters who had been engaged in the Rebellion, exclusion from office as a punishment for the offense."<sup>278</sup> Echoing Thaddeus Stevens and Thomas Chalfant, Chase then declared "it is obviously impossible to do this by a simple declaration . . . [I]t must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate."<sup>279</sup> As Chalfant had explained in detail, Chase also noted that "[t]o accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable."<sup>280</sup> Since the text of Section Three is silent on these "indispensable" matters, "these can only be provided for by congress."<sup>281</sup>

In 1870, Congress passed an Enforcement Act that specifically included provisions enforcing the restrictions of Section Three.<sup>282</sup> In his remarks on the proposed legislation, Lyman Trumbull specifically noted that such legislation was necessary because Section Three could not enforce itself. Explained Trumbull:

[Section Three] declares certain classes of persons ineligible to office, being those who having once taken an oath to support the

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277. *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815).

278. *Id.* at 26.

279. *Id.*

280. *Id.*

281. *Id.*

282. See *The Enforcement Bill and Repassage of the 1866 Civil Rights Act*, 16 Stat. 140 (May 31, 1870), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 605.

Constitution of the United States, afterward went into rebellion against the Government of the United States. But notwithstanding that constitutional provision we know that hundreds of men are holding office who are disqualified by the Constitution. The Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution.<sup>283</sup>

G. *Section Three and the Election of 1872*

Had Republicans understood Section Three as banning disloyal persons from holding the office of President of the United States, they had a perfect opportunity to make such an argument during the election of 1872. That year Republican candidate Ulysses S. Grant faced off against Democrat Horace Greeley. Both sides engaged in deeply partisan accusations against the other, with Greeley facing continued accusations of being a traitor to the United States.

The editor and publisher of the New York Tribune and a former member of the United States Congress,<sup>284</sup> Greeley had initially supported Andrew Johnson's lenient policies towards the South, and he supported efforts advancing national reconciliation. Most controversially, in 1867 Greeley had helped provide the bond releasing Jefferson Davis from prison.<sup>285</sup> The act infuriated Unionists across the country and prompted Greeley's fellow members of a private New York club to seek his removal for having provided "aid and comfort to Jefferson Davis," the man who was "the ruling spirit of

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283. CONG. GLOBE, 41<sup>st</sup> Cong., 1st Sess. 626 (1869); see also THE CRISIS (Columbus, Ohio), May 5, 1869, at 2 (emphasis added) (reporting on the debates of April 8, 1869). Baude and Paulsen claim that Congress may have been responding to the "erroneous" ruling in *Griffin's Case*. See Baude & Paulsen, *supra* note 3, at 20 & n.55, 46. Trumbull, however, expressly states that the text "provides no means for enforcing itself." See also *The Fourteenth and Fifteenth Amendments in the South*, Chi. Republican, Mar. 6, 1870, at 2 (regarding Section Three: "It is intimated that enforcing laws will be passed by the Congress now in session . . . . It is pretty certain that the enforcement of the amendment will require, not only stringent and complex laws, but Federal officials to execute them in those States whose populations are unfriendly to its provisions.").

284. Horace Greeley served as member of the House of Representatives from New York's 6th District from December 4, 1848 to March 3, 1849.

285. See FONER, *supra* note 71, at 503.

that band of conspirators who urged the Southern States into rebellion, as the chief enemy of the republic."<sup>286</sup>

When Greeley ran for president in 1872, Republicans tarred Greeley with accusations of supporting the confederate cause and being a traitor to the Union. The famous political cartoonist Thomas Nast published illustrations in *Harper's Weekly* depicting Greeley as shaking hands with John Wilkes Booth over Lincoln's grave,<sup>287</sup> and shaking hands with Confederate soldiers as they engaged in shooting down retreating Black union troops.<sup>288</sup> According to writer and civil rights advocate John Neal, Greeley was a traitor and rebel having given "aid and comfort" to "our enemies" during the Civil War.<sup>289</sup> Reminding his readers of Greeley's initial view that the seceding states should be allowed to depart in peace, Neal concluded, "Here, then, we have not only the right of secession, as understood by the Southern rebels, openly acknowledged by a candidate . . . for the Presidential chair, but the right of a considerable section to follow suit forever . . ."<sup>290</sup> Throughout the campaign, Republicans "wav[ed] the bloody shirt" and insisted that a vote for Greeley was a vote for the Ku Klux Klan.<sup>291</sup>

Nevertheless, despite their repeated claims that Greeley had given "aid and comfort" to the "enemies" of the United States who had engaged in insurrection and rebellion against the United States, no one seems to have raised a possible Section Three disqualification claim. This cannot be attributed to any punctilious legal conservatism on the part of Greeley's Republican critics—the illustrations of Thomas Nast were cruelly over the top in their associating Greeley with the late rebellion, and Neal's essay openly accuses Greeley of being guilty of aiding and abetting treasons against the United States. Yet no one seems to have viewed the recently

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286. See *Horace Greeley on Trial*, N.Y. HERALD, May 24, 1867, at 3.

287. Thomas Nast, *The Next in Order: Anything; or, Any Thing!* (illustration), in HARPER'S WEEKLY (Sept. 14, 1872), <https://bit.ly/45wa5tf> [<https://perma.cc/CUB8-X582>].

288. Thomas Nast, Illustration of Horace Greeley Shaking Hands with Confederate Soldier in HARPER'S WEEKLY, <https://bit.ly/3Msbs5N> [<https://perma.cc/49T6-PPNV>].

289. John Neal, *On to Richmond!*, PORTLAND DAILY PRESS (Me.), Aug. 31, 1872, at 2.

290. *Id.*

291. FONER, *supra* note 71, at 509.

adopted Section Three of the Fourteenth Amendment as having anything to do with Greeley's effort to qualify for the office of President of the United States. Either Republican partisans did not believe Section Three applied to anyone who had not joined the "late rebellion," or they did not believe that Section Three applied to persons running for the office of the President.

#### IV. ANALYSIS AND CONCLUSION

The core public understanding of Section Three is textually and historically clear. The ratifying public understood Section Three as targeting thousands of still living leaders of the recent rebellion and prohibiting those persons from returning to Congress, poisoning the electoral college, receiving a presidential appointment to federal office,<sup>292</sup> or joining the reconstructed governments of the southern states. Whether their disqualification would be temporary or life-long was up to Congress.

Beyond this, little else is clear. The text could be read as including persons seeking to hold the office of the President of the United States. But it also could reasonably be read according to the precedent of Blount's Case and protecting the office of the President only by way of the electoral college. The text could be read as including persons seeking to qualify as well as hold office, or it could be read as only involving the seating of certain persons ("holding" the office). The text could be read as declaring rules for both the present and future rebellions (rebellions "hereafter"). But it also could be read (and criticized) as failing to apply beyond the current crisis.<sup>293</sup>

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292. See, e.g., *Impeachment. Speech of Benjamin F. Butler, Delivered at the Brooklyn Academy of Music*, N.Y. TRIB., Nov. 24, 1866, at 8 ("I charge Andrew Johnson with improperly, wickedly and corruptly using and abusing the Constitutional power of pardons, for offenses against the United States, and in order to bring traitors and Rebels into places of honor, trust and profit under the Government of the United States, and to screen whole classes of criminals from the penalties of their crimes against the laws thereof.").

293. At least one lower court opinion suggested that a strict grammatical reading of Section Three's "perfect future" tense would have it apply only prospectively and not include *any* persons who violated their oaths prior to the ratification of the Fourteenth Amendment. See *Opinion of Judge Ballard. United States v. Thompson*, DAILY PICAYUNE

Finally, the text could be read as self-executing, but it also could be (and was) read as requiring enabling legislation. In short, on these key issues the text remains ambiguous<sup>294</sup>—it could be read either way.

And these are just some of the ambiguities of Section Three. As other scholars have pointed out, the text does not tell us what counts as a disqualifying event.<sup>295</sup> If ratifiers understood the text as applying only to the past Civil War, then there was no need to define “insurrection or rebellion.” Had more people believed the Clause would have future application, we may have had substantially more commentary on what kind of future insurrections might trigger the clause. John Hannah, for example, explained that Section Three applied not only to those “who engaged in the recent rebellion” but also “all such who, in time to come, may be guilty of

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(New Orleans), Oct. 16, 1870, at 6. According to Judge Ballard, such a strictly grammatical reading would “shock the common sense of the nation,” and that “the rules of just construction unite with all we know of the history of the adoption of amendment.” Ballard continues: “The history of the amendment is fresh in the memory of us all. There is hardly a child in the land who does not know it, and who does not know that the amendment was specially intended to disqualify from holding office those persons who had, as officers, taken an oath to support the constitution of the United States, and had engaged in the late rebellion.” *Id.* See also *Charge of Judge Emmons, of Mich., to the United States District Court Grand Jury, Nov. 30, 1870*, *REPUBLICAN BANNER* (Nashville), Dec. 4, 1870, at 3 (“Although the construction of this section of the Constitution [Section Three of the Fourteenth Amendment] will be given to you unqualifiedly and without the expression of doubt, it will of course be understood that every opinion now expressed will be open for reconsideration in the numerous cases now pending, and which are so soon to be argued before me. . . . Without perplexing you with difficult classifications or nice distinctions between political, judicial or executive officers, I charge you that it includes *all* officers. After some reflection, I can think of none which do not come within the description of the amendment. . . . The amendment and law apply to offenses committed before, as well as after the adoption of the one and the passage of the other. There has been much, and will undoubtedly be more, discussion of this question, but you will, without any hesitation, literally apply these provisions.”). My thanks to Gerard Magliocca for the pointer to these opinions.

294. Intentional ambiguity is a distinct possibility, given the ongoing division among radical and moderate Republicans on how to treat former rebel leaders in the midst of a last-minute rush to replace the Joint Committee’s original draft of Section Three.

295. See, e.g., *supra* note 3.

a similar crime.”<sup>296</sup> A truly “similar” crime would involve a militarized rebellion that placed thousands of soldiers into the field and caused the deaths of hundreds of thousands of people. Whether the ratifiers would understand future localized riots as triggering Section Three was never considered, much less vetted.

Some scholars try to resolve these ambiguities through the application of a kind of absurdity canon.<sup>297</sup> Framed in different ways, the basic idea is that, since it would have been absurd for the framers and ratifiers not to disqualify rebels from the office of the President of the United States, then the text must be read as doing so.<sup>298</sup>

There are multiple problems with this forced construction of an otherwise ambiguous text. If the public understood Section Three as applying only to the recent rebellion, then there was no need to address a disloyal President—no such person existed. To the extent that the framers and ratifiers worried about the Presidency, the only reasonable worry involved democratic capture of the Presidency—a concern expressly addressed by the Electors Clause which ensured that the leaders of the recent rebellion would play no role in the election of the nation’s President.

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296. John Hannah, *Speech of John Hannah* (Aug. 25, 1866), reprinted in SPEECHES, *supra* note 213, at 21 (emphasis added).

297. See, e.g., Baude & Paulsen, *supra* note 3, at 111 (stressing “the seeming absurdity of the prospect of exclusion of the offices of President and Vice President from triggering disqualification”); Graber, *supra* note 46, at 21 (“No one has ever advanced a commonsense reason why such an exemption [of the office of President] should exist.”); see also, Ilya Somin, *Why President Trump is an “Officer” who Can be Disqualified From Holding Public Office Under Section 3 of the 14th Amendment*, VOLOKH CONSPIRACY (Sept. 16, 2023), <https://reason.com/volokh/2023/09/16/why-president-trump-is-an-officer-who-can-be-disqualified-from-holding-public-office-under-section-3-of-the-14th-amendment/> [<https://perma.cc/SXJ4-Z2RD>] (arguing that it would be “absurd” to conclude that Section Three did not disqualify the President); Brief of Gerard N. Magliocca as *Amicus Curiae* in Support of Petitioners at 12, *Grove v. Republican Party of Minn.* 2023 WL 7221204 (Minn. Oct. 6, 2023) (No. A23-1354) (“Reading Section 3 to exclude the presidency would mean that leading Confederates such as Robert E. Lee and Jefferson Davis could not hold any office except the highest one. There is no historical support for that upside-down conclusion.”).

298. See, e.g., Baude & Paulsen, *supra* note 3, at 111; Graber, *supra* note 46, at 21; Magliocca, *supra* note 297, at 12.

Unlike their more radical counterparts, moderate Republicans believed most southerners would recover their loyalty to the United States once they were no longer under the sway of the leaders of the rebellion. As Senator Clark noted, once leading rebels were removed, “those who have moved in humble spheres [would] return to their loyalty and to the Government.”<sup>299</sup> Echoed Representative Windom, “if leading rebels are to be excluded from office, State as well as Federal, there is a reasonable probability that the loyal men of the South will control [local office].”<sup>300</sup> The electoral college itself, moreover, could be sufficiently secured by enabling legislation that gave freedmen in the southern states the right to vote. Congress did so, and the strategy worked in the election of 1868.

All of this helps explain why there are no discovered examples of any ratifier mentioning even the possible disqualification of persons seeking the office of the President: No one considered such disqualification to be necessary.<sup>301</sup> Rather than absurd, it seems most reasonable to resolve any textual ambiguity in a manner that leaves the election of the nation’s president to a properly constructed electoral college.<sup>302</sup> This reading matches the text and

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299. CONG. GLOBE, 39th Cong., 1st Sess. 2771 (1866).

300. CONG. GLOBE, 39th Cong., 1st Sess. 3170 (1866).

301. In 1872, six years after Congress passed the Fourteenth Amendment, John Bingham joked that Democrats’ criticism of the proposed amnesty bill must mean they wanted Jefferson Davis to be President. See TIFFLIN TRIB., *supra* note 245, at 2. Bingham’s off-hand joke, delivered years after passage and ratification, has little relevance to the original ratifiers’ understanding of Section Three.

302. Congress could count on a loyal electoral college through a variety of mechanisms. While the Fourteenth Amendment remained pending before the states, Congress passed the 1867 Reconstruction Acts. These acts allowed Black votes to join southern loyalists in voting for new constitutions and new state governments. These governments then voted to ratify the Fourteenth Amendment. See 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 227–34 (discussing the ratification of the Fourteenth Amendment). No state that refused to ratify the Fourteenth Amendment would have their presidential electors counted in the national election. See *infra* note 303. Reconstructed states remained free to continue to allow the local electorate to vote for presidential electors, or, should that process become tainted with rebel interference, alter the rules for that electors would be appointed by the loyal and newly reconstructed state government. A number of reconstructed states chose the latter option. See, e.g., *Presidential Electors at the South*, BOS. DAILY J., Aug. 11, 1868, at 4 (discussing the movement towards legislative appointment of electors in Florida, Alabama, Arkansas and

historical evidence and has the added benefit of not disenfranchising loyal Americans from voting for their choice of President.<sup>303</sup>

As far as enabling legislation is concerned, every time the subject arose the speaker presumed the necessity of such legislation. This was the publicly announced understanding of Thaddeus Stevens, the view of Thomas Chalfant in the Pennsylvania ratifying debates, the view of Chief Justice Chase in *Griffin's Case*, and the view of Lyman Trumbull during the passage of the 1869 Enforcement Act. I have not discovered a single person who thought the text was self-executing and capable of disqualifying a candidate prior to some kind of adjudication. It would have been surprising to find otherwise, given the Republican commitment to due process—a concern reflected in the opening section of the Fourteenth Amendment itself.<sup>304</sup>

Days after the ratification of the Fourteenth Amendment, the editors of the *Pennsylvania Globe* summarized Section Three's central purpose of protecting Congress. According to the *Globe*, the third section targeted

leading rebels, such as those who have taken an oath to support the Constitution of the United States, and then engaged in the rebellion against the same. This section also precludes any of the

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Louisiana). This option advanced the reconstruction policies of the Republicans and was criticized by Democrats. See *A Fraud on the People*, N.H. PATRIOT & GAZETTE (Concord), August 19, 1868, at 1.

303. Republicans were especially aware of the importance of reliable electors as the country approached the 1868 presidential elections. Only weeks after the ratification of the Fourteenth Amendment, Congress adopted a joint resolution refusing to accept the electoral votes from any state that had not complied with the requirements of the Reconstruction Acts (including the ratification of the Fourteenth Amendment) and been readmitted to the Union. See CONG. GLOBE., 40th Cong., 2d Sess. 3926 (1868) (passing S. No. 139, excluding from the Electoral College votes of States lately in rebellion which shall not have been reorganized). The danger of a disloyal electoral college was real. Democrats were actively planning on combining the votes of their northern and southern members (loyal or otherwise), in an effort to gain a majority in the electoral college at the next election. See, e.g., *Southern Politics*, JAMESTOWN J. (N.Y.), July 27, 1866, at 2 (speaker at a Virginia convention raising such a possibility where “the tables would be turned” on northern Republicans and advising his hearers to “be prepared” for war.).

304. U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law.”).



said class from being a Senator or Representative in Congress, but Congress may by a vote of two-thirds of each House, remove such disability.<sup>305</sup>

The “justice” of such a provision “cannot be doubted” since “were we to permit them in Congress, without any guarantee of their penitence, we would have re-enacted a civil warfare for all the imaginary rights of the conquered Confederacy.”<sup>306</sup>

As this editorial illustrates, Section Three’s primary concern involved preventing the still living leaders of the rebellion from disrupting the Republican Reconstruction. There were only a limited number of ways this might foreseeably occur, and Section Three addressed them all. The text does not clearly address the office of the President of the United States because it did not need to, and Republicans had enough on their hands as it was.

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Whether Section Three applies to future events, to the office of the President, or is self-executing is historically unclear and textually ambiguous.

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305. See *Constitutional Amendment*, THE GLOBE (Huntingdon, Pa.), Aug. 5, 1868, at 2.

306. *Id.*

## APPENDIX: THE PROPOSALS

*McKee's Initial Proposal*

No person shall be qualified or shall hold the office of President or vice president of the United States, Senator or Representative in the national congress, or any office now held under appointment from the President of the United States, and requiring the confirmation of the Senate, who has been or shall hereafter be engaged in any armed conspiracy or rebellion against the government of the United States, or has held or shall hereafter hold any office, either civil or military, under any pretended government or conspiracy set up set up within the same, or who has voluntarily aided, or who shall hereafter voluntarily aid, abet or encourage any conspiracy or rebellion against the Government of the United States.

*The Owen Proviso*

No person who, having been an officer in the army or navy of the United States, or having been a member of the Thirty-Sixth Congress, or of the cabinet in the year one thousand eight hundred and sixty, took part in the late insurrection, shall be eligible to either branch of the national legislature until after the fourth day of July, one thousand eight hundred and seventy-six.

*Joint Committee Draft Amendment*

Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.

*Joint Committee Proviso*

No person shall be eligible to any office under the Government of the United States who is included in any of the following classes, namely:

1. The President and Vice President of the Confederate States of America, so called, and the heads of departments thereof.
2. Those who in other countries acted as agents of the Confederate States of America, so-called.
3. The heads of Departments of the United States, officers of the Army and Navy of the United States, and all persons educated at the military or Naval Academy of the United States, judges of the courts of the United States, and members of either House of the thirty-sixth Congress of the United States who gave aid or comfort to the late rebellion.
4. Those who acted as officers of the Confederate States of America, so-called, above the grade of colonel . . .
5. Those who have treated officers or soldiers or sailors of the Army or Navy of the United States, captured during the late war, otherwise than lawfully as prisoners of war

*Joint Committee Draft Amendment*

Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.

*McKee's Second Proposal*

All persons who voluntarily adhered to the late insurrection, giving aid and comfort to the so-called southern confederacy, are forever excluded from holding any office of trust or profit under the Government of the United States.

*Wilson Proposal*

No person who has resigned or abandoned or may resign or abandon any office under the United States and has taken or may take part in rebellion against the Government thereof, shall be eligible to any office under the United States or of any State.

*Clark Proposal*

No person shall be a Senator or Representative in Congress, or be permitted to hold any office under the Government of the United States, who, having previously taken an oath to support the Constitution thereof, shall have voluntarily engaged in any insurrection or rebellion against the United States, or given aid or comfort thereto.

*Beaman Proposal*

No person shall hereafter be eligible to any office under the Government of the United States who is included in any of the following classes, namely:

1. The president and vice president of the confederate States of America, so called, and the heads of departments thereof.
2. Those who in other countries acted as agents of the Confederate States of America, so-called.
3. Heads of Departments of the United States, officers of the Army and Navy of the United States, and all persons educated at the military or Naval Academy of the United States, judges of the courts of the United States, and members of either House of the Thirty-Sixth Congress of the United States who gave aid and comfort to the late rebellion.

*Garfield Proposal*

All persons who voluntarily adhered to the late insurrection, giving aid and comfort to the so-called southern confederacy, are forever excluded from holding any office of trust or profit under the Government of the United States.

*Final Draft of Section Three*

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.