



THROUGH VIOLENCE, FORCE, OR INTIMIDATION:
UNDERSTANDING INSURRECTION AFTER
JANUARY 6TH, 2021

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* J.D. Candidate, Rutgers Law School, May 2024. I want to thank Professor Alexis Karteron, my faculty advisor, for her outstanding help and guidance throughout the writing process; and the Rutgers University Law Review staff for reviewing and editing this piece. I owe a tremendous debt of gratitude to my wife (Geena), parents (Glenn and Randi), brother (Connor), mother-in-law (Ruth), and small dog (Elle) for their love and support, and also for their patience in regularly listening to me talk about this topic at length.

I. INTRODUCTION

Section Three of the Fourteenth Amendment disqualifies individuals who took an oath to the Constitution and later engaged in insurrection from ever holding any civil or military office.¹ After the attack on the United States Capitol on January 6th, 2021, this Section has attracted significant interest from the media, lawyers, and Congress itself.²

In *New Mexico ex rel. White v. Griffin*, a court used Section Three for the first time in over a century to remove an elected official for participating in the Capitol attack.³ The *Griffin* court held that January 6th was an insurrection using a definition based on how “knowledgeable nineteenth-century Americans and Section Three’s framers” would have understood the term.⁴

Using history is “implicit in the study of constitutional law,”⁵ especially when “there is nowhere else to turn with respect to interpretation of the constitutional text, in the sense that other legally relevant materials are absent.”⁶ Neither the Fourteenth Amendment⁷ nor federal statutes define “insurrection,”⁸ and there is “a lack of case law exploring disqualification under Section [Three].”⁹

1. U.S. CONST. amend. XIV, § 3.

2. See, e.g., SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 690 (2022).

3. *New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1, at *70–71 (N.M. 1st Jud. Dist., Sept. 6, 2022). Other courts hearing Section Three disqualification cases avoided the question of whether the Capitol attack was an insurrection. See *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot 1, 18 (Off. State Admin. Hearings, May 6, 2022) (“Whether the Invasion of January 6 amounted to an insurrection . . . is not a question for this Court to answer at this time.”); *Cawthorn v. Amalfi*, 35 F.4th 245, 261 (4th Cir. 2022) (“We express no opinion about whether Representative Cawthorn in fact engaged in ‘insurrection or rebellion’”); *Stencil v. Johnson*, 605 F. Supp. 3d 1109, 1113 (E.D. Wis. 2022) (“I express no view on the merits of the plaintiffs’ allegations that the defendants engaged in an insurrection or rebellion against the United States.”).

4. *Griffin*, 2022 N.M. Dist. LEXIS 1, at *47.

5. Julius Goebel Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 555 (1938).

6. Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1672 (2018).

7. See generally U.S. CONST. amend. XIV.

8. See, e.g., 10 U.S.C. §§ 251–55 (commonly referred to as the Insurrection Act); 18 U.S.C. § 2383 (setting forth criminal penalties for insurrection).

9. 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.lawfareblog.com/treason-insurrection-and-disqualification-fugitive-slave-act-1850-jan-6-2021>.

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This Commentary analyzes whether the *Griffin* court's definition of insurrection is truly consistent with how Section Three's drafters would have understood the term. Part I examines Section Three of the Fourteenth Amendment. Part II discusses *Griffin*. Part III analyzes how the Fourteenth Amendment's drafters would have understood insurrection. Part IV compares the *Griffin* court's test to alternative definitions to determine which is the most faithful to the original meaning of the term "insurrection."

Other scholars have examined the meaning of insurrection during the nineteenth century. Professors William Baude and Michael Stokes Paulsen did so in their forthcoming article, *The Sweep and Force of Section Three*.¹⁰ This Commentary will address Baude and Paulsen's approach to defining insurrection as compared to the *Griffin* court's approach.¹¹

Mark Graber, who served as the plaintiff's historical expert in *Griffin*, also conducted an historical analysis of insurrection.¹² His argument primarily focuses on the connection between insurrection and "levying war,"¹³ while this Commentary looks at contemporaneous accounts of a wide array of insurrections during the nineteenth century and weighs alternative definitions.¹⁴

II. OVERVIEW OF SECTION THREE

The power to remove insurrectionists from office comes from Section Three of the Fourteenth Amendment. It reads, in relevant part, as follows:

No person shall . . . hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath [as a federal or state officer or legislator] to support the

10. See William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. (forthcoming 2024).

11. See discussion *infra* Section IV.D.

12. See Graber, *supra* note 9.

13. See *id.*

14. See discussion *infra* Parts III–IV.

Constitution of the United States, shall have engaged in insurrection or rebellion against the same¹⁵

Section Three sets up a two-part test for disqualification. First, a person must have taken an oath to support the Constitution as a federal or state executive, legislative, or judicial officer. Second, that person must have later engaged in insurrection or rebellion.

Section Three does not automatically remove insurrectionists from office.¹⁶ Litigants seeking to disqualify an insurrectionist under Section Three may, in some cases, be able to use a writ of *quo warranto*, an action “brought against the person who is charged with exercising an office or authority without lawful right.”¹⁷ Using Section Three also involves several difficult interpretive problems.¹⁸ This Commentary solely focuses on defining what an insurrection is.

15. U.S. CONST. amend. XIV § 3.

16. Indeed, in *Trump v. Anderson*, a recent Section Three case involving former President Donald Trump, the Supreme Court held that “Section 5 [of the Fourteenth Amendment] vests in Congress the power to enforce” Section Three against federal candidates and officeholders. No. 23-719, 2024 WL 899207, at *6 (U.S. Mar. 4, 2024) (per curiam). In other words, “Congress would likely need to enact new legislation” to apply Section Three to federal officeholders and candidates. Ilya Somin, *What the Supreme Court Got Wrong in the Trump Section 3 Case*, LAWFARE (Mar. 8, 2024), <https://www.lawfaremedia.org/article/what-the-supreme-court-got-wrong-in-the-trump-section-3-case>. But *Trump v. Anderson* does not unambiguously foreclose other avenues of enforcing Section Three. See Steve Vladeck, *The Shoddy Politics of Trump v. Anderson*, ONE FIRST (Mar. 11, 2024), <https://stevevladeck.substack.com/p/70-the-three-biggest-problems-with> (“[T]he opinion is distressingly ambiguous about . . . how federal officials can enforce Section 3 in future cases.”); Scott R. Anderson, et al., *Section 3 Disqualification Answers—and Many More Questions*, LAWFARE (Mar. 4, 2024), <https://www.lawfaremedia.org/article/section-3-disqualification-answers-and-many-more-questions> (“[*Trump v. Anderson*] no doubt raise[s] the question of whether there are other avenues to federal enforcement the majority implicitly leaves open, including during the counting of electoral votes.”).

17. *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 502 (1933).

18. The Supreme Court touched many of these interpretive problems during oral argument on *Trump v. Anderson*. See, e.g., Transcript of Oral Argument at 5–6, 9–19, *Trump v. Anderson*, No. 23-719 (2024) (discussing whether Section Three is self-executing); *id.* at 27–28 (discussing whether Section Three imposes a categorical disqualification on insurrectionists); *id.* at 36–52 (discussing whether the President qualifies as an officer under Section Three); *id.* at 74–76 (discussing whether states courts have the power to disqualify candidates for federal office); *id.* at 82, 90–94 (discussing whether a President’s actions are ultra vires after he or she engages in insurrection); see also Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of The Fourteenth Amendment*, 30 WM. & MARY BILL OF RTS. J. 153, 192–94 (2021) (removing members of Congress and certain other federal officials under Section Three is “unclear.”); Josh Blackman & Seth Barrett Tillman, *Is the President an “Officer of the United States” for Purposes of Section 3 of the Fourteenth Amendment?*, 15 N.Y.U. J.L. & LIBERTY 1, 5 (2021) (arguing that the

III. NEW MEXICO EX REL. *WHITE V. GRIFFIN*

New Mexico ex rel. White v. Griffin arose from a New Mexico county commissioner's participation in the Capitol attack.¹⁹ The commissioner, Couy Griffin, went to Washington on January 6th with guns and ammunition,²⁰ marched to the Capitol,²¹ "breached security barriers,"²² scaled walls,²³ "riled" up Trump supporters,²⁴ and congregated near "attackers beating police officers."²⁵

Stemming from his conviction for offenses related to the Capitol attack,²⁶ several New Mexico residents brought an action to remove Griffin from office under Section Three.²⁷ The court agreed.²⁸

The court first held that Section Three applies to county officeholders like Griffin.²⁹ The court then held that the Capitol attack was an insurrection.³⁰ The court reasoned that insurrection "as understood by knowledgeable nineteenth-century Americans and Section Three's framers, refer[s] to an (1) assemblage of persons, (2) acting to prevent the execution of one or more federal laws, (3) for a public purpose, (4) through the use of violence, force, or intimidation by numbers."³¹ The Capitol attack fits this definition. Thousands of people descended on the Capitol

President is not an officer under Section Three). *But see* Baude & Paulsen, *supra* note 10, at 108–12 (arguing that Blackman and Tillman's interpretation "implausibly splits linguistic hairs," relies "on the fine parsing of prepositional phrases," lacks "evidence of such a distinction in Section Three," was "explicitly refuted in the congressional debates proposing Section Three," and defies "the ordinary sense of the text").

19. *See New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1, at *26-34 (N.M. 1st Jud. Dist., Sept. 6, 2022).

20. *See id.* at *14.

21. *See id.* at *27.

22. *Id.* at *19.

23. *Id.* at *27–28.

24. *Id.* at *29.

25. *Id.* at *29–30.

26. *Id.* at *33.

27. *Id.*

28. *Id.*

29. *Id.* at *45–46; *see also* *Worthy v. Barrett*, 63 N.C. 199, 202–04 (N.C. 1869) (applying Section Three to county officials).

30. *Griffin*, 2022 N.M. Dist. LEXIS 1, at *47.

31. *Id.*

to stop Congress from certifying the 2020 presidential election³² which they temporarily achieved through violence, force, and intimidation.³³

The court finally held that Griffin “engaged” in insurrection.³⁴ Though he did not personally commit physical violence, engaging in insurrection historically included “personal service or by contributions, other than charitable, of anything that was useful or necessary.”³⁵ Engaging in insurrection meant committing some “overt act” intended to further it.³⁶ Griffin committed many overt acts. Before January 6th, he mobilized other insurrectionists to go to the Capitol.³⁷ During the attack, he illegally entered the Capitol to help the other insurrectionists.³⁸ He helped the mob temporarily stop Congress from certifying the 2020 election.³⁹ He also “incited, encouraged, and helped normalize the violence” at the Capitol.⁴⁰ Griffin, therefore, engaged in insurrection. As such, the court removed him from office and banned him from ever holding public office again.⁴¹

IV. IS *GRIFFIN* CONSISTENT WITH HOW THE DRAFTERS UNDERSTOOD INSURRECTION?

The *Griffin* court claims that the drafters of Section Three and knowledgeable nineteenth-century Americans understood insurrection to mean an assembly of persons acting to prevent the execution of federal law for a public purpose through violence, force, or intimidation.⁴²

Members of Congress wrote the Fourteenth Amendment two years after the Civil War ended.⁴³ Section Three addressed concerns about readmitting former Confederate states to the Union by removing “unrepentant Confederates” from Southern governments, rendering “virtually the entire political leadership of the South ineligible for

32. *Id.* at *49–53.

33. The mob injured over one hundred Capitol Police officers, brought weapons into Congress, and called for the murder of elected officials, including the vice president. *See id.* at *51.

34. *Id.*

35. *Worthy*, 63 N.C. at 203.

36. *Griffin*, 2022 N.M. Dist. LEXIS 1, at *54–56.

37. *See id.* at *56.

38. *See id.* at *57.

39. *See id.* at *58.

40. *Id.* at *58.

41. *See id.* at *61.

42. *See id.* at *47.

43. *See* ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* 251–61 (Harper Collins 2d ed., 2002) (discussing the drafting of the Fourteenth Amendment).

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office.”⁴⁴ Section Three’s drafters did not confine their understanding of insurrection to just the Civil War, however. They expressly drew on past insurrections like the Whiskey Rebellion, noting that:

Two instances of treasonable plots and conspiracies stain our former history. The one, an armed conspiracy to resist the execution of the laws, was organized in the State of Pennsylvania, known as the whisky insurrection.

That, like the late rebellion, (though small in comparison,) organized its misguided followers, set the law at defiance, plundered the public mails, and murdered the officers of the law. . . .

So cautious was the Pennsylvania Assembly at its next meeting that it carefully scrutinized the claims of all members returned from the insurrectionary district, with a view of cleansing itself from all stains of treason by excluding all participators in the insurrection.⁴⁵

The drafters used the past to define insurrection. So does this Part, which looks at the plain meaning of insurrection during the nineteenth century and examines an array of uprisings the drafters would have viewed as an insurrection. The *Griffin* court constrains insurrection to resistance against federal law, but this Part argues that the drafters would have recognized resistance against any law as insurrectionary.

A. *Plain Meaning*

The plain meaning of insurrection did not just refer to risings against federal law.⁴⁶ For instance, both the 1848 and 1864 Merriam Webster Dictionary defined insurrection as “the open and active opposition of a

44. *Id.* at 259. Some members of Congress even feared that former Confederates would “gain control of Congress, compensate slaveowners for emancipation, and elect Robert E. Lee President in 1868.” *Id.* at 252.

45. CONG. GLOBE, 39th Cong., 1st Sess. 2534.

46. *See Griffin*, 2022 N.M. Dist. LEXIS 1, at *51.

number of persons to the execution of law in a city or state.”⁴⁷ The plain meaning of insurrection, then, included resistance to state and municipal law.

B. Insurrections Before the Civil War

An analysis of pre-Civil War insurrections confirms the *Griffin* court’s definition is largely consistent with how Section Three’s drafters would have understood insurrection.⁴⁸ Again, the *Griffin* court and the record depart on the scope of insurrection.

1. Shays’s Uprising (1786–87)

Section Three’s drafters would have understood Shays’s Uprising was an insurrection. Shays’s Insurrection was the first major popular unrest in post-Revolutionary War America and shook the founders of the country enough to adopt the Constitution.⁴⁹

Shays’s Uprising arose in 1786 after Massachusetts enacted “the largest direct tax that peacetime America had ever seen.”⁵⁰ To stop government officials from collecting the direct tax, Daniel Shays led a mob of 1,500 armed farmers to storm, occupy, and shut down Massachusetts county courthouses for months.⁵¹ He then tried to breach the Springfield Armory and overthrow the state government, but failed.⁵²

47. MERRIAM WEBSTER ENGLISH DICTIONARY: REVISED AND ENLARGED EDITION 613 (1848); DR. WEBSTER’S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 702 (Chauncey A. Goodrich & Noah Porter, eds., 1864).

48. *Griffin*, however, does not discuss uprisings by enslaved persons, even though nineteenth-century Americans understood them as insurrections. See Sidney Kaplan, *The “Domestic Insurrections” of the Declaration of Independence*, 61 J. NEGRO HIST. 243, 248–49 (1976). See generally Harvey Wish, *American Slave Insurrections Before 1861*, 22 J. NEGRO HIST. 299 (1937); Edwin A. Miles, *The Mississippi Slave Insurrection Scare of 1835*, 42 J. NEGRO HIST. 48 (1957); Harvey Wish, *The Slave Insurrection Panic of 1856*, 5 J. SO. HIST. 206 (1939). The *Griffin* court’s failure to discuss slave uprisings is not fatal to their definition because the Radical Republican drafters of the Fourteenth Amendment viewed slavery as legally invalid, and therefore would not have seen slave uprisings as insurrectionary. See FONER, *supra* note 43.

49. Paul M. Thompson, *The Reaction to Shays’ Rebellion*, 4 MASS. LEGAL HIST. 37, 37 (1998).

50. *Id.* at 44.

51. *Id.* at 45; see also GEORGE R. MINOT, *THE HISTORY OF THE INSURRECTIONS, IN MASSACHUSETTS, IN THE YEAR MDCCLXXXVI: AND THE REBELLION CONSEQUENT THEREON*, 39–49 (Worcester, Mass., Isaiah Thomas 1788).

52. See Thompson, *supra* note 49, at 47; MINOT, *supra* note 51, at 136.

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Knowledgeable people at the time understood Shays Uprising was an insurrection. Contemporaneous accounts refer to it as an insurrection.⁵³ The government charged participants in the uprising with insurrection.⁵⁴ The indictment against one read:

James Maloon . . . lay unlawfully by force of Arms to stir up, promote and incite and maintain Riots Mobs Tumults and Insurrections in this Commonwealth and to disturb and impede the Government of the Same and the due Administration of Justice in the Same and to prevent the Courts of Justice as by Law appointed for that purpose.⁵⁵

Observers at the time found that Shays Insurrection bore “a [s]trong re[s]emblance” to Ely’s Insurrection, another uprising where a mob also attacked and occupied courthouses.⁵⁶ Both mobs sought to prevent the execution of state laws: Shays’s, a direct tax, and Ely’s, a number of other policies.⁵⁷ Knowledgeable Americans like Section Three’s drafters, therefore, understood that Shays and Ely’s uprisings were insurrections even though both sought to oppose state law.

2. The Whiskey Rebellion (1794)

Section Three’s drafters understood that the Whiskey Rebellion was an insurrection and expressly drew upon it while drafting the section.⁵⁸ Some historical context is therefore instructive.

The Whiskey Rebellion started because of a 1792 federal excise tax on grain alcohol (such as whiskey).⁵⁹ At first, the excise tax sparked

53. See generally Thompson, *supra* note 49 (referring repeatedly to the uprising as an insurrection).

54. See JOHN NOBLE, A FEW NOTES ON THE SHAYS REBELLION 6 (1903).

55. *Id.* at 26.

56. MINOT, *supra* note 51, at 26.

57. See John L. Brooke, *To the Quiet of the People: Revolutionary Settlements and Civil Unrest in Western Massachusetts, 1774-1789*, 46 WILLIAM & MARY Q. 425, 425 (1989) (describing Ely’s grievances).

58. See *supra* text accompanying note 45.

59. See Act of May 8, 1792, Ch. 32, 1 Stat. 267 (1792) (concerning the duties on spirits distilled within the United States) (repealed 1802); see also H. M. BRACKENRIDGE, HISTORY OF THE WESTERN INSURRECTION IN WESTERN PENNSYLVANIA, COMMONLY CALLED THE WHISKEY INSURRECTION 17 (W.S. Haven, 1859); David O. Whitten, *An Economic Inquiry*

limited resistance; mostly in angry town hall meetings and occasional assaults on tax collectors.⁶⁰ The violence quickly intensified, though, as mobs of farmers tarred and feathered two tax collectors, threatened to burn a third collector's house down, and followed through on this threat against a fourth.⁶¹

Anti-tax violence quickly spiraled out of control. In June 1794, the federal government ordered "over sixty western country distillers" to appear in court for failure to pay excise taxes.⁶² On July 14, thirty to forty armed men stopped a tax collector from serving delinquent taxpayers with process.⁶³ Two days later, the mob tried to kidnap him.⁶⁴

Seven hundred armed men then surrounded the collector's home and demanded he submit to capture.⁶⁵ When the collector refused, the mob burned his house down, shot at him, and kidnapped a federal marshal.⁶⁶ The mob then swelled to seven thousand people who sought to secede from the Union and invade Pittsburgh.⁶⁷

Though the mob's plans never materialized, the Federal Government understood that this unrest constituted an insurrection. President Washington invoked the "Calling Forth Act" to summon troops and "suppress such insurrection."⁶⁸ Washington described the mob as "combinations to defeat the execution of the laws laying duties upon Spirits . . . proceeding in a manner subversive . . . of the just authority of Government."⁶⁹ In other words, people assembled to prevent the execution of the law using "actual violence" and "vindictive menaces."⁷⁰

Into the Whiskey Rebellion of 1794, 49 AGRIC. HIST. 491 (1975); Cynthia L. Krom & Stephanie Krom, *The Whiskey Tax Of 1791 and The Consequent Insurrection*, 40 ACCT. HIST. J. 91 (2013).

60. BRACKENRIDGE, *supra* note 59, at 26.

61. *Id.* at 28–29.

62. THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 177* (Oxford Univ. Press 1986).

63. *Id.* at 178.

64. *Id.* at 179.

65. *Id.* at 179–80.

66. *Id.* at 181, 186. The mob eventually let the marshal go but threatened to kill him if he returned to Western Pennsylvania. *Id.* at 186.

67. *See id.* at 188.

68. Act of May 2, 1792, Ch. 28, 1 Stat. 264 (1792) (calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions) (repealed 1795). *See generally* Richard H. Kohn, *The Washington Administration's Decision to Crush the Whiskey Rebellion*, 59 J. AM. HIST. 567 (1972).

69. George Washington, Proclamation Calling Out the Militia to Occupy the Western Counties of Pennsylvania (Aug. 7, 1794).

70. *Id.*

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Nor was Washington alone in describing the events as an insurrection. Federal and state officials at the time described the mob as “men who accompany their requests with threats, and resist by force the public authority.”⁷¹ Justice Paterson, who presided over one of the Whiskey Rebellion trials, also called the uprising an insurrection along the same lines as the *Griffin* court:

[W]hat was the general object of the insurrection? If its object was to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation, the offence, in legal estimation, is High Treason; it is an usurpation of the authority of government; it is High Treason by levying of war.⁷²

This view endured into the nineteenth century. In 1825, for instance, a former district attorney in Pennsylvania explained that the Whiskey Rebellion was:

An insurrection, the object of which was to suppress an office of excise established under a law of the United States, and the marching with a party in arms to the house of the excise officer, and committing acts of violence and outrage there, with a view by force and intimidation to prevent the execution of the law.⁷³

The Whiskey Rebellion involved an armed mob preventing the government from collecting taxes using violence, force, and intimidation. At the time, and years after, knowledgeable Americans, from the President to judges and prosecutors, understood that the Whiskey Rebellion was an insurrection.

3. Fries’s Rebellion (1799)

Section Three’s drafters would have recognized Fries’ Insurrection as an insurrection. Fries’ Rebellion started because of a direct federal tax on

71. BRACKENRIDGE, *supra* note 59, at 200.

72. *United States v. Mitchell*, 2 U.S. 348, 355 (1795). See also Linda Myrsiades, *A Tale of a Whiskey Rebellion Judge: William Paterson, Grand Jury Charges, and the Trials of the Whiskey Rebels*, 140 PENN. MAG. HIST. & BIOGRAPHY 129, 150–60 (2016).

73. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 142 (2d ed. 1826).

land, houses, and enslaved persons.⁷⁴ Once again, mobs of angry farmers “threatened, intimidated, and generally prevented [federal tax assessors] from performing their duties.”⁷⁵

John Fries, the leader of the mob, kidnapped three tax assessors.⁷⁶ Soon after, a federal marshal arrested several of Fries’s compatriots.⁷⁷ Fries then led 140 armed farmers to storm the marshal’s headquarters and liberate his prisoners.⁷⁸

Five days later, President Adams invoked the Militia Act, describing Fries’s mob as “combinations to defeat the execution of the laws for the valuation of lands . . . [who] have proceeded in a manner subversive of the just authority of the government, by . . . deterring the officers of the United States to forbear the execution of their functions, and by openly threatening their lives.”⁷⁹ President Adams understood Fries’s Rebellion as an assembly of men to prevent the execution of a federal law through force, violence, or intimidation.

Eventually Fries surrendered and was charged with treason.⁸⁰ The charging documents noted that treason included “insurrection or rising to resist, or to prevent by force or violence, the execution of any statute of the United States.”⁸¹ At sentencing, Justice Chase also remarked that Fries’s uprising bore “a strong and striking analogy” to the Whiskey Rebellion.⁸² Justice Chase understood that both the Fries and the

74. Dwight F. Henderson, *Treason, Sedition, and Fries’ Rebellion*, 14 AM. J. LEGAL HIST. 308, 309 (1970). See generally Jane Shaffer Elsmere, *The Trials of John Fries*, 103 PENN. MAG. HIST. & BIOGRAPHY 432 (1979); Paul Douglas Newman, *Fries’ Rebellion and American Political Culture*, 119 PENN. MAG. HIST. & BIOGRAPHY 37 (1995); Peter Levine, *The Fries Rebellion: Social Violence and the Politics of the New Nation*, 40 PENN. HIST. J. MID-ATL. STUD. 240 (1973).

75. Henderson, *supra* note 74, at 309.

76. See *id.* at 310.

77. *Id.* at 310–11.

78. *Id.* at 311.

79. John Adams, *Proclamation 9—Law and Order in the Counties of Northampton, Montgomery, and Bucks, in the State of Pennsylvania*, THE AM. PRESIDENCY PROJECT, (Mar. 12, 1799), <https://www.presidency.ucsb.edu/documents/proclamation-9-law-and-order-the-counties-northampton-montgomery-and-bucks-the-state>; see also Act of Feb. 28, 1795, ch. 36, 2 Stat. 424 (calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions) (repealed 1814).

80. Henderson, *supra* note 74, at 312. John Adams eventually pardoned the participants. John Adams, *Proclamation of Pardons to Those Engaged in Fries Rebellion*, THE AM. PRESIDENCY PROJECT (May 21, 1800), <https://www.presidency.ucsb.edu/documents/proclamation-granting-pardon-certain-persons-engaged-insurrection-against-the-united>.

81. Case of Fries, 9 F. Cas. 924, 930 (C.C.D. 1800).

82. *Id.* at 933.

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Whiskey rebels engaged in insurrection by assembling mobs of armed farmers to oppose tax collection through violence, force, and intimidation.

President Adams eventually pardoned Fries.⁸³ In his pardon, Adams called the uprising a “late wicked and treasonable insurrection against the just authority of the United States.”⁸⁴ Adams too understood that Fries sparked an insurrection.

In leading a mob to overpower a federal marshal, John Fries assembled a mob to prevent the execution of federal law through violence, force, and intimidation. Knowledgeable Americans understood that Fries fomented an insurrection. The drafters would have agreed. The *Griffin* court’s definition of insurrection accurately reflects this understanding.

3. *United States v. Hoxie* (1808)

United States v. Hoxie expanded the legal understanding of insurrection to require that insurrection have a public purpose. *Hoxie* arose from the Embargo Act of 1807, which prohibited American ships from going to foreign ports.⁸⁵ Frederick Hoxie sought to transport lumber from Vermont to Canada by raft.⁸⁶ Before he could, a federal tax official impounded his raft and lumber.⁸⁷ Hoxie then assembled a mob of sixty armed men to successfully liberate his boat, but shot at a federal tax officer and a few soldiers in the process.⁸⁸ He was later arrested and charged with treason.⁸⁹

In charging the jury, however, the court rejected that Hoxie committed treason.⁹⁰ The court distinguished Hoxie’s uprising from Fries’s Rebellion and the Whiskey Rebellion.⁹¹ Fries stormed courts to oppose any attempt to collect a direct tax on land.⁹² The Whiskey rebels attacked tax collectors to oppose any attempt to collect an excise tax.⁹³

83. See Adams, *supra* note 80.

84. *Id.*

85. See Act of Dec. 22, 1807, ch. 5, 1 Stat. 451 (laying an Embargo on all ships and vessels in the ports and harbors of the United States) (repealed 1808).

86. *United States v. Hoxie*, 26 F. Cas. 397, 399–401 (C.C.D. 1808).

87. *Id.*

88. See *id.* at 400.

89. *Id.* at 397, 399–401.

90. *Id.* at 399–401.

91. *Id.* at 400.

92. See *supra* text accompanying note 78.

93. *Hoxie*, 26 F. Cas. at 400–01.

Hoxie just wanted his raft back. His conduct was “of a private nature, and . . . no further violence was contemplated, than to smuggle a raft which had been seized by the collector.”⁹⁴ In other words, to engage in insurrection, the participants need to resist the law for a reason beyond their own narrow self-interest. Hoxie’s actions lacked a public purpose and did not amount to insurrection. Knowledgeable Americans, then, understood that purpose matters in defining insurrection.

5. The Dorr Rebellion (1841)

Section Three’s framers would have understood the Dorr Rebellion as an insurrection, even though it involved an uprising against state law.

In 1841, every state but Rhode Island had a constitution.⁹⁵ Rhode Island still used their British Royal Charter of 1663.⁹⁶ The charter allowed only male landowners to vote, disenfranchising “over half of the [state’s] adult males.”⁹⁷

Thomas Dorr believed the Royal Charter was not a valid governing document because Rhode Island declared independence from the British in 1776.⁹⁸ He therefore concluded the state’s government was illegitimate.⁹⁹ Dorr organized political meetings across the state to elect delegates tasked with establishing a new government.¹⁰⁰ In 1841, those delegates wrote a new constitution guaranteeing universal white male suffrage.¹⁰¹ The next year, Dorr’s delegates elected him as “Governor.”¹⁰²

94. *Id.*

95. See NATHANIEL WEYL, *TREASON: THE STORY OF DISLOYALTY AND BETRAYAL IN AMERICAN HISTORY* 188 (1950).

96. See *id.*

97. *Id.*; see also *Charter of Rhode Island and Providence Plantations*, YALE L. SCH.: THE AVALON PROJECT, https://avalon.law.yale.edu/17th_century/ri04.asp (last visited Feb. 28, 2023).

98. See WEYL, *supra* note 95, at 190.

99. See *id.*

100. See *id.* at 191.

101. See *id.*; see also Erik J. Chaput, *Proslavery and Antislavery Politics in Rhode Island’s 1842 Dorr Rebellion*, 85 *NEW ENG. Q.* 658, 673–74 (2012) (describing the People’s Convention).

102. See WEYL, *supra* note 95, at 193. After Dorr’s “election,” both he and the actual governor asked the President for support. *Id.* The President responded that he could not aid either man until insurrection broke out. See President John Tyler Letter to Governor Samuel Ward King (May 7, 1842), https://sosri.access.preservica.com/uncategorized/IO_dc38dc3b-adc8-4a74-b2a7-74a5c97c60c1/ (“If resistance is made to the execution of the laws of Rhode-Island, by such force as the civil peace shall be unable to overcome, it will be the duty of this Government to enforce the constitutional guarantee.”).

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Dorr then tried to take over Rhode Island's government. He assembled one thousand armed supporters, stood before them, waved a sword, and said "when the hour struck, he would know what to do with it."¹⁰³ After the actual Governor assembled the state militia, Dorr "decided to retaliate by seizing the arms at the Providence Arsenal in the grand style of the Shays Rebellion."¹⁰⁴ He failed spectacularly.¹⁰⁵

A year and a half later, Dorr was arrested for treason.¹⁰⁶ At trial, Dorr argued he could not be found guilty of treason, because treason could only be committed against the United States.¹⁰⁷ The court disagreed.¹⁰⁸ In instructing the jury, the court held that treason involved "insurrection," and could be committed against a state when its goal is to prevent the state from executing its "internal and municipal" functions.¹⁰⁹ The court further remarked that judges and states unanimously agreed that treason could be committed against states.¹¹⁰

As with earlier insurrections, the *Griffin* test accurately reflects how knowledgeable Americans understood insurrection, save for the fact that Dorr's Rebellion involved resistance to state law.

C. *Insurrections During Reconstruction*

Section Three's drafters recognized Reconstruction-era uprisings as insurrections. Reconstruction-era violence occurred after the adoption of the Fourteenth Amendment.¹¹¹ That said, it can help further clarify what the drafters understood as insurrection.

Reconstruction represented a "profound change in all aspects of American life" as Congress fought to establish and protect equal rights

103. WEYL, *supra* note 95, at 195.

104. *Id.*

105. See *id.* at 195–96. Dorr's soldiers forgot to bring ammunition and when Dorr gave the order to storm the arsenal, his cannon misfired. *Id.* He was not cut out for warfare.

106. *Id.* at 197.

107. GEORGE TURNER & W.S. BURGESS, REPORT OF THE TRIAL OF THOMAS WILSON DORR FOR TREASON 31 (1844).

108. *Id.* at 81–82.

109. *Id.* at 82.

110. *Id.*

111. The Fourteenth Amendment became part of the Constitution on July 28, 1868. *Fourteenth Amendment Adopted*, HIST. (Nov. 24, 2009), <https://www.history.com/this-day-in-history/14th-amendment-adopted>. The earliest Reconstruction-era insurrection occurred in 1871. See *infra* notes 114–15.

for Black Americans.¹¹² The white supremacists who governed the South before the Civil War formed groups like “the Ku Klux Klan . . . whose purpose [was] to obstruct and destroy Reconstruction government.”¹¹³

The federal government qualified several notable incidents of anti-Reconstruction violence as insurrection and used the Insurrection Act to restore order. In South Carolina, the Ku Klux Klan violently terrorized Black voters after the 1870 election and “had rendered the local laws [to protect Black residents] ineffectual.”¹¹⁴ The loser of Louisiana’s 1872 gubernatorial election incited the White League, another white supremacist group, to murder Black voters and attempt to overthrow the state’s government.¹¹⁵ The loser of Arkansas’s 1872 gubernatorial also assembled a white supremacist mob in an attempt to overthrow the state’s government.¹¹⁶ In 1874, the White League again tried overthrowing Louisiana’s government.¹¹⁷ Outbreaks of white

112. Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1585–86 (2012).

113. Eric Foner, *Southern Violence During Reconstruction*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/reconstruction-southern-violence-during-reconstruction/> (last visited Mar. 11, 2023).

114. Ulysses S. Grant, *Special Message to the House of Representatives*, THE AM. PRESIDENCY PROJECT (Apr. 19, 1872), <https://www.presidency.ucsb.edu/documents/special-message-2071>; see also Ulysses S. Grant, *Proclamation 197—Law and Order in the State of South Carolina*, THE AM. PRESIDENCY PROJECT (Mar. 24, 1871), <https://www.presidency.ucsb.edu/documents/proclamation-197-law-and-order-the-state-south-carolina>; Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 J. NEGRO HIST. 34, 43 (1964).

115. See Ulysses S. Grant, *Proclamation 213—Law and Order in the State of Louisiana*, THE AM. PRESIDENCY PROJECT (May 22, 1873), <https://www.presidency.ucsb.edu/documents/proclamation-213-law-and-order-the-state-louisiana>. President Grant issued this proclamation after the Colfax Massacre, “one of the bloodiest and most vivid examples of” racial violence during Reconstruction. D. Grier Stephenson, Jr., *The Judicial Bookshelf*, 34 J. SUP. CT. HIST. 125, 140 (2009).

116. See Ulysses S. Grant, *Proclamation 218—Law and Order in the State of Arkansas*, THE AM. PRESIDENCY PROJECT (May 15, 1874), <https://www.presidency.ucsb.edu/documents/proclamation-218-law-and-order-the-state-arkansas> (“Whereas certain turbulent and disorderly persons, pretending that Elisha Baxter, the present executive of Arkansas, was not elected, have combined together with force and arms to resist his authority as such executive and other authorities of said State”); Earl F. Woodward, *The Brooks and Baxter War in Arkansas*, 30 ARK. HIST. Q. 315, 324–27 (1971).

117. See Ulysses S. Grant, *Proclamation 220—Law and Order in the State of Louisiana*, THE AM. PRESIDENCY PROJECT (Sept. 15, 1874), <https://www.presidency.ucsb.edu/documents/proclamation-220-law-and-order-the-state-louisiana>; Ulysses S. Grant, *Sixth Annual Message*, THE AM. PRESIDENCY PROJECT (Dec. 7, 1874), <https://www.presidency.ucsb.edu/documents/sixth-annual-message-3> (“Steps were taken by me to support the existing and recognized State government, but before the expiration of the five days the *insurrectionary movement* was practically abandoned.”)

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supremacist violence in Mississippi in 1874 followed a similar pattern of resistance.¹¹⁸

In each case, armed mobs opposed federal efforts to enforce equal rights and attempted to overthrow state governments.¹¹⁹ Each time, the president referred to the events as “insurrection” and invoked the Insurrection Act.¹²⁰ During this period, it is likely that the drafters understood insurrection like the *Griffin* court does.

V. ALTERNATIVE DEFINITIONS

A. *An Expanded Griffin Definition*

As discussed above, the *Griffin* court confines insurrection to uprisings against federal law.¹²¹ A broader *Griffin* framework would instead define insurrection as (1) an assembly of persons (2) acting to prevent the execution of any law (3) for public purposes (4) through violence, force, or intimidation. This definition more closely aligns to the historical record. Shays Insurrection, Ely’s Insurrection, and the Dorr Rebellion involved resistance to state political authority.¹²² Most Reconstruction-era violence involved opposition to state governments.¹²³

(emphasis added). See also Joe Gray Taylor, *New Orleans and Reconstruction*, 9 J. LA. HIST. ASS’N 189, 203 (1968) (describing the uprising as “possibly the largest military insurrection that has ever occurred against the government of a state of the United States”).

118. See Ulysses S. Grant, *Proclamation 223—Law and Order in the State of Mississippi*, THE AM. PRESIDENCY PROJECT (Dec. 21, 1874), <https://www.presidency.ucsb.edu/documents/proclamation-223-law-and-order-the-state-mississippi> (“[S]everal of the legally elected officers of Warren County . . . are prevented from executing the duties of their respective offices by force and violence.”).

119. See *supra* notes 114–18.

120. *Id.*

121. New Mexico *ex rel.* White v. Griffin, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1, at *47 (N.M. 1st Jud. Dist., Sept. 6, 2022).

122. See discussion *supra* Section IV.B.

123. See discussion *supra* Section IV.B. See also *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894) (“Insurrection is . . . the open and active opposition of a number of persons to the execution of law in a city or state.”).

B. Insurance Law's Definition

Insurance law has its own definition of insurrection. The leading insurance case defining insurrection, *Home Insurance Company v. Davila*, arose after the Puerto Rican Nationalist Party burned down three buildings that the plaintiff owned.¹²⁴ The plaintiff's fire insurance policy on the buildings covered losses related to riots, not insurrection.¹²⁵ Home Insurance Company refused to cover the plaintiff's losses, arguing his buildings were damaged in an insurrection.¹²⁶ The question before the *Davila* court was whether the unrest constituted insurrection.¹²⁷

The *Davila* court used past insurance case law to define insurrection as "a movement accompanied by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof."¹²⁸ Insurrection requires "(1) a violent uprising . . . (2) acting for the specific purpose of overthrowing the constituted government and seizing its powers."¹²⁹

Several problems with the *Davila* framework probably render it inappropriate for use in a Fourteenth Amendment disqualification case. For one, even in *Davila*, the court defined insurrection only "within the meaning of [Davila's] policies."¹³⁰ Outside of insurance, the court noted, insurrection can refer to more limited uprisings, but within the policies, it could not.¹³¹ Section Three disqualification actions do not relate to insurance coverage disputes, rendering *Davila's* framework inappropriate for interpreting the Fourteenth Amendment.¹³²

Nor is *Davila's* definition consistent with the original meaning of insurrection. Shays's Uprising, the Whiskey Rebellion, and Fries' Rebellion would not constitute insurrections under the *Davila*

124. See *Home Ins. Co. of New York v. Davila*, 212 F.2d 731, 732 (1st Cir. 1954).

125. *Id.*

126. *Id.* at 733.

127. *Id.* at 734–35.

128. *Id.* at 736.

129. *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1465 (S.D.N.Y. 1983).

130. *Davila*, 212 F.2d at 736.

131. See *id.* ("[W]e are dealing here with the meaning of 'insurrection' in an insurance policy.")

132. See Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-To Guide*, LAWFARE: THE JAN. 6TH PROJECT (Jan. 19, 2021), <https://www.lawfareblog.com/disqualifying-insurrectionists-and-rebels-how-guide> (arguing that *Davila* framework protects individuals engaged in "run-of-the-mill civil disobedience" because "insurrection must be 'violent'"). *New Mexico ex rel. White v. Griffin*, however, also requires "violence, force, or intimidation." No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1, at *47 (N.M. 1st Jud. Dist., Sept. 6, 2022).

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framework. Neither Shays,¹³³ Fries,¹³⁴ nor the Whiskey rebels¹³⁵ sought to overthrow the government. The insurance definition, while novel, does not provide the original meaning of insurrection within Section Three, nor is it appropriate to resolve a disqualification question.¹³⁶

C. Lynch's Definition

Another definition for insurrection comes from Myles J. Lynch's article, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*.¹³⁷ Lynch used historical, common law, and constitutional analyses to "reconstruct" Section Three.¹³⁸

Lynch defines insurrection using the Militia Act of 1795, the predecessor to the Insurrection Act of 1807.¹³⁹ The Militia Act gave the President the power to call forth soldiers "whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals."¹⁴⁰ Before calling forth the militia, the President must make a proclamation to commanding "the insurgents to disperse."¹⁴¹

Lynch then ties the Militia Act's requisites to a definition for insurrection under Section Three.¹⁴² Insurrection, then, requires two conditions. First, a combination of persons "too powerful to be suppressed" must oppose or obstruct the execution of the law.¹⁴³ Second, the opposition or obstruction must be so extreme that the President

133. See Brooke, *supra* note 57, at 426–28.

134. See discussion *supra* Section IV.B.3.

135. See discussion *supra* Section III.C.2.

136. That said, Couy Griffin's petition for certiorari uses the *Davila* definition to argue that the trial court incorrectly deemed the Capitol Attack an insurrection. Petition for Writ of Certiorari at 5, *Griffin v. New Mexico*, 2023 WL 6217210 (2023) (No. 23-279), ("[T]he trial court made no finding that the goal of said events was to overthrow the government or to seize the powers thereof.")

137. See Lynch, *supra* note 18, at 153.

138. See *id.* at 157.

139. *Id.* at 167.

140. Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424 (providing for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions).

141. *Id.* § 3. The President's statutory power to call forth the militia remains "largely the same." Lynch, *supra* note 18, at 169.

142. See Lynch, *supra* note 18, at 181.

143. Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424.

issues a proclamation calling forth the militia.¹⁴⁴ Anyone who takes part in such a combination would face disqualification under Section Three.¹⁴⁵

Lynch argues his definition protects the right to legitimate civil disobedience because the thresholds for invoking the Insurrection Act are so high.¹⁴⁶ If the President invoked the Insurrection Act against a group of peaceful protestors, for instance, “a court (or Congress) would [not] allow for a deprivation of somebody's right to hold public office according only to the President's subjective and secretive assertion.”¹⁴⁷ Under Lynch's definition, however, a President who incites a violent uprising against their own government would not engage in insurrection until they invoke the Insurrection Act.¹⁴⁸ Section Three's framers, who feared an unrepentant Confederate like Robert E. Lee would win the Presidency, likely would not have understood disqualification to depend on the President's discretion. Lynch's definition, therefore, does not conform to the original meaning of the term insurrection.

D. Baude and Paulsen's Definition

Baude and Paulsen define insurrection as “concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect.”¹⁴⁹ They sought out the “the *objective, original* meaning of the [term],”¹⁵⁰ using contemporaneous dictionary definitions,¹⁵¹ President Lincoln's speeches,¹⁵² congressional debates and enactments,¹⁵³ case law,¹⁵⁴ and invocations of the Insurrection Act and its predecessors.¹⁵⁵

Baude and Paulsen's definition of insurrection is broader than *Griffin's*. It includes no public purpose requirement and does not examine

144. *Id.*

145. *See* Lynch, *supra* note 18, at 181.

146. *See id.*

147. *Id.* at 180.

148. Then-President Trump did not invoke the Insurrection Act on January 6th. *See* 2021 Donald Trump Proclamations, FED. REG., <https://www.federalregister.gov/presidential-documents/proclamations/donald-trump/2021> (last visited Nov. 19, 2023).

149. Baude & Paulsen, *supra* note 10, at 64.

150. *Id.* at 70.

151. *Id.*

152. *Id.* at 74–79.

153. *Id.* at 79–84.

154. *Id.* at 84–87. *See also* The Prize Cases, 67 U.S. 635 (1863).

155. *Id.* at 87–98.

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Hoxie.¹⁵⁶ Someone like Hoxie, who assembles a gang to liberate personal property from government impoundment for their own purely private reasons, could qualify as an insurrectionist under Baude and Paulsen's definition, an outcome that knowledgeable Americans at the time did not contemplate.

E. The Original Meaning of Insurrection

An expanded version of the *Griffin* court's test for insurrection—an assembly of persons acting to prevent the execution of law for public purposes through violence, force, or intimidation—fully encapsulates the original meaning of insurrection. The original meaning of insurrection went beyond resistance to federal law. It does not depend on the President invoking the Insurrection Act, like Lynch's definition. It does not relate to insurance. But it does require the mob act for a public purpose.

VI. CONCLUSION

Insurrection, as used in Section Three of the Fourteenth Amendment, originally meant an assembly of persons seeking to prevent the execution of a law for a public purpose through violence, force, or intimidation.

Defining insurrection is not a semantic exercise. Political violence is becoming more frequent¹⁵⁷ and entering the mainstream.¹⁵⁸ Those who engaged in insurrection on January 6th have served or are serving in

¹⁵⁶ *Id.* at 27–28. Nor do Baude and Paulsen examine *Griffin's* definition of insurrection. *See id.*

¹⁵⁷ *See generally* Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160 (2021); Nicholas Riccardi, *U.S. Grapples With Rising Threats of Political Violence as 2024 Election Looms*, PBS (Aug. 12, 2023, 12:08 PM), <https://www.pbs.org/newshour/politics/u-s-grapples-with-rising-threats-of-political-violence-as-2024-election-looms>; Michael Kaplan & Kathryn Watson, *Capitol Police Investigated About 7,500 Cases of Potential Threats Against Lawmakers in 2022*, CBS NEWS (Jan. 17, 2023, 6:17 PM), <https://www.cbsnews.com/news/threats-congress-2022/>.

¹⁵⁸ *See generally* Lisa Lerer & Astead W. Herndon, *Menace Enters the Republican Mainstream*, N.Y. TIMES (Nov. 12, 2021), <https://www.nytimes.com/2021/11/12/us/politics/republican-violent-rhetoric.html>.

public office.¹⁵⁹ The Capitol attack may have been the first insurrection in nearly a century, but it may not be the last.

After the Civil War, Congress built a tool into the Fourteenth Amendment to deal with insurrection. Courts need to figure out how to use it. Understanding what is and is not an insurrection is a good place to start.

159. Catie Edmondson, *They Were at the Capitol on Jan. 6. Now They're Running for Congress*, N.Y. TIMES (Sept. 2, 2022), <https://www.nytimes.com/2022/09/02/us/politics/jan-6-congress.html>.