

SECTION THREE OF THE FOURTEENTH AMENDMENT: INSURRECTION

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ABSTRACT

The public, scholarly, and legal debate over whether former president Donald Trump is eligible to hold office under Section Three of the Fourteenth Amendment has focused far more on technical legal questions than on whether Trump engaged in an insurrection. Scholarly and public commentary rarely examines the constitutional/common law of insurrection, preferring instead to examine whether Trump is exempt from Section Three because Section Three either exempts presidents or the presidency from disqualification or because Section Three is not self-executing. *Trump v. Anderson* (2024) focused on state incapacity to disqualify “oathbreaking insurrectionists” rather than on whether Trump was an “oathbreaking insurrectionist.” One consequence of this omission in the popular press and Supreme Court is the impression that what constituted an insurrection or engaging in an insurrection was not well defined in 1866, that the Reconstruction Republican framers largely jerry-rigged a vague understanding of insurrection into the Constitution.

This Article demonstrates that the constitutional/common law of insurrection was well-established and well-understood in 1866. “Insurrection” at the time Section Three of the Fourteenth Amendment was framed and ratified “had a precise and well-understood meaning.” This understanding was articulated from the American

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Revolution to Reconstruction by the Supreme Court, by Supreme Court Justices riding circuit, by other federal judges, by state court justices, and by the leading legal treatise writers during the period between the ratification of the Constitution and Reconstruction. Clear standards exist from 1866 that enable state and federal officials to determine whether the persons responsible for drafting Section Three of the Fourteenth Amendment would have thought the events of January 6, 2021, were an insurrection and whether Trump engaged in that insurrection.

The Congressional Globe, case survey, and constitutional commentaries clearly support the following conclusions: First, an insurrection at the time Section Three was framed consisted of an assemblage resisting the implementation of any law by force, violence, and intimidation for a public purpose and was not limited to rebellious attempts to overthrow the government. Second, the events of January 6, 2021, are consistent with the legal understanding of insurrection in 1866. Third, constitutional authorities before, during, and immediately after the Civil War maintained that any person who knowingly contributed to an insurrection was engaged in that insurrection, even if that person did not personally commit an act of violence or was far from the scene of the violence, force, and intimidation. Fourth, if the allegations made by the *Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol* and state decisions disqualifying Trump are true, the Former President participated in the insurrection that took place on January 6, 2021.

Congress relied on this consensual understanding of insurrection when framing the Second Confiscation Act of 1862. The Senators who insisted that Section Two of that measure punish persons who “shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States” stated that they were not altering the law of treason and insurrection by describing separate offenses. Section Two was rooted in part by a misinterpretation of judicial decisions that some Senators believed required that they spell out what they believed constituted insurrectionary behavior and in part because no one wanted all participants in the Civil War to be executed for treason. If members of the Thirty-Seventh Congress would have thought that an insurrection took place on January 6, 2021, and Trump participated in that insurrection, then those members of the Thirty-Ninth Congress who framed Section Three would have thought Trump is disqualified from holding state or federal office in the United States.

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INTRODUCTION

The public and scholarly debate over whether former president Donald Trump is eligible to hold office under Section Three of the Fourteenth Amendment has focused far more on technical legal questions than on whether Trump engaged in an insurrection. Scholarly and public commentary rarely examines the constitutional/common law of insurrection, preferring instead to examine whether Trump is exempt from Section Three because Section Three either exempts presidents or the presidency from disqualification or because Section Three is not self-executing.¹ One consequence

¹ See Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 HARV. J.L. & PUB. POL’Y (forthcoming 2024) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838 [<https://perma.cc/WM34-6Z74>] (discussing whether Section Three is self-executing, whether Section Three covers the presidency, whether Section Three covers candidates for the presidency, and whether Section Three applies to insurrections other than the Civil War); James A. Heilpern & Michael T. Worley, *Evidence that the President is an “Officer of the United States” for Purposes of Section 3 of the Fourteenth Amendment*, S. CAL. L. REV. (forthcoming 2024) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4681108 [<https://perma.cc/Z4U3-WUD8>]; Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President Into Section 3*, 28 TEX. REV. L. & POL. 360, 361–62, 366, 515 (2024) (focusing on whether the president is an officer of the United States and whether Section Three is self-executing, but also considering the Constitution’s definition of insurrection). But see William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 611, 726 (2024) (discussing at length Civil War texts, but not the pre-Civil War history of insurrection).

of this is the impression that what constituted an insurrection or engaging in an insurrection was not well-defined in 1866, that the Reconstruction Republican framers largely jerry-rigged a vague understanding of insurrection into the Constitution.²

The Supreme Court in *Trump v. Anderson*³ made no effort to correct this misimpression. The judicial majority on dubious historical and textual grounds⁴ ruled that states have no power to disqualify “oathbreaking insurrectionists”⁵ under Section Three of the Fourteenth Amendment.⁶ No opinion in *Trump* considered whether the Supreme Court of Colorado, when holding that Trump was constitutionally disqualified from being on the presidential ballot in that state, correctly determined for Section Three purposes what constituted an insurrection;⁷ what constituted being engaged in an insurrection;⁸ whether the events of January 6, 2021, met the constitutional conditions for an insurrection;⁹ or whether Trump met the constitutional conditions for being engaged in an insurrection.¹⁰ The *Trump* Court would have reached the same conclusion had the Colorado Court found that Trump ordered the murder of every Democratic member of Congress in his effort to overturn the results of the 2020 national election.¹¹

This failure to explore the constitutional and common law of insurrection and treason from the American Revolution to Reconstruction is unfortunate. The Supreme Court has increasingly turned to history when determining the meaning of constitutional provisions. History, some Justices claim, provides a more objective basis than other methods of constitutional interpretation for implementing constitutional words.¹²

² See Ilya Somin, *January 6 and Insurrection—a Response to Ross Douthat*, VOLOKH CONSPIRACY (Jan. 12, 2024, 4:20 PM), <https://reason.com/volokh/2024/01/12/january-6-and-insurrection-a-response-to-ross-douthat/> [https://perma.cc/5F2X-TJ47]; Ross Douthat, *Why Jan. 6 Wasn’t an Insurrection*, N.Y. TIMES (Jan. 12, 2024), <https://www.nytimes.com/2024/01/12/opinion/jan-6-not-insurrection.html> [https://perma.cc/S8YQ-ZGD9]; Steven Calabresi, *January 6, 2021 Was Not an Insurrection*, VOLOKH CONSPIRACY (Jan. 6, 2024, 8:12 PM), <https://reason.com/volokh/2024/01/06/january-6-2021-was-not-an-insurrection/> [https://perma.cc/SR7S-LG5K].

³ See generally 601 U.S. 100 (2024).

⁴ See Mark A. Graber, *Originalism as Novelty and Originalism as Authentic: Trump v. Anderson v. The Reconstruction’s Fourteenth Amendment*, 93 GEO. WASH. L. REV. ARGUENDO (forthcoming 2024) (manuscript at 1).

⁵ *Trump*, 601 U.S. at 121 (Sotomayor, Kagan & Jackson, JJ., concurring).

⁶ See *id.* at 110.

⁷ See *Anderson v. Griswold*, 543 P.3d 283, 330 (Colo. 2023), *rev’d*, 601 U.S. 100 (2024).

⁸ See *id.* at 331–32.

⁹ See *id.* at 330–31.

¹⁰ See *id.* at 332–36.

¹¹ See Graber, *supra* note 4 (manuscript at 8).

¹² See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 25 (2022) (“[R]eliance on history to inform the meaning of constitutional text . . . is, in our view, more legitimate, and more administrable, than asking judges to ‘make difficult empirical judgments’ about ‘the costs and benefits of firearms restrictions’ . . .”).

All the Justices, even those who employ a greater variety of interpretive tools, regard history as an important source for determining how best to understand constitutional phrases.¹³ History can provide this more objective basis or important source only when the history is accurate and unambiguous.¹⁴ Inaccurate history imports judicial bias into constitutional law. Ambiguous history, Justice Robert Jackson observed, “yields no net result but only supplies more or less apt quotations from respected sources on each side of any question” that “largely cancel each other.”¹⁵

The following pages provide accurate, unambiguous information on how persons in 1866, the persons who framed Section Three of the Fourteenth Amendment in particular, understood the constitutional disqualification of past and present office holders who engaged in an insurrection or rebellion against the United States.¹⁶ Section Three states:

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.¹⁷

The analysis below is based on a close reading of the debates that took place during the first session of the Thirty-Ninth Congress that are memorialized in the *Congressional Globe*, the debates on confiscation that took place during the second session of the Thirty-Seventh Congress that are memorialized in the *Congressional Globe*, an analysis and survey of state and federal cases from the founding until 1873,

¹³ See *id.* at 102–03 (Breyer, J., dissenting) (“Although I agree that history can often be a useful tool in determining the meaning and scope of constitutional provisions, I believe the Court’s near-exclusive reliance on that single tool today goes much too far.”).

¹⁴ See Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, GEO. L.J. (forthcoming 2024) (manuscript at 4, 33, 35), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4538260 [<https://perma.cc/Z28B-AEMY>].

¹⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).

¹⁶ A companion paper examines how persons in 1866, the persons who framed Section Three, in particular, understood such preliminaries as the purpose of Section Three, whether Section Three was self-executing, required a criminal conviction, or was limited to the Civil War, and whether presidents and the presidency are exempt from constitutional disqualification. See Mark A. Graber, *Section 3 of the Fourteenth Amendment: Is Trump’s Innocence Irrelevant?*, MD. L. REV. (forthcoming) (manuscript at 4–5).

¹⁷ U.S. CONST. amend. XIV, § 3.

an analysis and survey of the leading legal treatises of that time period, and a review of how the federal legislative and executive branches implemented the Ironclad Oath, which required prospective federal officeholders other than the President to swear that they had “never voluntarily borne arms against the United States” and had “voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto.”¹⁸ The reading of the *Congressional Globe* pays particular attention to how Republicans spoke of “treason” and “insurrection.” The case survey includes all opinions that speak of “insurrection,” “treason,” “levy war,” “levied war,” “levying war,” or that used some version of “levy” in the same sentence as “war.”¹⁹

The *Congressional Globe*, case survey, and constitutional commentaries clearly support the following conclusions. First, an insurrection at the time Section Three was framed consisted of an assemblage resisting the implementation of any law by force, violence, and intimidation for a public purpose and was not limited to rebellious attempts to overthrow the government. Second, the events of January 6, 2021, are consistent with the legal understanding of insurrection in 1866. Third, constitutional authorities before, during, and immediately after the Civil War maintained that any person who knowingly contributes to an insurrection has engaged in the insurrection, even if that person did not personally commit an act of violence or was far from the scene of the violence, force, and intimidation. Fourth, if the allegations made by the *Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol*²⁰ and state decisions disqualifying Donald Trump²¹ are accurate, Trump participated in the insurrection that took place on January 6, 2021.

¹⁸ Oath of Office for Those in Public Service, Ch. 128, 12 Stat. 502, 37th Cong. (1862).

¹⁹ CONG. GLOBE, 37th Cong., 2d Sess. 2166–67 (1862). Unsurprisingly, many uses of “officers of the United States,” “insurrection,” “treason,” and similar words/phrases do not provide much help interpreting Section Three. Members of Congress often used such language without self-consciously considering whether their usage reflected common legal meanings precisely. Many cases focus on the consequences of a conviction for treason, most notably forfeiture of property, without discussing the elements of treason or the conduct alleged to be treasonous. Other uses were metaphorical. Chief Justice John Marshall declared, “We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.” *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). Fortunately, more than enough cases and commentary exist to demonstrate a broad consensus on the legal meaning of “official of the United States,” and “engaged in insurrection” at the time Section Three of the Fourteenth Amendment was framed and ratified.

²⁰ See H.R. REP. NO. 117-663, at 689–90 (2022) [hereinafter SELECT COMMITTEE, FINAL REPORT].

²¹ See, e.g., *Anderson v. Griswold*, 543 P.3d 283, 342 (Colo. 2023), *rev’d*, 601 U.S. 100 (2024); Ruling of the Secretary of State, ME 32–33 (Dec. 28, 2023), <https://www.maine.gov/sos/news/2023/Decision%20in%20Challenge%20to%20Trump%20Presidential%20Primary%20Petitions.pdf> [<https://perma.cc/S8GC-HZNF>] [hereinafter Ruling of the Secretary of State]; *Anderson v. Trump*, 2024 COEL 000013, 2024 Ill. Cir. LEXIS 1, at *22–23 (Ill. Cir. Ct. Feb. 28, 2024).

I. AMERICAN JUDGES AND LAWYERS BEFORE, DURING, AND IMMEDIATELY AFTER
THE CIVIL WAR MAINTAINED THAT A CONSTITUTIONAL INSURRECTION
OCCURRED WHEN TWO OR MORE PERSONS BY FORCE AND VIOLENCE RESISTED
THE EXECUTION OF ANY FEDERAL LAW FOR A PUBLIC PURPOSE

“Insurrection” at the time Section Three of the Fourteenth Amendment was framed and ratified “had a precise and well-understood meaning.”²² The understanding was articulated by the Supreme Court,²³ by Supreme Court Justices riding circuit,²⁴ by other federal justices,²⁵ by state court justices,²⁶ and by the leading legal treatise

²² CARLTON F.W. LARSON, *ON TREASON: A CITIZEN’S GUIDE TO THE LAW* 7 (2020).

²³ *Ex parte Vallandigham*, 28 F. Cas. 874, 888 (C.C.S.D. Ohio 1863) (No. 16,816); Opinion on the Motion to Introduce Certain Evidence in the Trial of Aaron Burr, For Treason, Pronounced Monday, August 31, 8 U.S. (4 Cranch) 470, 472, 481 (1807); *Ex parte Bollman* and *Ex Parte Swartwout*, 8 U.S. (4 Cranch) 75, 128 (1807); *United States v. Burr*, 25 F. Cas. 55, 163 (C.C.D. Va. 1807) (No. 14,693); *United States v. Vigol*, 2 U.S. (2 Dall.) 346, 347 (1795); *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 357 (1795).

²⁴ See Judge Field, *The Charge Delivered by Judge Field to the Grand Jury Impaneled for the Circuit Court of the United States for the Northern District of California at the City of San Francisco on the Thirteenth of August, 1863*, in *TREASON AND REBELLION: BEING IN PART THE LEGISLATION OF CONGRESS AND OF THE STATE OF CALIFORNIA* 27, 28–31 (S.F., Towne & Bacon, Book and Job Printers 1863); *United States v. Greathouse*, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863) (No. 15,254); Charge to Grand Jury—Treason, 30 F. Cas. 1034, 1035 (C.C.S.D.N.Y. 1861) (No. 18,271); JOHN CATRON ET AL., *CHARGE TO THE GRAND JURY BY THE COURT* 4 (St. Louis, Democratic Book and Job Office 1861); Justice Swayne, *United States v. Chenoweth*, in *OPINION OF JUDGE N.K. HALL, OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK ON HABEAS CORPUS IN THE CASE OF REV. JUDSON D. BENEDICT; AND DOCUMENTS AND STATEMENT OF FACTS RELATING THERETO* 109, 109 (Buffalo, N.Y., Joseph Warren & Co. 1863); *United States v. Hanway*, 26 F. Cas. 105, 127–28 (C.C.E.D. Pa. 1851) (No. 15,299); Charge to Grand Jury—Neutrality Laws & Treason, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851) (No. 18,269); Charge to Grand Jury—Treason, 30 F. Cas. 1046, 1047 (C.C.D.R.I. 1842) (No. 18,275); *United States v. Hoxie*, 26 F. Cas. 397, 399 (C.C.D. Vt. 1808) (No. 15,407); Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) (No. 5,127); James Iredell, *A Charge Delivered to the Grand Jury of the United States, for the District of Pennsylvania, in the Circuit Court of the United States, for the Said District, Held in the City of Philadelphia, April 11, 1789*, in 2 GRIFFIN J. MCREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL, ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* 551, 568–69 (N.Y., D. Appleton & Co. 1858).

²⁵ See *Greathouse*, 26 F. Cas. at 21–22; CONNALLY F. TRIGG, *CHARGE TO THE GRAND JURY IN THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, AT NASHVILLE, ON THE EIGHTH DAY OF JULY, 1863*, at 6–7 (Nashville, Tenn., Barry, Winham 1863); *United States v. Greiner*, 26 F. Cas. 36, 38–39 (C.C.E.D. Pa. 1861) (No. 15,262); Charge to Grand Jury—Treason & Piracy, 30 F. Cas. 1049, 1049 (C.C.D. Mass. 1861) (No. 18,277); Judge Miller’s *Charge to the Grand Jury on the Law of Treason, and the Present State of Our Country*, 3 W.L. MONTHLY 360, 362 (1861); *Charge to Grand Jury—Treason*, 30 F. Cas. at 1033; Charge to Grand Jury—Fugitive Slave Law, 30 F. Cas. 1015, 1015 (D.C.D. Mass. 1851) (No. 18,263); Hon. John K. Kane, *The Law of Treason: In the Circuit Court of the United States Eastern District of Pennsylvania*, 9 W. L.J. 103, 103 (1852) [hereinafter *Judge*

writers during the period between the ratification of the Constitution and Reconstruction.²⁷ American jurists understood an insurrection against the United States to

Kane's Hanway Charge]; *Burr*, 25 F. Cas. at 163; *United States v. Bollman*, 24 F. Cas. 1189, 1192–93 (C.C.D.C. 1807) (No. 14,622).

²⁶ See *Salisbury Hubbard & Co. v. Harnden Express Co.*, 10 R.I. 244, 247 (1872) (“[A]n insurrection against lawful authority”); *Worthy v. Barrett*, 63 N.C. 206, 207, 209 (1869); *Hague v. Powers*, 39 Barb. 427, 453 (N.Y. Gen. Term 1863) (“[F]or the crime of treason will be committed by any citizen who shall resist by force any law of the United States, or adhere to their enemies, giving them aid and comfort.”); *Nichols v. Pinner*, 18 N.Y. 295, 303 (1858) (“An intent to overthrow the government is not treason without an overt act.”); *Ingram's Heirs v. Cocke*, 1 Tenn. 22, 28 (1804).

²⁷ See GEORGE S. BOUTWELL, *THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY* 319 (Bos., D.C. Heath 1895); JOHN D. LAWSON, *DEFENCES TO CRIME: THE ADJUDGED CASES IN THE AMERICAN AND ENGLISH REPORTS WHEREIN THE DIFFERENT DEFENCES TO CRIME ARE CONTAINED: WITH NOTES* 114 (S.F., S. Whitney 1885); JOHN WILDER MAY, *THE LAW OF CRIMES* 225 (Bos., Little, Brown, & Co. 1881); FREDERICK C. BRIGHTLY, *A DIGEST OF THE DECISIONS OF THE FEDERAL COURTS, FROM THE ORGANIZATION OF THE GOVERNMENT TO THE PRESENT TIME* 214–16 (Phila., Kay & Brother 1868); H.W. HALLECK, *ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR* 151 (Phila., J.B. Lippincott & Co. 1866); FRANCIS LIEBER, *INSTRUCTION FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES, IN THE FIELD* 34 (N.Y., D. Van Nostrand 1863); DANIEL AGNEW, *OUR NATIONAL CONSTITUTION: ITS ADAPTATION TO A STATE OF WAR OR INSURRECTION* 7 (Phila., C. Sherman, Son & Co. 2d ed. 1863); WILLIAM WHITING, *THE WAR POWERS OF THE PRESIDENT, AND THE LEGISLATIVE POWERS OF CONGRESS IN RELATION TO REBELLION, TREASON AND SLAVERY* 93 (Bos., J.L. Shorey 1862); 2 FRANCIS WHARTON, *A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: COMPRISING A GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW AND A DIGEST OF THE PENAL STATUTES OF THE GENERAL GOVERNMENT, AND OF MASSACHUSETTS, NEW YORK, PENNSYLVANIA, VIRGINIA, AND OPINION: WITH THE DECISIONS ON CASES ARISING UPON THOSE STATUTES* 486–88 (Phila., Kay & Bro, 5th ed. 1861); HENRY FLANDERS, *AN EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES: DESIGNED AS A MANUAL OF INSTRUCTION* 229 (Phila., E.H. Butler 1860) (“A conspiracy or agreement to levy war does not amount to treason.”); ANDREW W. YOUNG, *THE CITIZEN'S MANUAL OF GOVERNMENT AND LAW: COMPRISING THE ELEMENTARY PRINCIPLES OF CIVIL GOVERNMENT; A PRACTICAL VIEW OF THE STATE GOVERNMENTS; AND OF THE GOVERNMENT OF THE UNITED STATES; A DIGEST OF COMMON AND STATUTORY LAW, AND OF THE LAW OF NATIONS; AND A SUMMARY OF PARLIAMENTARY RULES FOR THE PRACTICE OF DELIBERATIVE ASSEMBLIES* 147 (N.Y., H. Dayton, enlarged ed. 1858); 3 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* 211–16 (Bos., C.C. Little & J. Brown 1853); *On the Law of Treason*, 14 MONTHLY L. REP. 409, 416 (George P. Sanger ed., Bos., Little, Brown & Co. 1851); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION* 669–72 (Bos., Hilliard, Gray & Co. 1833); WILLIAM ALEXANDER DUER, *OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES* 183–84 (N.Y., Collins & Hannay 1833); 6 NATHAN DANE, *A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW: WITH OCCASIONAL NOTES AND COMMENTS* 691 (Bos., Cummings, Hilliard & Co. 1823); WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 305–06 (Phila., H.C. Carey & I. Lea 1825); James Wilson, *Lectures on Law*, in 3 THE WORKS OF THE HONORABLE JAMES WILSON, L.L.D.: LATE ONE OF THE

be an attempt by an assemblage, for public reasons, to obstruct by force the implementation of federal law or obstruct a federal proceeding. Broad agreement existed among judges and influential legal commentators that the four elements of an insurrection against the United States were: (a) an assemblage; (b) actual resistance to a federal²⁸ law or federal proceeding; (c) force or intimidation; and (d) a public purpose. The constitutional law of insurrection and treason when Section Three was framed and ratified did not require for conviction or disqualification an effort to overthrow the government, an assemblage using force sufficient to overwhelm ordinary law enforcement, or a presidential proclamation that an insurrection or rebellion was taking place. Slight variations in formulation existed. Not every legal opinion or treatise spelled out every element of an insurrection. Nevertheless, with respect to determining whether the events of January 6, 2021, constituted an insurrection, no material differences exist in the definitions of insurrection offered by American jurists from 1789 until 1868.

This consensus existed within the legal community. Most Representatives and Senators during the Civil War and early Reconstruction were lawyers, who as part of their education and practice had at least read the treatises that laid out the common/constitutional law of treason and insurrection. Many members of Congress during the debates over the Second Confiscation Act demonstrated a knowledge of the common/constitutional law of treason and insurrection.²⁹ Nevertheless, no representative during the debates over the Fourteenth Amendment spelled out any elements of the common or constitutional law treason, elaborated contrary elements of treason, or made any comment from which the events that the speaker thought triggered Section Three disqualification might be inferred. How the average citizen in 1866 understood treason and insurrection is unknown.³⁰

A. Basics

The conditions for disqualification set out in Section Three of the Fourteenth Amendment mirror the definition of treason set out in Article III, Section Three. Section Three disqualifies past and present officeholders who, after taking the oath of office, “engaged in insurrection or rebellion against the [United States], or [gave] aid or comfort to the enemies thereof.”³¹ Article III, Section Three declares that “[t]reason against the United States, shall consist only in levying War against them,

ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, AND PROFESSOR OF LAW IN THE COLLEGE OF PHILADELPHIA 102, 102–04 (Bird Wilson ed., Phila., Lorenzo Press 1804). *But see* 2 JOEL PRINTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 661 (Bos., Little, Brown & Co. 1859).

²⁸ Insurrections against states were directed against state laws or proceedings.

²⁹ *See infra* notes 55, 67 and accompanying text.

³⁰ *See* LARSON, *supra* note 22, at ix–xi (noting the various behaviors some contemporary Americans claim are treasonous).

³¹ U.S. CONST. amend. XIV, § 3.

or in adhering to their Enemies, [and] giving them Aid and Comfort.” Americans in the nineteenth century regarded “insurrection” as a synonym for “levying war,” with the proviso, as Chief Justice John Marshall noted in *United States v. Burr*, that “levying war” was a “technical term.”³² “Levying war” in the constitutional sense did not require, as Trump’s lawyers in *Trump v. Anderson* suggested,³³ massive armies or violent national conflict.³⁴ Persons could “levy war” against the United States without the formal declarations required by the law of nations to determine the existence of a war between independent nations.³⁵ Many Union legal authorities during the first five years of the 1860s denied that a war was occurring between the states, preferring to describe the military hostilities as an insurrection.³⁶ Persons levied war against the United States when they sought to overthrow the government of the United States, resisted by force federal authority, or resisted by force the implementation of any federal law.

An insurrection could be aimed at secession or overturning the government, but as the insurrection trials of persons involved in the Whiskey Insurrection, the Fries Insurrection, the Christiana Riots, and the Taos Insurrection demonstrate, an insurrection could occur when Pennsylvania farmers in 1794 burnt the house of a tax collector,³⁷ when John Fries and friends in 1799³⁸ made a show of arms that resulted in the release of persons charged with federal tax evasion,³⁹ when Pennsylvanians in 1851 obstructed official efforts to capture an alleged fugitive slave,⁴⁰ and when

³² *United States v. Burr*, 25 F. Cas. 55, 159 (C.C.D. Va. 1807) (No. 14,693); see *United States v. Greathouse*, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254); *United States v. Hanway*, 26 F. Cas. 105, 127 (C.C.E.D. Pa. 1851) (No. 15,299); AGNEW, *supra* note 27.

³³ See Petition for Writ of Certiorari at 27, *Trump v. Anderson*, No. 23-719 (Jan. 3, 2024), 2024 WL 81676; see also Patrick Morrissey, Brief of Amici Curiae States of Indiana, West Virginia, 25 Other States, and the Arizona Legislature in Support of Petitioner at 16, *Trump v. Anderson*, 601 U.S. 100 (2024) (No. 23-719), 2024 WL 268198.

³⁴ See RAWLE, *supra* note 27, at 305. Many Union legal authorities during the first five years of 1860s denied that a war was occurring between the states, preferring to describe the military hostilities as an insurrection. See *The Brig Amy Warwick (Prize Cases)*, 67 U.S. (2 Black) 635, 698 (1863).

³⁵ See RAWLE, *supra* note 27, at 305.

³⁶ See *Prize Cases*, 67 U.S. (2 Black) at 642, 698.

³⁷ For references to the Whiskey insurrection as an “insurrection,” see CONG. GLOBE, 37th Cong., 2d Sess. 2898 (1862); *Case of Fries*, 9 F. Cas. 924, 933 (C.C.D. Pa. 1800) (No. 5,127); *Burr*, 25 F. Cas. at 154; *United States v. Hoxie*, 26 F. Cas. 397, 399 (C.C.D. Vt. 1808); *Moore v. Houston*, 3 Serg. & Rawle 169, 177 n.1 (Pa. 1817); *Charge to Grand Jury—Fugitive Slave Law*, 30 F. Cas. 1015, 1015 (D.C.D. Mass. 1851) (No. 18,263); STORY, *supra* note 27, at 87, 343 n.5.

³⁸ For references to the Fries Insurrection as an “insurrection,” see *Case of Fries*, 9 F. Cas. at 933, 944; *Burr*, 25 F. Cas. at 184 n.5; *Hoxie*, 26 F. Cas. at 399; *State v. Williams*, 3 Stew. 454, 471 (Ala. 1851); *Charge to Grand Jury—Fugitive Slave Law*, 30 F. Cas. at 1015.

³⁹ LARSON, *supra* note 22, at 29.

⁴⁰ In addition to these examples, nineteenth-century Americans referred to Shay’s Rebellion as an insurrection. See CONG. GLOBE, 37th Cong., 2d Sess. 2898 (1862); *Powell v.*

rival forces in Kansas resisted laws on slavery.⁴¹ Political actors, including Abraham Lincoln, made repeated references to slave insurrections.⁴² Presidents and courts spoke of insurrections when northerners sought to rescue fugitive slaves⁴³ and when anti-slavery advocates resisted the spread of slavery into Kansas. Contemporaries spoke of the Dorr Rebellion in Rhode Island as an “insurrection.”⁴⁴

Levying war was often a local affair. An insurrection could be limited to a neighborhood or county as long as persons were resisting by force or violence the implementation of federal law. Adjudicating a case arising from the Whiskey Insurrection, Justice William Patterson in *United States v. Mitchell* (1795) declared “an insurrection with an avowed design to suppress public offices, is an act of levying war.”⁴⁵ District Judge David Allen Smalley when charging a jury during the Civil War maintained,

If a body of people conspire and meditate an insurrection, to resist or oppose the laws of the United States by force, they are only guilty of a high misdemeanor; but, if they proceed to carry such intention into execution by force, they are guilty of treason by levying war.⁴⁶

The relationship between Section Three of the Fourteenth Amendment and Article III, Section Three, which spells out the elements of treason, was never made explicit during the debates over the ratification of the Fourteenth Amendment, but

Murray, 10 Paige Ch. 256, 257–58 (N.Y. Ch. 1843); STORY, *supra* note 27, at 680; Attorney General *ex rel.* Bashford v. Barstow, 4 Wis. 567, 614 (1855) (referring to Dorr’s Rebellion as an insurrection); Gregory v. Baugh, 25 Va. 611 (4 Rand.), 626 (1827) (referring to Bacon’s 1676 “insurrection”).

⁴¹ CONG. GLOBE, 34th Cong., 1st Sess. 298 (1856); *see* LARSON, *supra* note 22, at 29–30 (noting that “early American decisions” punished actions as treason that “had no intent to overthrow the federal government”).

⁴² *See, e.g.,* Ross v. Vertner, 5 Miss. (5 Howard) 305, 336 (1840); Jack v. Martin, 14 Wend. 507, 537 (N.Y. 1835); County of Pulaski v. Irvin, 4 Ark. 473, 504 (1842); Fisher’s Negroes v. Dabbs, 14 Tenn. (6 Yer.) 119, 127 (1834); *see also* Caldwell v. State, 1 Stew. & P. 327, 426–27 (Ala. 1832) (discussing “insurrections” by Native Americans); Smith v. Hancock, 7 Ky. (4 Bibb) 222, 223–24 (1815); Parter v. The Friendship, 18 F. Cas. 1271, 1271 (C.C.D. Mass. 1831) (No. 10,783); Atwood’s Heirs v. Beck, 21 Ala. 590, 599, 615–16 (1852).

⁴³ *Charge to Grand Jury—Fugitive Slave Law*, 30 F. Cas. at 1015; STORY, *supra* note 27, at 740.

⁴⁴ *See* Luther v. Borden, 48 U.S. (7 How.) 1, 34 (1849); CONG. GLOBE, 37th Cong., 2d Sess. 2209, 2223 (1862); 2 LIFE AND LETTERS OF JOSEPH STORY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND DANE PROFESSOR OF LAW AT HARVARD UNIVERSITY 415 (William W. Story ed., Bos., Little & Brown 1851).

⁴⁵ *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 349 (1795).

⁴⁶ *Charge to Grand Jury—Treason*, 30 F. Cas. 1032, 1033 (C.C.S.D.N.Y. 1861) (No. 18,270); TRIGG, *supra* note 25, at 8.

numerous speakers on the floor of Congress indicated that the purpose of the former constitutional provision was to exclude traitors from public office. “I am for the exclusion of traitors and rebels from exercising control and power,” Senator Richard Yates of Illinois declared immediately before the Senate approved the final version of the Fourteenth Amendment.⁴⁷ Contrary to a recent law review article on the subject by a recent law school graduate,⁴⁸ a presidential proclamation is not necessary for an insurrection to take place. Presidents have sometimes issued proclamations, as in the Whiskey Insurrection of 1794.⁴⁹ In other instances, presidents in speeches have described events as “insurrections” without issuing a proclamation. In still other instances, courts declared events to be insurrections in the absence of any presidential statement on the subject. No judge before, during, or immediately after the Civil War required the prosecution to provide presidential authority when seeking to establish the defendant had engaged in an insurrection.⁵⁰

The constitutional law of treason and insurrection when Section Three was framed made fairly clear distinctions between “levying war against the” United States and “adhering to their Enemies.” Persons “levied war” when they allied with other persons who owed allegiance to the United States to resist by force federal law. Persons “adhered to their enemies” when they supported foreign efforts to subvert American laws and interests. Constitutional authorities in the United States during the Civil War emphasized the levying war prong of the treason clause and in federal statutes punishing treason. The indictments against Jefferson Davis for treason spoke of “levying war” rather than “adhering to their enemies” because relying on the latter might have implied the lawfulness of secession.⁵¹ Justice Stephen Field when charging the jury in *United States v. Greathouse* explained why confederates “must be brought within the first clause of the definition” of treason when he stated:

[T]he second clause . . . applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country.⁵²

⁴⁷ CONG. GLOBE, 39th Cong., 1st Sess. 3025, 3038; see MARK A. GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR 148–49 (2023).

⁴⁸ Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153, 168 (2021).

⁴⁹ Donna Brearcliff, *The Whiskey Rebellion*, LIBR. OF CONG. RSCH. GUIDES (Jan. 2021), <https://guides.loc.gov/this-month-in-business-history/august/whiskey-rebellion> [<https://perma.cc/QRL7-QQCF>].

⁵⁰ I was unable to find any jury charge or treatise that claimed a presidential proclamation was necessary for an event to be labeled an insurrection.

⁵¹ Case of Davis, 7 F. Cas. 63, 93–94 (C.C.D. Va. 1871) (No. 3,621a).

⁵² *United States v. Greathouse*, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254); see

Judge Connally Trigg maintained that:

[T]he term “enemies,” as used in the constitutional definition of treason . . . has reference alone to *aliens*, the subjects or citizens of a nation at war with the United States, or such *foreigners* as may commit an act of war against them, and not to citizens of the United States in a state of rebellion against their Government.⁵³

This sentiment was not unanimous. Charles Sumner’s speeches in the Senate indicated that Congress had the option of treating rebels as domestic criminals under the Constitution or foreign enemies under the law of nations.⁵⁴

Both treasons had the same elements. With the probable exception of conspiracy, which was treasonable only with respect to “aid and comfort,”⁵⁵ the behaviors that constituted levying war against the United States also constituted aiding and comforting the enemies of the United States. Judge Hoffmann in *Greathouse* contended:

Every act which, if performed with regard to a public and foreign enemy, would amount to “an adhering to him, giving him aid and comfort,” will, with regard to a domestic rebellion, constitute a levying of war. And, conversely, every act which, with regard to a domestic rebellion, will constitute “a levying of war,” will, with regard to a foreign enemy, constitute “an adhering to him, giving him aid and comfort.”⁵⁶

Judge Noah Swayne reached the same conclusion. He wrote, “the same facts which make a case within the statute of adhering and giving aid and comfort to *foreign enemies*, when done in respect to insurgents and rebels, make the offender guilty of the crime of levying war against the government, and liable to be punished under the other provision of the [treason] statute for that offence.”⁵⁷

Justice Swayne, *U.S. v Chenoweth*, in OPINION OF JUDGE N.K. HALL, *supra* note 24, at 109, 109 (holding that persons who “shall adhere to their enemies, giving to them aid and comfort” are guilty of treason but are limited to “*foreign enemies*” and have “no application to those who commit the like acts in respect of domestic traitors, engaged in insurrection or rebellion against their own government”).

⁵³ TRIGG, *supra* note 25, at 12.

⁵⁴ See CONG. GLOBE, 37th Cong., 2d Sess. 2188, 2964 (1862).

⁵⁵ See Wilson, *supra* note 27, at 103–05.

⁵⁶ *Greathouse*, 26 F. Cas. at 25; see TRIGG, *supra* note 25, at 10.

⁵⁷ *United States v. Chenoweth*, 4 W.L. MONTHLY 165, 168 (C.C.S.D. Ohio 1862). James Wilson declared, “To give intelligence to enemies, to send provisions to them, to sell arms to them, treacherously to surrender a fort to them, to cruise in a ship with them against the United States—these are acts of adherence, aid and comfort.” Wilson, *supra* note 27, at 105. These acts were also considered as participating in an insurrection. See *Greathouse*, 26 F. Cas. at 27.

Judges and treatise writers during the nineteenth century differed on the precise distinction between a rebellion and insurrection, while agreeing that the phrase “insurrection or rebellion” covered small-scale violent resistance to federal authority as well as attempts to overthrow the national government. At least one judge thought that “insurrection” and “rebellion” were “synonymous.”⁵⁸ More commonly, commentators made one of two distinctions. Some commentators regarded a rebellion as an insurrection in which the insurgents intended to overthrow the government. “The term *rebellion*,” Francis Lieber wrote, “is applied to an insurrection of large extent.”⁵⁹ Many state courts agreed that a rebellion was an insurrection aimed at overthrowing the government. *Martin v. Hortin* (1865), quoting from Halleck, *Elements of International Law and Laws of War*, declared that “the term *rebellion* is applied to an insurrection of large extent or long duration; and is usually a war between the legitimate government of a State and portions or parts of the same, who seek to overthrow the government.”⁶⁰ More often, judicial opinions and commentary distinguished “a rebellion” from “a mere insurrection.”⁶¹ Webster’s Dictionary in 1865 informed readers that a revolt is an attempt to overthrow the government and an insurrection is an effort to resist the legal authority of the government.⁶² The Supreme Court of the United States adopted a similar distinction between insurrections and rebellions in the *Prize Cases* (1862) when describing the Civil War as “no loose, unorganized insurrection, having no defined boundary or possession.”⁶³ Numerous state cases quoted or paraphrased this passage.⁶⁴ Senator Willard Saulsbury of Delaware maintained that an insurrection is “the act of unorganized individuals” as opposed to rebellions which required “States or organized political communities.”⁶⁵

Nineteenth-century Americans often spoke of “insurrection” and “rebellion” in the same sentence. Both were considered serious crimes, deserving of serious sanctions,

⁵⁸ *State v. McDonald*, 4 Port. 449, 456 (Ala. 1837).

⁵⁹ LIEBER, *supra* note 27, at 34.

⁶⁰ *Martin v. Hortin*, 64 Ky. (1 Bush) 629, 633 (1865) (quoting HALLECK, *supra* note 27, at 151).

⁶¹ *Metropolitan Bank v. Van Dyck*, 27 N.Y. 400, 465 (1863); *see Chancely v. Bailey*, 37 Ga. 532, 548 (1868) (“If the late war had been marked merely by the armed resistance of *some* of the citizens of the State to its laws, or to the laws of the Federal Government, as in the cases in Massachusetts in 1789, and in Pennsylvania in 1793, it would very properly have been called an insurrection” (emphasis added)); *Johnson v. Jones*, 44 Ill. 142, 149 (1867) (“The rebellion was more than an insurrection.”).

⁶² *Insurrection*, DR. WEBSTER’S UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 702 (London, Bell & Daldy 1865).

⁶³ 67 U.S. 635, 673 (1862).

⁶⁴ *Smith v. Brazelton*, 48 Tenn. (1 Heisk) 44, 55 (1870); *Hill v. Boyland*, 40 Miss. 618, 630, 632 (1866); *Pennywit v. Kellogg*, 13 Ohio Dec. Reprint 389, 390 (1870); *Texas v. White & Chiles*, 25 Tex. Supp. 465, 544 (1868); *Hall v. Keese*, 31 Tex. 504, 543 (1868).

⁶⁵ CONG. GLOBE, 37th Cong., 2d Sess. 2898 (1862); *see White & Chiles*, 25 Tex. Supp. at 521 (“mere insurrection of individuals”); *Bishop v. Jones & Petty*, 28 Tex. 294, 313 (1866) (referring to “local unorganized insurrection”).

and meriting disqualification from office-holding. The Attorney General of the United States described “the case of domestic war existing in form of rebellion or insurrection.”⁶⁶ This practice no more “equates” “rebellion” and “insurrection”⁶⁷ than Section Three’s declaration, disqualifying those who had held “any office, civil or military,” equates civil and military offices. General Henry Halleck declared that “[t]he term *rebellion* is applied to an insurrection of large extent or long duration.”⁶⁸ The same paragraph also provides the standard definition of an “insurrection” as “the rising of a portion of the people against their government, or against its officers, or against the execution of its laws.”⁶⁹ Halleck previously spoke of “mere insurrection[s],” as “the acts of such *individual* insurgents . . . in resisting or opposing the authority of the government.”⁷⁰

Some commentators preferred the distinction between direct and constructive treason or the direct and constructive levying of war to the distinction between insurrection and rebellion.⁷¹ Judge Connally Trigg charged a grand jury that the levying of war

is *direct* when the war is levied directly against the Government, with the intent to subvert or overthrow it And it is *constructive* where it is levied for the purpose of producing changes of a public and general nature by an armed force; as, for the purpose of attempting by force to obtain the repeal of a statute, or to compel the resignation of a public officer, or the like.⁷²

This terminological difference did not make *substantive* difference. Those who constructively levied war against the United States were as guilty as those who *directly* levied war against the United States. Trigg insisted that if those who “conspire, and mediate an insurrection to resist or oppose the execution of any statute of the United States by force” and “proceed to carry such an intention into execution by force, they are then guilty of treason by levying war.”⁷³

A second distinction between direct and constructive treason did make a substantive difference. Story declared that “constructive treasons” resulted from “forced and arbitrary constructions” that “raise offences into the guilt and punishment of treason, which were not suspected to be such.”⁷⁴ Such constructive treasons were

⁶⁶ The Reconstruction Acts, 12 U.S. Op. Att’y Gen. 141, 160 (1867).

⁶⁷ See Brief for States of Indiana, West Virginia, et al. as Amici Curiae Supporting Petitioner at 4, *Trump v. Anderson*, 601 U.S. 100 (2024) (No. 23-719).

⁶⁸ HALLECK, *supra* note 27, at 151.

⁶⁹ *Id.*

⁷⁰ *Id.* at 155.

⁷¹ Larson adopts this understanding of constructive treason. See LARSON, *supra* note 22, at 27–28.

⁷² TRIGG, *supra* note 25, at 7.

⁷³ *Id.*

⁷⁴ STORY, *supra* note 27, at 670.

apparently barred by the statute of treasons, which with some degree of success defined common law treason.⁷⁵ Nineteenth-century commentators sometimes spoke of constructive treasons as the common law treasons that the Constitution rejected. For example, seducing the queen was a form of constructive treason, as was forging false coin.⁷⁶ These English common law treasons were not constitutional law or even American common law treasons. Significantly, however, when commentators declared that the Constitution rejected constructive treason, they either made clear that they were referring to such matters as seducing the queen, or did not treat resistance to law by force as constructive treason.

Nineteenth-century legal precedent emphasized that a conspiracy to commit insurrection or levy war against the United States did not constitute treason. “If a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States, by force,” the charge in *United States v. Hanway* declared, “they are guilty only of a high misdemeanor.”⁷⁷ “To conspire to levy war, and actually to levy war,” the Supreme Court declared in *Ex parte Vallandigham* (1863), “are distinct offenses.”⁷⁸ William Alexander Duer observed, “to constitute a ‘levying of war,’ there must be an assemblage of persons with intent to effect by force a treasonable purpose; but the mere enlistment of men for such a purpose, is not sufficient.”⁷⁹ If those persons were subsequently “assembled with treasonable designs,” however, that was the “overt act” sufficient for “treason.”⁸⁰ Andrew W. Young hinted at this distinction when he claimed that a “secret unarmed meeting of conspirators, not in force, not in warlike form, though met for a treasonable purpose, is not treason; but these offenses are high misdemeanors.”⁸¹

⁷⁵ *Id.*

⁷⁶ 4 WILLIAM BLACKSTONE, COMMENTARIES *350–51.

⁷⁷ DAVID R. FORBES, A TRUE STORY OF THE CHRISTIANA RIOT 121 (Quarryville, Pa., Sun Printing House 1898); see CATRON ET AL., *supra* note 24, at 4; Charge to Grand Jury—Fugitive Slave Law, 30 F. Cas. 1015, 1015 (C.C.D. Mass. 1851) (No. 18,263); *United States v. Burr*, 25 F. Cas. 55, 89 (C.C.D. Va. 1807) (No. 14,693); *Burr*, 25 F. Cas. at 163, 165–66; *United States v. Hoxie*, 26 F. Cas. 397, 398–99 (C.C.D. Vt. 1808) (No. 15,407); STORY, *supra* note 27, at 670–71.

⁷⁸ *Ex parte Vallandigham*, 28 F. Cas. 874, 888 (1863) (C.C.S.D. Ohio 1863); see *Ex parte Bollman*, 8 U.S. 75, 126 (1807) (“To conspire to levy war, and actually to levy war, are distinct offenses.”); Grand Jury—Treason, 30 F. Cas. 1032, 1033 (C.C.S.D.N.Y. 1861) (No. 18,270) (“To conspire to levy war, and actually to levy war, are distinct offences.”); Charge to Grand Jury—Treason, 30 F. Cas. 1046, 1047 (C.C.D.R.I. 1842) (No. 18,275) (“[A] conspiracy to levy war and an actual levy of war are distinct offences.”); Charge to Grand Jury—Treason & Piracy, 30 F. Cas. 1049, 1051 (C.C.D. Mass. 1861) (No. 18,277); Charge to Grand Jury—Treason, 30 F. Cas. 1034, 1035 (C.C.S.D.N.Y. 1861) (No. 18,271); TRIGG, *supra* note 25, at 7; FLANDERS, *supra* note 27, at 229 (“A conspiracy or agreement to levy war does not amount to treason.”); YOUNG, *supra* note 27, at 147.

⁷⁹ DUER, *supra* note 27, at 183.

⁸⁰ 6 DANE, *supra* note 27, at 689.

⁸¹ YOUNG, *supra* note 27, at 147.

Only persons who have allegiance obligations to the United States may commit treason against the United States. Citizens of the United States may commit treason. Persons under the temporary protection of the United States are also capable of committing treason because they have temporary allegiance obligations to the United States. Nathan Dane stated,

[A]ll persons abiding within the State, and deriving protection from the laws of the same, owe allegiance to this State, and are members thereof; and that all persons passing through, visiting, or making temporary stay in this State, being entitled to and actually receiving, the protection of the laws, during the time of such visitation, or temporary stay, owe, during the same time, allegiance to this State.⁸²

Citizens of foreign states may not commit treason. They owe no allegiance to the United States. James Wilson’s *Lectures on Law* stated, “who may commit treason against the United States? To this the answer is—those who owe obedience to their authority.”⁸³ Dane agreed that “for treason he can be punished only by the nation to which he owes allegiance.”⁸⁴

B. Development

The American law of treason dates from the fourteenth century.⁸⁵ Edward III declared “high treason to compass or imagine the death of the king, to violate the women of the royal household, to levy war against the king, to adhere to the king’s enemies by giving them aid and comfort, to counterfeit the king’s currency or seal, or to murder the king’s chancellor or judges.”⁸⁶ Americans narrowed the definition of treason to only two of these offenses. George Ticknor Curtis observes, the Framers

resorted to the great English statute of the 25th Edward III; and from it they selected two of the offenses there defined as treason, which were alone applicable to the nature of the sovereignty of the United States. The statute, among a variety of other offences,

⁸² 6 DANE, *supra* note 27, at 686; *see* Wilson, *supra* note 27, at 100.

⁸³ Wilson, *supra* note 27, at 100.

⁸⁴ 6 DANE, *supra* note 27, at 94.

⁸⁵ *See* United States v. Greathouse, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863) (No. 15,254); Wilson, *supra* note 27, at 97–99.

⁸⁶ Jonathan W. White, *The Trial of Jefferson Davis and the Americanization of Treason Law*, in CONSTITUTIONALISM IN THE APPROACH AND AFTERMATH OF THE CIVIL WAR 113, 114 (Paul D. Moreno & Johnathan O’Neill eds., 2013) (summarizing 25 Edw. 3 Stat. 5 c.2 [1351]); *see* LARSON, *supra* note 22, at 2–3. For the actual Norman text and English translation, *see* 1 THE STATUTES 184–89 (London, George Edward Eyre & William Spottiswoode rev. ed. 1870).

denominates as treason the levying of war against the king in his realm, and the adhering to the king's enemies in his realm, giving them aid and comfort in the realm, or elsewhere.⁸⁷

Nineteenth-century jurists relied on this modified common law of treason and insurrection when implementing the American constitutional law of treason and insurrection. Chief Justice John Marshall in *United States v. Burr* declared,

It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England, and in this country, to have been used in the statute of the 25th of Edw. III. from which it was borrowed.⁸⁸

Simon Greenleaf in 1851 noted, "the Constitution makes it treasonable to levy war, but does not define the offence, nor describe the persons who may be said to have committed it. The common law does both; and is therefore to be resorted to for this knowledge."⁸⁹

The constitutional law of treason and insurrection experienced very little development from independence until Reconstruction. Judges and treatise writers discussing insurrections against fugitive slave laws and considering treason during the Civil War relied on case law developed in cases involving participants in the Whiskey Insurrection (1794) and Fries Insurrection (1799). Justices sometimes elaborated on such decisions as *United States v. Mitchell*⁹⁰ and *Case of Fries*.⁹¹

⁸⁷ 2 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES: WITH NOTICES OF ITS PRINCIPAL FRAMERS 384–85 (New York, Harper & Bros 1858); GREENLEAF, *supra* note 27, at 412–13 (paraphrasing B.R. Curtis); STORY, *supra* note 27, at 555; Wilson, *supra* note 27, at 97–99; LARSON, *supra* note 22, at 3; 6 DANE, *supra* note 27, at 685.

⁸⁸ *United States v. Burr*, 25 F. Cas. 55, 159 (C.C.D. Va., 1807) (No. 14,693); *see* *United States v. Greathouse*, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863); *United States v. Hanway*, 25 F. Cas. 105, 127–28 (C.C.E.D. Pa. 1851) (No. 15,299); Charge to Grand Jury—Treason, 30 F. Cas. 1034, 1035 (C.C.S.D.N.Y. 1861) (No. 18,271); STORY, *supra* note 27, at 669; RAWLE, *supra* note 27, at 305; DUER, *supra* note 27, at 183; 6 DANE, *supra* note 27, at 686; AGNEW, *supra* note 27, at 7.

⁸⁹ GREENLEAF, *supra* note 27, at 409, 418; *see* Charge to Grand Jury—Neutrality Laws & Treason, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851) (No. 18,269) ("This language is borrowed from an ancient English statute, enacted in the year 1352 (25 Edw. III.), mainly for the purpose of restraining the power of the crown to oppress the subject by arbitrary constructions of the law of treason. At the time of the introduction of this language into our constitution, it had acquired a settled meaning, and that meaning has been adopted by the courts of the United States when they have had occasion, as unfortunately they have had occasion, to interpret these words."); TRIGG, *supra* note 25, at 6.

⁹⁰ *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 349 (1795).

⁹¹ *Case of Fries*, 9 F. Cas. 924, 943–44 (C.C.D. Pa. 1800) (No. 5,127).

Nevertheless, Justices on the Jay, Ellsworth, and Marshall Courts would have recognized and endorsed the constitutional law of treason and insurrection as articulated by Justices on the Taney and Chase Courts, as well as by their lower federal court and state court contemporaries.

Justices on the Jay, Ellsworth, and early Marshall Courts laid down the basic principles underlying the constitutional law of treason and insurrection. Justice Patterson in *United States v. Mitchell* declared that if the “object” of an insurrection “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.”⁹² Versions of this definition were offered by the Justices who presided over the relevant trials for the perpetrators of the Fries Insurrection and Burr Insurrection (1803–04). Justice Samuel Chase in *Case of Fries* declared insurrection to be forcible resistance to “the execution of any statute of the United States.”⁹³ William Rawle noted during the argument, “not only those who rebelled against the king, by taking up arms with the avowed design of dethroning him, but those who withstood his lawful authority, and who endeavoured to oppose his government; who withstood the king’s forces, or attacked any of his fortresses . . . were guilty of high treason.”⁹⁴ Justice James Iredell in *Fries* charged a grand jury that “if . . . the intention was to prevent by force of arms the execution of any act of the Congress of the United States altogether . . . any forcible opposition calculated to carry that intention into effect

⁹² *Mitchell*, 2 U.S. at 355; see 6 DANE, *supra* note 27, at 358 (describing *Mitchell* as “a precedent not suddenly to be departed from; and so a reason for viewing the law [as] settled”).

⁹³ 9 F. Cas. at 930; see 6 DANE, *supra* note 27, at 358–61 (endorsing the interpretation of “insurrection” in *Fries*). Fifteen years after the *Fries* trial, John Adams claimed that Fries’s “crime did not amount to treason,” that he had “been guilty of a high-handed riot and rescue, attended with circumstances hot, rash, violent, and dangerous, but all these did not amount to treason.” Letter from John Adams to James Lloyd (March 31, 1815), in 10 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 152, 154 (Charles Francis Adams ed., 1856). Adams declared he had “suppressed an insurrection in Pennsylvania.” *Id.* at 153. Fries and his accomplices, Adams stated, were “obscure, miserable Germans, as ignorant of our language as they were of our laws, and the nature and definition of treason.” *Id.* at 153. Lacking any knowledge of American law, Fries could not have intentionally resisted the implementation of federal law.

⁹⁴ *Case of Fries*, 9 F. Cas. at 927. *United States v. Hoxie* varied the formulation slightly, speaking of “the execution of any act of congress.” 26 F. Cas. 397, 399 (C.C.D. Vt. 1808) (No. 15,407); see also Charge to the Grand Jury—Neutrality Laws and Treason, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851) (No. 18,269); Charge to Grand Jury—Fugitive Slave Law, 30 F. Cas. 1015, 1015 (C.C.D. Mass. 1851) (No. 18,263) (“any one law of the United States”); RAWLE, *supra* note 27, at 305–06 (“A conspiracy to subvert by force the government of the United States, violently to dismember the union, to coerce repeal of a general law, or to revolutionize a territorial government by force if carried into effect, by embodying and assembling a military body in a military posture is an overt act of levying war . . .”); DUER, *supra* note 27, at 183.

was a levying of war against the United States, and of course an act of treason.”⁹⁵ John Marshall endorsed these rulings in *Ex parte Bollman*.⁹⁶ Nathan Dane, commenting on these decisions, declared that “it is treason to obstruct, with force and violence, the execution of a particular law of the United States, of a public nature.”⁹⁷

Northern judges repeated and sometimes elaborated the Patterson/Chase/Marshall understanding of insurrection and treason when charging grand juries on the legal consequences of resisting fugitive slave laws. Judge John K. Kane and Justice Robert Grier in the 1851 *Christiana Trials* articulated the consensus understanding of insurrection in the years immediately before the Civil War. Judge Kane in *Hanway v. United States* declared:

If a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States, by force, they are guilty only of a high misdemeanor; but if they proceed to carry such intention into execution, by force, that they are guilty of the treason of levying war, and the quantum of the force employed neither lessens nor increases the crime, whether by one hundred or one thousand persons is wholly immaterial.

A combination or conspiracy to levy war against the United States is not treason unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention, will constitute the crime of ‘levying war.’

. . . .

But the resistance of the execution of a law of the United States accompanied with any degree of force, if for a private purpose, is not treason. To constitute that offense, the object of the resistance must be of a public and general nature.

. . . .

⁹⁵ Iredell, *supra* note 24, at 568; see BRIGHTLY, *supra* note 27, at 215 (“An insurrection, to prevent by force and intimidation, the execution of an act of [C]ongress, is treason, by levying war.”).

⁹⁶ *Ex parte Bollman* and *Ex parte Swartwout*, 8 U.S. (4 Cranch) 75, 128 (1807).

⁹⁷ 6 DANE, *supra* note 27, at 358.

In the application of these principles of construction to the case before us, the jury will observe, that “the levying of war” against the United States is not necessarily to be judged of alone by the number or array of troops—but there must be a conspiracy to resist by force and an actual resistance by force of arms or intimidation by numbers. This conspiracy and the insurrection connected with it must be, to effect something of a public nature, to overthrow the Government, or to nullify some law of the United States, and totally to hinder its execution, or comply with its repeal.⁹⁸

Justice Benjamin Curtis and Judge Peleg Sprague gave similar charges to grand juries in Massachusetts considering whether and with what to indict abolitionists who resisted fugitive slave laws.⁹⁹ A decade earlier, Justice Joseph Story delivered a similar grand jury charge respecting persons involved in the Dorr Insurrection.¹⁰⁰

Federal justices during the Civil War, most notably Supreme Court Justices John Catron and Stephen Field, as well as the leading treatise of the time on the criminal law, repeated this definition of insurrection. Field declared:

The words “levying war” in the Constitution are not restricted to the act of making war for the entire overthrow of the Government, but embrace any combination to prevent, or oppose by force, the execution of a provision, either of the Constitution of the United States or of any public statute of the United States, if accompanied or followed by an act of forcible opposition in pursuance of such combination. There must be a conspiracy to resist by force; there must be an assemblage of men to carry the treasonable purpose into effect; and there must be actual resistance by force, or intimidation by numbers. The conspiracy must be directed against the provision of the Constitution or law generally, and not to its application or enforcement in a particular case, or

⁹⁸ FORBES, *supra* note 77, at 121–22; *see* Charge to Grand Jury—Neutrality Laws & Treason, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851) (No. 18,269) (“All that is necessary, is, that being assembled, they should act in forcible opposition to a law of the United States, pursuant to a common design to prevent the execution of that law, in any case within their reach.”); GREENLEAF, *supra* note 27, at 414 (quoting Curtis, J.); *Judge Kane’s Hanway Charge*, *supra* note 25, at 103 (“The expression ‘levying war,’ so regarded, embraces not merely that act of formal or declared war, but any combination forcibly to prevent or oppose the execution or enforcement of a provision of the constitution or of a public statute, if accompanied or followed by an act of forcible opposition in pursuance of such combination.”).

⁹⁹ Charge to Grand Jury—Fugitive Slave Law, 30 F. Cas. 1015, 1015–17 (C.C.D. Mass. 1851).

¹⁰⁰ *Ex parte Dorr*, 44 U.S. (3 How.) 103, 104–05 (1845).

against a particular individual; in other words, the conspiracy must be to effect something of a *public nature*, as the overthrow of the Government, or a department thereof, or to nullify some law of the United States.¹⁰¹

During the Civil War when faced with an armed attempt to overthrow the government, Justices continued insisting that an insurrection took place whenever there was forcible resistance to any federal law. The Civil War was an insurrection or at least began as an insurrection but jurists insisted that many insurrections were not analogous to the Civil War. Federal judges charging juries in cases of persons accused of providing aid to the Confederacy spoke of “the execution of any act of the Congress,”¹⁰² or efforts to “nullify some law of the United States by preventing its execution,” or efforts to “nullify some law of the United States by preventing its execution.”¹⁰³

The constitutional law of treason immediately after the Civil War was the constitutional law of treason immediately before the Civil War. State court justices in particular adhered closely to the definition of treason and insurrection developed by justices in the decades after independence and elaborated in grand jury charges respecting the culpability of persons rescuing fugitive slaves. The Supreme Court of Wisconsin, quoting Justice Benjamin Robins Curtis, declared that “forcibly to oppose the execution of any public law of the United States” was an act of insurrection.¹⁰⁴ No judicial opinion handed down during the 1860s limited an insurrection to an attempt to overthrow the government or an event analogous to the Confederate secession.

Several scholars claim that “American courts had come around to a stringent definition of overt acts of levying war by the time of the Civil War.”¹⁰⁵ Jonathan White maintains that “[d]uring the first half of the nineteenth century the federal courts narrowed the definition of treason to require an actual levying of war with intent to overthrow the government.”¹⁰⁶ White provides two examples to support his claim that Americans before the Civil War “narrowed the definition of treason to require an actual levying of war with intent to overthrow the government”:¹⁰⁷ *United*

¹⁰¹ Field, *supra* note 24, at 29–30; see AGNEW, *supra* note 27, at 7–8 (endorsing the Fries and Hanway understandings of treason).

¹⁰² Hon. Samuel F. Miller, *Judge Miller’s Charge To the Grand Jury on the Law of Treason, and the Present State of our Country*, 3 W.L. MONTHLY 360, 361 (1861).

¹⁰³ Hon. N.K. Hall, *Charge of Judge Hall, of the Northern District of New York, May 1861*, 3 W.L. MONTHLY 271, 273 (1861); TRIGG, *supra* note 25, at 6; see LIEBER, *supra* note 27, at 34 (“against one or more of its laws”).

¹⁰⁴ *Drueker v. Salomon*, 21 Wis. 621, 626 (1867).

¹⁰⁵ CYNTHIA NICOLETTI, *SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS* 140 n.7 (2017).

¹⁰⁶ White, *supra* note 86, at 116; see also Cynthia Nicoletti, *Did Secession Really Die at Appomattox?: The Strange Case of U.S. v. Jefferson Davis*, 41 U. TOL. L. REV. 587, 600 (2010).

¹⁰⁷ White, *supra* note 86, at 116.

States v. Hanway and *United States v. Burr*.¹⁰⁸ Both reject that limited account of treason and insurrection.

Neither *Hanway* nor *Burr* betray any awareness of breaking from or modifying the existing constitutional/common law of treason and insurrection. Both decisions cite *Fries* approvingly. Justice Grier in *Hanway* cited *Fries* for the proposition that “an insurrection or rising of any body of people within the United States, to attain by force or violence any object of a great public nature, or of public (or national) and general concern, is a levying of war against the United States.”¹⁰⁹ Chief Justice Marshall in *Burr* quoted *Fries* for the proposition that if “the intention was to prevent by force of arms the execution of an act of the congress of the United States altogether, any forcible opposition, calculated to carry that intention into effect, was a levying of war against the United States, and, of course, an act of treason.”¹¹⁰ Both *Hanway* and *Burr* emphasize that an insurrection need not be an attempt to overthrow the government. The *Hanway* charge stated, “any insurrection to resist or prevent by force or violence the execution of any statute of the United States, under any pretense of its being unequal, burdensome, oppressive or unconstitutional, is a levying of war.”¹¹¹ Marshall in *Burr* observed:

Those also, he says, who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt with force to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative by attempting to do that by private authority which he, by public justice, ought to do; which manifestly tends to a downright rebellion.¹¹²

Hanway and Burr were each found not guilty of treason because the prosecution in both cases did not establish an element of treason, not because they did not seek to overthrow the government. Grier in the *Hanway* trial indicated that the Christiana Riots were a spontaneous outburst and not part of a general effort to resist the

¹⁰⁸ *Id.* at 116–17.

¹⁰⁹ *United States v. Hanway*, 26 F. Cas. 105, 128 (C.C.E.D. Pa. 1851) (No. 15,299); *see also id.* at 127 (citing *Fries* approvingly).

¹¹⁰ *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693).

¹¹¹ FORBES, *supra* note 77, at 121; *see id.* (“[T]o resist or prevent by armed force, the execution of a particular statute of the United States, is a levying war against the United States.”). *United States v. Greathouse* suggested a slightly more expansive understanding of insurrection when claiming “[t]o constitute a levying of war there must be an assemblage of persons in force, to overthrow the government, or to coerce its conduct.” 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254). Insurrections might attempt to compel the passage, as well as the repeal of laws.

¹¹² *Burr*, 25 F. Cas. at 163; *see Hanway*, 26 F. Cas. at 128–29.

fugitive slave law.¹¹³ Marshall in *Burr* emphasized that even if Burr had conspired to commit treason, no effort to implement that plan was ever undertaken.¹¹⁴

Judges before the Civil War were aware that common law understandings of levying war were being narrowed abroad. Grier observed that “levying war” in nineteenth-century English law was being “confined to insurrections and rebellions for the purpose of overthrowing the government by force and arms.”¹¹⁵ Nevertheless, Grier charged the *Hanway* jury that they should find the defendant guilty not only if Hanway participated in an attempt “to overthrow the government,” but if his efforts were “to nullify some law of the United States.”¹¹⁶ Historians debate when and whether American law caught up to English law.¹¹⁷ Both Willard Hurst and Carlton Larson think that the common law understanding of “levying war” in the United States has “become obsolete by nonuse and by critical reaction against it at the bar and in the courts.”¹¹⁸ They nevertheless agree that this development occurred “since the Civil War.”¹¹⁹ Common law treason was alive, well, and the near exclusive understanding of “levying war” when the Fourteenth Amendment was framed.

C. Elements

Insurrection and treason from independence to the beginning of Reconstruction had four elements. An insurrection required: (1) an assemblage; (2) resisting a federal law; (3) by force; and (4) for a public purpose. Many commentaries combined the second and fourth element when discussing what constituted an insurrection. Justice Field charged a grand jury:

[T]o constitute a levying of war there must be: *first*, an assemblage of persons in force—in a condition to make war; *second*, the assemblage must be for a treasonable purpose; *third*, there must be an actual use of force, or such display of numbers as to intimidate, in pursuance of such purpose.¹²⁰

Such commentaries, when appropriate, then specified that a treasonable purpose was preventing the implementation of a federal law for public reasons.

¹¹³ *Hanway*, 26 F. Cas. at 128–29.

¹¹⁴ See LARSON, *supra* note 22, at 46–47.

¹¹⁵ *Hanway*, 26 F. Cas. at 127.

¹¹⁶ *Id.* at 128.

¹¹⁷ See LARSON, *supra* note 22, at 32.

¹¹⁸ JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS*, at ix (1971); see LARSON, *supra* note 22, at 32.

¹¹⁹ HURST, *supra* note 118, at 7; see LARSON, *supra* note 22, at 32.

¹²⁰ Field, *supra* note 24, at 30; see TRIGG, *supra* note 25, at 7.

1. An Assemblage

Americans in the nineteenth century thought an insurrection had to involve more than one person.¹²¹ Although in theory, one person could resist the execution of a law of the United States, judges consistently described an insurrection as involving “an assemblage of men,”¹²² “a combination or conspiracy,” “a number of men, armed with weapons, offensive and defensive,”¹²³ or any action done by “a body of people.”¹²⁴ Justice Curtis spoke of “[a] combination, or conspiracy by which different individuals are united in one common purpose.”¹²⁵ Justice Sprague when charging a jury in a fugitive slave case declared, “there must be an actual assemblage of men.”¹²⁶ A private individual could commit treason by giving aid or comfort to the enemies of the United States, but nineteenth-century Americans did not believe a private person acting alone could precipitate an insurrection.

The precise number of persons resisting federal law by force had no bearing on whether an insurrection occurred. Chase in *Case of Fries* declared, “the quantum of the force employed neither lessens nor increases the crime—whether by one hundred or one thousand persons, is wholly immaterial.”¹²⁷ Marshall maintained, “[I]t is altogether immaterial whether the force used be sufficient to effectuate the object. Any force connected with the intention will constitute the crime of levying of war.”¹²⁸

¹²¹ See LARSON, *supra* note 22, at 34 (“The nineteenth-century decisions insisted that a lone individual was incapable of levying war by himself.”).

¹²² *United States v. Burr*, 25 F. Cas. 55, 163 (C.C.D. Va. 1807) (No. 14,693); *United States v. Bollman*, 24 F. Cas. 1189, 1193 (C.C.D.C. 1807) (No. 14,622); see *Opinion on the Motion to Introduce Certain Evidence in the Trial of Aaron Burr, For Treason, Pronounced Monday, August 31*, 8 U.S. (4 Cranch) 470, 482 (1807); *Ex parte Bollman*, 8 U.S. 75, 126, 127 (1807) (“an actual assembling of men”); *Ex parte Vallandigham*, 28 F. Cas. 874, 889 (C.C.S.D. Ohio 1863) (No. 16,816); *Charge to Grand Jury—Treason*, 30 F. Cas. 1046, 1047 (C.C.D.R.I. 1842) (No. 18,275) (“assembly of persons”); *United States v. Hanway*, 26 F. Cas. 105, 127 (C.C.E.D. Pa. 1851) (No. 15,299); FLANDERS, *supra* note 27, at 229 (“an actual assembling of men”).

¹²³ 6 DANE, *supra* note 27, at 689.

¹²⁴ See CATRON ET AL., *supra* note 24, at 4 (“any combination”); *United States v. Great-house*, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254) (“an assemblage of persons”); LIEBER, *supra* note 27, at 34 (“the rising of people in arms against their government, or a portion of it”); *Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) (No. 5,127) (“rising of any body of the people”); DUER, *supra* note 27, at 183 (“an assemblage of persons with intent to effect by force a treasonable purpose”).

¹²⁵ *Charge to Grand Jury—Neutrality Laws & Treason*, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851) (No. 18,269); see GREENLEAF, *supra* note 27, at 413 (quoting Curtis, J.).

¹²⁶ *Charge to Grand Jury—Fugitive Slave Law*, 30 F. Cas. 1015, 1015 (C.C.D. Mass. 1851) (No. 18,263).

¹²⁷ *Case of Fries*, 9 F. Cas. at 931.

¹²⁸ *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693) (quoting Judge Chase in *Fries*); see *Ex parte Bollman*, 8 U.S. 75, 128 (1807) (quoting Judge Chase in *Fries*); *Case of Fries*, 9 F. Cas. at 931 (“[I]t is altogether immaterial whether the force

Grier cobbled both quotations together when charging the jury in *United States v. Hanway*.¹²⁹ Courts immediately after the Civil War gave no more weight to the total number of participants than courts before the Civil War. State judges in the early years of Reconstruction asserted that the “numbers engaged in the effort make no difference.”¹³⁰ The futility of the resistance did not excuse the insurrection. The Supreme Court of North Carolina in *Shortridge v. Macon* declared “the armed attempts of a few, attended by no serious danger to the Union, and suppressed by slight exertions of the public force, come, unquestionably, within the constitutional definition.”¹³¹

History provides no support for claims that the existence of an insurrection is determined “by the ability of [a] state’s justice system to suppress it.”¹³² Catron informed a grand jury, “[t]he offense is not to be judged alone by the number assembled or even by the hostile appearance of the assemblage.”¹³³ As noted in Judge Kane’s charge in *Hanway*, an insurrection is not measured by the probability of success.¹³⁴ Justice Field agreed. His charge in *Greathouse* declared, “It is not essential to constitute the giving of aid and comfort that the enterprise commenced should be successful and actually render assistance.”¹³⁵

James Wilson was slightly more cautious. He thought numbers and military array mattered, but was not decisive. His “Lectures on Law” stated:

[W]hether the greatness of their numbers and their continuance together doing these acts may not amount to being arrayed in a warlike manner, deserves consideration. If they have no military arms, nor march or continue together in the posture of war; they may be great rioters, but their conduct does not always amount to a levying of war.¹³⁶

used is sufficient to effectuate the object—any force connected with the intention will constitute the crime of levying war.”). The number of persons involved was relevant to an assessment of whether the participants had a public purpose. *See United States v. Hoxie*, 26 F. Cas. 397, 399–400 (C.C.D. Vt. 1808) (No. 15,407).

¹²⁹ *United States v. Hanway*, 26 F. Cas. 105, 127 (C.C.E.D. Pa. 1851) (No. 15,299).

¹³⁰ *Noble v. Cullom*, 44 Ala. 554, 562 (1870).

¹³¹ *Shortridge v. Macon*, 61 N.C. 392, 395 (1867); *see Latham v. Clark*, 25 Ark. 574, 592 (1869) (same); *Luter v. Hunter*, 30 Tex. 688, 710 (1868) (same).

¹³² *Lynch*, *supra* note 48, at 215.

¹³³ *CATRON ET AL.*, *supra* note 24, at 4.

¹³⁴ *FORBES*, *supra* note 77, at 121; *Case of Fries*, 9 F. Cas. 924, 926 (C.C.D. Pa. 1800) (No. 5,127).

¹³⁵ *United States v. Greathouse*, 26 F. Cas. 18, 24 (C.C.N.D. Cal. 1863) (No. 15,254); *see SIR MICHAEL FOSTER, REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, in THE COUNTY OF SURRY; AND OF OTHER CROWN CASES: TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW* 208, 208–20 (3d ed. 1809).

¹³⁶ *Wilson*, *supra* note 27, at 102.

2. Resisting a Federal Law

An insurrection required resistance to “any statute”¹³⁷ or “some public law of the United States.”¹³⁸ Marshall claimed, “not only those who rebel against the king, and take up arms to dethrone him, but, also, in many other cases, those who, in a violent and forcible manner, withstand his lawful authority, are said to levy war against him.”¹³⁹ Grier’s *Hanway* charge emphasized, “[A]ny insurrection to resist or prevent by force or violence the execution of any statute of the United States, under any pretense of its being unequal, burdensome, oppressive or unconstitutional, is a levying of war”¹⁴⁰ Justices during the Civil War adopted the same rule. Justice Catron observed that the goal may be “to nullify and totally hinder the execution of some U.S. law.”¹⁴¹ Justice Story elaborated at more length when charging a grand jury impeached after the Dorr Insurrection. The Justice declared:

[I]t is not necessary, that it should be a direct and positive intention entirely to subvert or overthrow the government. It will be equally treason, if the intention is by force to prevent the execution of any one or more general and public laws of the government, or to resist the exercise of any legitimate authority of the government in its sovereign capacity. Thus, if there is an assembly of persons with force, with an intent to prevent the collection

¹³⁷ See Charge to Grand Jury—Fugitive Slave Law, 30 F. Cas. 1015, 1015 (C.C.D. Mass. 1851) (No. 18,263) (“any one law of the United States”); 6 DANE, *supra* note 27, at 358 (“a particular law of the United States”).

¹³⁸ Charge to the Grand Jury—Neutrality Laws and Treason, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851) (No. 18,269); GREENLEAF, *supra* note 27, at 413 (quoting Curtis, J.); see *Greathouse*, 26 F. Cas. at 22 (“The offense is complete, whether the force be directed to the entire overthrow of the government throughout the country, or only in certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws.”); *Case of Fries*, 9 F. Cas. at 931 (“the execution of any statute of the United States”); *Judge Kane’s Hanway Charge*, *supra* note 25, at 104 (“The combination must be directed against the law itself.”); TRIGG, *supra* note 25, at 6; LARSON, *supra* note 22, at 27.

¹³⁹ *United States v. Burr*, 25 F. Cas. 55, 163 (C.C.D. Va. 1807) (No. 14,693); see FLANDERS, *supra* note 27, at 229 (“for the purpose of overthrowing the government, or resisting its powers”).

¹⁴⁰ FORBES, *supra* note 77, at 121; see *id.* (“to resist or prevent by armed force, the execution of a particular statute of the United States, is a levying war against the United States”). *United States v. Greathouse* suggested a slightly more expansive understanding of insurrection when claiming “[t]o constitute a levying of war there must be an assemblage of persons in force, to overthrow the government, or to coerce its conduct.” 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254). Insurrections might attempt to compel the passage as well as the repeal of laws.

¹⁴¹ CATRON ET AL., *supra* note 24, at 4; see *Greathouse*, 26 F. Cas. at 22 (“coerce its conduct. . . . defeat the execution and compel the repeal of one of its public laws”).

of the lawful taxes or duties, levied by the government,—or to destroy all customhouses,—or to resist the administration of justice in the courts of the United States, and they proceed to execute their purpose by force,—there can be no doubt, that it would be treason against the United States.¹⁴²

Justice Curtis provided the most extensive treatment in antebellum American of the “any statute” element of insurrection. He began with the common understanding. Curtis stated:

[T]he words “levying war,” include not only the act of making war for the purpose of entirely overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law.¹⁴³

He then detailed the logic of the “any public law” standard.¹⁴⁴ He reminded the jury, “The law does not distinguish between a purpose to prevent the execution of one, or several, or all laws.”¹⁴⁵ “If this crime could not be committed by forcibly resisting one law,” Curtis continued,

[H]ow many laws should be thus resisted to constitute it? Should it be two, or three, or what particular number, short of all? And if all, how easy would it be for the worst of treasons to escape punishment, simply by excepting out of the treasonable design, some one law.¹⁴⁶

The “single law” standard reflected common understanding beyond the courtroom. Treatise writers agreed. Francis Lieber described an “insurrection” as “the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government.”¹⁴⁷ “[M]ere armed resistance” to a particular law, without any “greater ends” was sufficient.¹⁴⁸ Congress agreed. The Insurrection Act of 1807 gave the president power to “call forth the militia”

¹⁴² Charge to Grand Jury—Treason, 30 F. Cas. 1046, 1047 (C.C.D.R.I. 1842) (No. 18,275).

¹⁴³ Charge to Grand Jury—Neutrality Laws & Treason, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851) (No. 18,269); GREENLEAF, *supra* note 27, at 413; see *Judge Kane’s Hanway Charge*, *supra* note 25, at 103.

¹⁴⁴ *Charge to Grand Jury—Neutrality Laws & Treason*, 30 F. Cas. at 1025.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*; GREENLEAF, *supra* note 27, at 414 (replacing “worst” with “most”).

¹⁴⁷ LIEBER, *supra* note 27, at 34.

¹⁴⁸ *Id.*

“in all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory.”¹⁴⁹ Presidents agreed. President Franklin Pierce in 1856 described “treasonable insurrection” as “resistance by force to the fundamental or any other Federal law, and to the authority of the General Government.”¹⁵⁰

Practice before the Civil War corresponded with theory. Federal authorities regarded resistance to a single federal law as sufficient to establish an insurrection. The persons involved in the Whiskey Insurrection and Fries Insurrection were resisting only certain taxes and particular tax collection. *United States v. Vigol* (1795) sustained a conviction for using force and violence to “compel the resignation of Wells the Excise Officer, so as to render null and void, in effect, an act of Congress.”¹⁵¹ Federal justices informed grand juries that organized efforts to prevent by force the implementation of fugitive slave acts constituted treason. Grier’s charge in *United States v. Hanway* declared, “if the intention be, to prevent by force of arms, the execution of any act of congress altogether, any forcible opposition calculated to carry that intention into effect, is levying war against the United States.”¹⁵²

No case decided or prominent legal treatise published between independence and the ratification of the Fourteenth Amendment insisted that insurrections attempt to overthrow the government. Story was explicit on this point. As noted above, Justice Story insisted, “[I]t is not necessary, that it should be a direct and positive intention entirely to subvert or overthrow the government.”¹⁵³ Curtis agreed that “the words ‘levying war,’ include . . . any combination forcibly to oppose the execution of any public law of the United States.”¹⁵⁴ Livingston, in *Hoxie*, noted that “without having recourse to rules of construction,” the phrase “levying war” in the Constitution might require an effort to overthrow the government or at least “troops . . . so armed, and so directed, as to leave no doubt, that the United States, or their government, were the immediate object of their attack.”¹⁵⁵ The judge immediately noted, however, that “a wider range has been taken at the bar.”¹⁵⁶ Livingston quoted Judge Iredell’s claim in *Fries* that “[i]f the intention be to prevent by force of arms the execution of any act of congress altogether, any forcible opposition calculated to carry that intention into effect, is levying of war against the United States.”¹⁵⁷

¹⁴⁹ Ch. 39, 2 Stat. 443 (1807) (current version at 10 U.S.C. §§ 251–55).

¹⁵⁰ CONG. GLOBE, 34th Cong., 1st Sess. 298 (1856).

¹⁵¹ *United States v. Vigol*, 2 U.S. 346, 347 (1795); see RAWLE, *supra* note 27, at 305.

¹⁵² 26 F. Cas. 105, 128 (C.C.E.D. Pa. 1851) (No. 15,299).

¹⁵³ Charge to Grand Jury—Treason, 30 F. Cas. 1046, 1047 (C.C.D.R.I. 1842) (No. 18,275).

¹⁵⁴ Charge to Grand Jury—Neutrality Laws & Treason, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851) (No. 18,269); GREENLEAF, *supra* note 27, at 413; see *Judge Kane’s Hanway Charge*, *supra* note 25, at 103.

¹⁵⁵ *United States v. Hoxie*, 26 F. Cas. 397, 398 (C.C.D. Vt. 1808) (No. 15,407); see LARSON, *supra* note 22, at 30–31 (claiming that Livingston was “argu[ing] for a more narrow definition of levying of war”).

¹⁵⁶ *Hoxie*, 26 F. Cas. at 398.

¹⁵⁷ *Id.* at 399.

3. By Force

Persons were engaged in insurrections when they were part of assemblages that resisted federal law by force.¹⁵⁸ Treason required violence or the threat of violence. Story informed a grand jury, “There must be a present intention to proceed in the execution of the treasonable purpose by force.”¹⁵⁹ Intimidation substituted for actual violence. Grier stated, “[T]here must be a conspiracy to resist by force, and an actual resistance by force of arms or intimidation by numbers.”¹⁶⁰ This force need not resemble a military engagement. The assemblage, Cranch claimed, must be “armed in warlike manner, or else assembled in such numbers, as to supersede the necessity of arms.”¹⁶¹ Interference with federal troops may have been an exception to the force requirement. Lieber noted, “Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops, is levying war against the United States, and is therefore treason.”¹⁶² No case or other treatise writer affirmed or disavowed this use of treason law.

An insurrection could occur even when no person was physically harmed. No actual violence had to occur. Intimidation by numbers was sufficient. Curtis informed a grand jury:

It is not necessary that there should be any military array, or weapons, nor that any personal injury should be inflicted on the officers of the law. If a hostile army should surround a body of troops of the United States, and the latter should lay down their arms and submit, it cannot be doubted that it would constitute an overt act of levying war, though no shot was fired or blow struck. The presence of numbers who manifest an intent to use force, if found requisite to obtain their demands, may compel submission to that force, which is present and ready to inflict injury, and which may thus be effectually used to oppose the execution of the law.¹⁶³

¹⁵⁸ *United States v. Burr*, 25 F. Cas. 55, 163, 165 (C.C.D. Va. 1807) (No. 14,693) (“the actual exercise of force, the actual employment of some degree of violence”); *Case of Fries*, 9 F. Cas. 924, 931 (C.C.D. Pa. 1800) (No. 5,127) (“intimidation and violence”); *Judge Kane’s Hanway Charge*, *supra* note 25, at 103–04; *DUER*, *supra* note 27, at 183–84; 6 *DANE*, *supra* note 27, at 358 (“obstruct[] with force and violence”).

¹⁵⁹ *Charge to Grand Jury—Treason*, 30 F. Cas. 1046, 1047 (C.C.D.R.I. 1842) (No. 18,275).

¹⁶⁰ *United States v. Hanway*, 26 F. Cas. 105, 128 (C.C.E.D. Pa. 1851) (No. 15,299); *FORBES*, *supra* note 77, at 120 (quoting the charge to the jury, which notes that “intimidation” is sufficient); *CATRON ET AL.*, *supra* note 24, at 4 (“actual resistance by force of arms, or intimidation by numbers”); N.K. Hall, *Treason against the United States, and Misprison of Treason*, 3 W.L. MONTHLY 271, 273 (Cleveland, Ohio, Fairbanks, Benedict & Co. 1861).

¹⁶¹ *United States v. Bollman*, 24 F. Cas. 1189, 1193 (1807) (No. 14,622); *see* Hall, *supra* note 160, at 273 (“Levying of war against the United States is not necessarily to be judged of alone by . . . the number or quality of their weapons or means of offence . . .”).

¹⁶² *LIEBER*, *supra* note 27, at 36.

¹⁶³ *Charge to Grand Jury—Neutrality Laws & Treason*, 30 F. Cas. 1024, 1026 (C.C.D.

Crucial events during the Whiskey Insurrection did not involve actual violence. The offending tax collector fled when confronted by farmers, many of whom were armed and bent on resisting the excise tax.¹⁶⁴ The federal marshal during the Fries Insurrection surrendered prisoners after the local residents made a show of arms.¹⁶⁵ Again, crucial events involved intimidation but no actual violence. What mattered for constitutional purposes is that the insurrectionists threatened force.

4. Public Purpose

An insurrection has to have a “public nature.”¹⁶⁶ Rawle noted that the “avowed object was of a public and general, and not of a private and personal nature.”¹⁶⁷ Justice Samuel Chase, when charging the jury in *Fries*, stated:

[A]ny such insurrection or rising to resist, or to prevent by force or violence, the execution of any statute of the United States, for levying or collecting taxes, duties, imposts, or excises; or for calling forth the militia to execute the laws of the Union, or for any other object of a general nature or national concern, under any pretence, as that the statute was unjust, burthensome, oppressive, or unconstitutional, is a levying . . . against the United States, within the contemplation and construction of the constitution.¹⁶⁸

Mass. 1851) (No. 18,269); GREENLEAF, *supra* note 27, at 414 (quoting Curtis, J.); *see Case of Fries*, 9 F. Cas. at 924, 930 (“[M]ilitary weapons (as guns and swords, mentioned in the indictment) are not necessary to make such insurrection or rising amount to a levying war, because numbers may supply the want of military weapons, and other instruments may effect the intended mischief. The legal guilt of levying war may be incurred without the use of military weapons or military array.”); *Charge to Grand Jury—Treason*, 30 F. Cas. at 1047 (“[I]f they are armed and march in a military form, for the express purpose of overawing or intimidating the public,—and thus they attempt to carry into effect the treasonable design,—that will, of itself, amount to a levy of war, although no actual blow has been struck, or engagement has taken place.”).

¹⁶⁴ *See United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 349–50, 355, 26 F. Cas. 1277 (C.C.D. Pa. 1795).

¹⁶⁵ *See Case of Fries*, 9 F. Cas. at 929–30.

¹⁶⁶ 6 DANE, *supra* note 27, at 358; *see LARSON*, *supra* note 22, at 27 (“[T]he insurrectionists must be motivated by some broad public concern.”).

¹⁶⁷ *Case of Fries*, 9 F. Cas. at 927.

¹⁶⁸ *Id.* at 930; *see Iredell*, *supra* note 24, at 568 (“But if the intention was merely to defeat its operation in a particular instance, or through the agency of a particular officer, from some private or personal motive, though a high offence may have been committed, it did not amount to the crime of treason. The particular motive must however be the sole ingredient in the case, for it combined with a general view to obstruct the execution of the act, the offence must be deemed treason.”); BRIGHTLY, *supra* note 27, at 215.

Resistance for personal advantage was criminal, but not treasonous. The crucial words are “unjust, burthensome, oppressive, or unconstitutional.”¹⁶⁹ Chase continued, “assembling bodies of men, armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges, or other peace officers, should be insulted or resisted, or even great outrages committed to the persons or property of our citizens.”¹⁷⁰ The issue in cases involving participants in the Fries and Whiskey Insurrections was whether they were violently denying the legal authority of the United States to tax them or merely using force to avoid paying taxes. The crucial question concerned “the intention, with which the people did assemble.”¹⁷¹ Chase insisted, “When the intention is universal or general, as to effect some object of a general public nature, it will be treason.”¹⁷²

*United States v. Hoxie*¹⁷³ illustrated how the public purpose requirement operated in the early American republic. Frederick Hoxie was charged with treason for resisting the embargo laws of the United States.¹⁷⁴ Hoxie, in the company of sixty armed men, retrieved a raft of timber that had been seized by the customs officials of the United States.¹⁷⁵ He then fired on government officials to prevent recapture of the embargoed goods.¹⁷⁶ Supreme Court Justice Henry Brockholst Livingston, riding circuit, acknowledged that American constitutional law adopted the common law understanding of a “levying of war” as an effort to “redress by force national grievances; or to reform real or imaginary evils of a public nature, and in which the insurgents had no special interest; or, by intimidation and violence . . . to force the repeal of a law.”¹⁷⁷ This was the public purpose requirement, requiring that the insurgents be acting as citizens with “no special interest” in the matter.¹⁷⁸ No levying of war occurred, Livingston pointed out, “when the object of an insurrection is of

¹⁶⁹ *Case of Fries*, 9 F. Cas. at 930.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*; see Wilson, *supra* note 27, at 103–04 (“If it is levied on account of some *private* quarrel, or to take revenge of particular persons, it is not a war levied against the United States. A rising to maintain a *private* claim of right; to break prisons for the release of *particular* persons, without any other circumstance of aggravation; or to remove nuisances which affect, or are thought to affect, in point of interest, the parties who assemble—this is not a levying of war against the United States. Insurrections in order to throw down *all* inclosures, to open *all* prisons, to enhance the price of *all* labour, to expel foreigners in general, or those from any single nation living under the protection of government, to alter the established law, or to render it ineffectual—insurrections to accomplish these ends, by numbers and an open and armed force, are a levying of war against the United States.”).

¹⁷³ *United States v. Hoxie*, 26 F. Cas. 397 (C.C.D. Vt. 1808) (No. 15,407).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 399.

¹⁷⁸ *Id.*

a local or private nature, not having a direct tendency to destroy all property and all government by numbers and armed force.”¹⁷⁹ Hoxie’s actions were of the latter sort—an attempt at personal advantage rather than an effort to rectify a public injustice. Livingston asked how “an opposition to law . . . so evidently calculated for the sole purpose of private gain, was making war against the United States?”¹⁸⁰ The justice ruled that Hoxie was “not guilty of the crime of levying war” because he,

among others, was hired by the owner of this raft, for the purpose of evading the embargo laws, only in this instance, and for his own private emolument, although it may have been part of the plan to use violence, and force [was] actually employed against the collector or his agents to accomplish this object, but that this formed no link in a conspiracy to resist or impede the operation of these laws within the district generally as far as their means enabled them.¹⁸¹

Hoxie was in it for Hoxie. His “conduct,” Livingston emphasized, “shows it to have been of a private nature, and that no further violence was contemplated, than to smuggle a raft which had been seized by the collector, and was then lying at a small distance from a guard, into Canada.”¹⁸²

Supreme Court Justices elaborated on the public purpose element of insurrection when charging juries in fugitive slave cases. Grier informed the *Hanway* jury that “[t]he conspiracy and the insurrection connected with it must be to effect something of a public nature, to overthrow the government, or to nullify some law of the United States, and totally to hinder its execution, or compel its repeal.”¹⁸³ Ordinary criminals lacked this public purpose when they engaged in conduct designed to prevent their bad acts from being detected or sanctioned. Smugglers “resist[ing] by armed force, the execution of the revenue laws,” debtors resisting “the sheriff and his officers, in executing process on their property,” and fugitive slaves resisting rendition were not guilty of treason, Grier charged the jury, because “[t]heir insurrection, their violence, however great their numbers may be, so long as it is merely to attain some personal or private end of their own, cannot be called levying war.”¹⁸⁴ Curtis similarly distinguished people resisting the arrest of a friend from people committed “to prevent any person from being arrested under that law”¹⁸⁵ Insurrections need

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 402.

¹⁸² *Id.* at 400.

¹⁸³ *United States v. Hanway*, 26 F. Cas. 105, 128 (C.C.E.D. Pa. 1851) (No. 15,299).

¹⁸⁴ *Id.* For other good examples, see LARSON, *supra* note 22, at 27.

¹⁸⁵ Charge to Grand Jury—Neutrality Laws & Treason, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851) (No. 18,269); GREENLEAF, *supra* note 27, at 413–14 (quoting Curtis, J.).

not be global. Curtis observed that public purpose was satisfied by efforts “to prevent the execution of [a particular] law . . . within their reach.”¹⁸⁶ Organized efforts to prevent the rendition of fugitive slaves were insurrections if the participants were committed to preventing all rendition efforts in their locality, and not just those directed at friends or longstanding community members.

Grier’s successful effort to convince the jury to find Hanway not guilty was based on the common purpose element of the common/constitutional law of treason and not, as has been sometimes suggested,¹⁸⁷ on an abandonment of common law treason. Grier first pointed to the evidence that Castner Hanway was not associated with the persons who precipitated the violent resistance to an effort to capture an alleged fugitive slave.¹⁸⁸ The justice then observed that the participants in that violent resistance likely lacked the appropriate state of mind. The prosecution failed to establish that Hanway and others were aware they were resisting the execution of federal law.¹⁸⁹ They might not have been aware of the fugitive slave laws. Grier informed the jury, “[T]here is no evidence that any person concerned in the transaction knew there were such acts of congress, as those with which they are charged with conspiring to resist by force and arms”¹⁹⁰ The evidence also provided reason for thinking Hanway and others did not know they were resisting authorized federal law enforcement agents. Given past illegal attempts by private persons to kidnap and sell into slavery African American residents of Christiana, Pennsylvania, the place where the confrontation occurred, Grier worried that “the rightful claimant could not be distinguished from the odious kidnapper, or the fact be ascertained whether the person seized, deported or stolen in this manner, was a free man or a slave.”¹⁹¹ As important, the evidence indicated that the resisters in Christiana were attempting to prevent the capture of a particular person rather than carrying out a plot to prevent the execution of fugitive slave laws wherever possible. Grier noted the “want of any proof of previous conspiracy to make a general and public resistance to any law of the United States.”¹⁹² The events were “but a sudden ‘conclama-tio’ or running together.”¹⁹³ This was a riot at common law, a spontaneous affair, not an insurrection that required planning.¹⁹⁴ The treatise writers agreed. Dane observed, “[T]o raise a force or tumult only to pull down a *particular* house, or a *particular* inclosure, is only a riot.”¹⁹⁵ Hanway, if associated with the violent resisters, was

¹⁸⁶ *Charge to Grand Jury—Neutrality Laws & Treason*, 30 F. Cas. at 1025; GREENLEAF, *supra* note 27, at 414 (quoting Curtis, J.).

¹⁸⁷ *See* White, *supra* note 86, at 117.

¹⁸⁸ *Hanway*, 26 F. Cas. at 126.

¹⁸⁹ *Id.* at 128.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 129.

¹⁹² *Id.* at 128.

¹⁹³ *Id.*

¹⁹⁴ *See id.* at 129.

¹⁹⁵ 6 DANE, *supra* note 27, at 689.

guilty of serious criminal offenses¹⁹⁶ but not insurrection or treason. The actions failed to satisfy the public purpose element of common and constitutional law treason because the confrontation was designed “to prevent the capture of certain of their friends or companions,” without any “evidence of a determination or conspiracy by the people to publicly resist any legislation of congress, or levy war against the United States.”¹⁹⁷

The public purpose could be to rectify an injustice. Dane declared, “*Levying war* may be by taking arms under a pretence to reform religion or the laws, or to remove evil counsellors or other grievances, whether real or pretended.”¹⁹⁸ The federal justices who charged grand juries respecting persons who violently resisted fugitive slave laws insisted those laws were constitutional and just,¹⁹⁹ but that constitutionality and justice were not defenses to insurrection and treason. Forcible resistance to unjust or unconstitutional laws was as much an insurrection or treason as forcible resistance to just, constitutional laws. Kane’s charge to the *Hanway* jury spoke of “insurrections to redress by force national grievances; or to reform real or imaginary evils of a public nature.”²⁰⁰ The crucial element was that “the insurgents had no private or special interest”²⁰¹ in the matter, not whether the insurgents’ cause was just.

The American constitutional law of treason adopted the common law understanding that private violence was never a legal means of remedying public wrongs.²⁰² In *Burr*, Marshall observed:

Those also . . . who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt with force to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative by attempting to do that by private authority which he, by public justice, ought to do; which manifestly tends to a down-right rebellion.²⁰³

Justices in the Civil War continued to insist on public purpose, although circumstances did not require elaborating on the element. Supreme Court Justice John Catron, when charging a jury, declared the “conspiracy and the insurrection connected with it must be to effect something of *a public nature*.”²⁰⁴ Judge N. K. Hall’s

¹⁹⁶ See *Hanway*, 26 F. Cas. at 129.

¹⁹⁷ *Id.* at 128–29.

¹⁹⁸ 6 DANE, *supra* note 27, at 689.

¹⁹⁹ *Hanway*, 26 F. Cas. at 123–24.

²⁰⁰ See FORBES, *supra* note 77, at 120 (quoting the charge to the jury).

²⁰¹ See *id.*

²⁰² See 1 WILLIAM BLACKSTONE, COMMENTARIES *161–62.

²⁰³ *United States v. Burr*, 25 F. Cas. 55,163 (C.C.D. Va. 1807) (No. 14,693).

²⁰⁴ CATRON ET AL., *supra* note 24, at 4.

charge to the jury similarly stated, “[T]he conspiracy and insurrection connected with it must be to effect something of a public nature, to overthrow the Government, or to nullify some law of the United States by preventing its execution or compelling its repeal.”²⁰⁵

D. Contemporary State Decisionmakers

The three contemporary state decisionmakers who considered whether an insurrection occurred on January 6, 2021, adopted the common/constitutional law of treason in place when Section Three of the Fourteenth Amendment was framed and ratified. The Colorado Supreme Court did so explicitly. Both the Maine Secretary of State and Judge Tracie Porter of the Circuit Court, Cook County, Illinois, relied heavily on the Colorado Supreme Court. Some statements in the Maine ruling suggest a narrower concept of insurrection, but they are almost immediately clarified and broadened.

The Colorado Supreme Court performed the most extensive analysis of “insurrection” of the three decisionmakers who disqualified Trump. The state justices observed that the Colorado state trial court correctly found that “an insurrection as used in Section Three is (1) a public use of force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States.”²⁰⁶ The majority opinion then cited various historical sources finding that “an insurrection is more than a riot but less than a rebellion,” and accurately observed that “[n]o authority supports the position . . . that insurrectionary conduct must involve a particular length of time or geographic location.”²⁰⁷ *Anderson v. Griswold* properly concluded that the Colorado Supreme Court “need not adopt a single, all-encompassing definition of the word ‘insurrection,’” because for this purpose, “any definition . . . would encompass a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country.”²⁰⁸

Illinois and Maine followed Colorado. Judge Porter in Illinois declared, “[T]his Court finds the majority’s opinion [in *Anderson v. Griswold*] well-articulated, rationale [sic] and established in historical context, and assessing the construction and meaning of legal principles, such the Section 3 of the Fourteenth Amendment.”²⁰⁹ Her opinion contains no independent analysis of the constitutional meaning of insurrection. The Secretary of State of Maine also “f[ou]nd the reasoning of the Colorado Supreme Court compelling” regarding the definition of insurrection and

²⁰⁵ Hall, *supra* note 160, at 273.

²⁰⁶ *Anderson v. Griswold*, 543 P.3d 283, 330 (Colo. 2023), *rev’d*, 601 U.S. 100 (2024).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Anderson v. Trump*, 2024 COEL 000013, 2024 Ill. Cir. LEXIS 1, at 24 (Ill. Cir. Ct., Feb. 28, 2024).

whether the events of January 6, 2021, were an insurrection.²¹⁰ Unlike the judge in Illinois, the Maine ruling included independent analysis of what constituted a constitutional insurrection. The Secretary of State’s definition of “an insurrection as a public use of violence by a group of people to hinder or prevent the execution of the Constitution” seems imprecise.²¹¹ A more precise definition would have clarified that insurrections against the United States occur when the assemblage relies on physical intimidation and when they are resisting federal law.²¹² That clarification occurs later in the ruling. The Maine opinion approves the 1860 *Webster’s Dictionary* definition of insurrection as “distinct from rebellion,” and consisting of “the open and active opposition of a number of persons to the execution of law.”²¹³ Citing *Fries* and other cases, the ruling goes on to correctly note that an insurrection “need not involve military-style weaponry . . . involve bloodshed . . . or even be highly organized.”²¹⁴

II. THE EVENTS OF JANUARY 6TH WERE AN INSURRECTION WITHIN THE LEGAL UNDERSTANDING OF “INSURRECTION” WHEN SECTION THREE WAS FRAMED

The events of January 6, 2021, are consistent with the legal understanding of “insurrection” at the time Section Three was framed, assuming commonly understood facts are correct (i.e., the point was to influence the selection of the president and not to sell congressional furniture on eBay). Each element of a constitutional insurrection was present. Most critically, fact-findings by the Colorado Supreme Court²¹⁵ and the Congress of the United States²¹⁶ indicate that the effort to disrupt the transition of power from Donald Trump to Joseph Biden was a planned insurrection rather than a spontaneous riot. The Maine Secretary of State found that the “violent disruption of Congress’s duty, through a transparently public use of force, meets both [the] historically accurate definition of an insurrection, and . . . [an] alternative definition” proposed by Trump.²¹⁷

The Colorado Supreme Court, Maine Secretary of State, and Illinois county judge correctly found that the events of January 6 were consistent with the legal understanding of “insurrection” when Section Three was framed.²¹⁸ Each element of a constitutional insurrection was present. There was an assemblage. Hundreds of

²¹⁰ Ruling of the Secretary of State, *supra* note 21, at 23–24.

²¹¹ *Id.* at 24.

²¹² See *supra* notes 121–203 and accompanying text.

²¹³ Ruling of the Secretary of State, *supra* note 21, at 24.

²¹⁴ *Id.* at 24–25.

²¹⁵ *Anderson v. Griswold*, 543 P.3d 283, 330–31 (Colo. 2023), *rev’d*, 601 U.S. 100 (2024).

²¹⁶ H.R. Rep. No. 117-663, at 499–502 (2022).

²¹⁷ Ruling of the Secretary of State, *supra* note 21, at 26.

²¹⁸ As noted above, the Illinois judge relied entirely on the findings of the Colorado Supreme Court. See *supra* note 209 and accompanying text.

people breached the Capitol Building and thousands trespassed on federal land. The Colorado Supreme Court observed, “It is undisputed that a large group of people forcibly entered the Capitol.”²¹⁹ There was clear resistance to federal law. The trespassers intended to disrupt the proceedings mandated by the Electoral Count Act. *Anderson v. Griswold* states: “[S]ubstantial evidence in the record showed that the mob’s unified purpose was to hinder or prevent Congress from counting the electoral votes as required by the Twelfth Amendment and from certifying the 2020 presidential election.”²²⁰ The resistance made extensive use of force. Many in the mob engaged in crimes of violence or threatened crimes of violence. The Colorado Supreme Court stated, “[T]he mob repeatedly and violently assaulted police officers who were trying to defend the Capitol.”²²¹ Calls to “Hang Mike Pence”²²² did not suggest an attempt to achieve goals by rational persuasion. Thousands of trespassers engaged in intimidation by numbers. Reasonable members of Congress could presume that those who trespassed on federal land were serving as backup for those engaged in violence inside the Capitol building.

The mob was motivated by a public purpose. The Maine Secretary of State observed that the insurrectionists “were organized behind a common purpose. . . . to ‘stop the steal,’ i.e., prevent by force the certification of the results of the 2020 presidential election that was scheduled to occur in the halls of Congress that afternoon.”²²³ That some or most protestors believed sincerely that the 2020 national election was stolen is an element of a constitutional insurrection rather than a defense to insurrection. Legal authorities from the framing to Reconstruction insist that insurrections or treason trials do not turn on the justice of any complaint against the laws. An effort to obstruct immoral government action, such as the rendition of slaves, is an insurrection. That the motive is moral rather than pecuniary is one factor that converts a riot into an insurrection.²²⁴

The events in Washington, D.C., on January 6, 2021, satisfied each element of an insurrection to the same or greater degree as the events in western Pennsylvania in 1794 that are universally acknowledged to constitute the Whiskey Insurrection. The assemblage that invaded the nation’s Capitol on January 6 was far more numerous

²¹⁹ *Anderson*, 543 P.3d at 330; see Ruling of the Secretary of State, *supra* note 21, at 25 (“a large and angry crowd”).

²²⁰ *Anderson*, 543 P.3d at 331; see Ruling of the Secretary of State, *supra* note 21, at 25–26.

²²¹ *Anderson*, 543 P.3d at 331; see Ruling of the Secretary of State, *supra* note 21, at 25 (noting members of the crowd “assaulted . . . capitol police officers” and “were armed with weapons”).

²²² See Betsy Woodruff Swan & Kyle Cheney, *Trump Expressed Support for Hanging Pence During Capitol Riot, Jan. 6 Panel Told*, POLITICO (May 25, 2022, 1:35 PM), <https://www.politico.com/news/2022/05/25/trump-expressed-support-hanging-pence-capitol-riot-jan-6-00035117> [<https://perma.cc/5NU9-HNXC>].

²²³ Ruling of the Secretary of State, *supra* note 21, at 25–26.

²²⁴ See *supra* notes 190–95 and accompanying text.

than the assemblage that disrupted tax collection in 1794. The assemblage in 2021 was resisting the peaceful transition of federal power and not merely a particular federal tax. The assemblage in Washington, D.C., was responsible for a greater loss of life, more injuries, and more property damage than the assemblage in western Pennsylvania.²²⁵ The public purpose of the 2021 assemblage was resisting an alleged stolen election. The public purpose of the 1794 assemblage was resisting an alleged unconstitutional tax.

Justice Sprague, in an 1851 jury charge, provided a reason for questioning whether the events of January 6 are best described as a riot rather than an insurrection. He declared, “[T]he sudden outbreak of a mob, or the assembling of men in order by force to defeat the execution of the law, in a particular instance, and then to disperse, without the intention to continue together, or to re-assemble for the purpose of defeating the law generally, in all cases, is not levying war.”²²⁶ Persons who spontaneously engaged in force or violence on January 6, Sprague and other justices in the 1850s and 1860s would maintain, were not insurrections. An insurrection had to be planned or had to be maintained over time.²²⁷

The evidence nevertheless seems clear that the events of January 6 were not merely a spontaneous outbreak of violence. There was no “sudden outbreak” of a mob. The Report of the Select Committee on January 6th details a number of messages by persons involved in January 6th who anticipated resistance by force and violence to the execution of the laws mandating the presidential transition.²²⁸ Groups handed out flyers before January 6th proclaiming “#OccupyCongress.”²²⁹ The Capitol and capitol grounds were occupied for a long enough time to give all parties the time to reflect on their actions. There is substantial evidence of coordination. The Report of the Select Committee on January 6th found “[t]he intelligence community and law enforcement agencies did successfully detect the planning for potential violence on January 6th, including planning specifically by the Proud Boys and Oath Keeper militia groups who ultimately led the attack on the Capitol.”²³⁰ Jeremy Bertino, a Proud Boy who pled guilty to seditious conspiracy, testified that he “understood from internal discussions among the Proud Boys that in the leadup to January 6, the willingness to resort to unlawful conduct increasingly included a willingness to use and promote violence to achieve political objectives.”²³¹ Numerous protestors brought weapons to the protest.²³² At the very least, spontaneity is a question of fact, rather than a defense.

²²⁵ SELECT COMMITTEE, FINAL REPORT, *supra* note 20, at 119.

²²⁶ Charge to Grand Jury—Fugitive Slave Law, 30 F. Cas. 1015, 1015 (C.C.D. Mass. 1851) (No 18,263).

²²⁷ See *supra* notes 190–95 and accompanying text.

²²⁸ SELECT COMMITTEE, FINAL REPORT, *supra* note 20, at 60–68.

²²⁹ *Id.* at 56.

²³⁰ *Id.* at 5.

²³¹ See *id.* at 56–63.

²³² *Id.* at 68–69.

The events of January 6, 2021, were in one sense a one-time event only. We can assume the same people will not storm the Capitol if they anticipate that Donald Trump will be declared the winner of the 2024 national election. Sprague by “a particular instance” seems to have meant public purpose, which is not otherwise mentioned in his opinion.²³³ Both the insurrectionists of January 2021 and the insurrectionists of 1861 were motivated to defeat a particular application of American constitutional law, namely the naming of an electoral winner. What makes their act an insurrection is the public purpose, not their refusal to abide by other, more favorable, election results.

III. A LEGAL CONSENSUS EXISTED WHEN SECTION THREE WAS FRAMED AND RATIFIED THAT PERSONS ENGAGED IN INSURRECTIONS WHENEVER THEY KNOWINGLY INCITED, ASSISTED, OR PARTICIPATED IN AN INSURRECTION

Persons “engage” in an insurrection or “levy war” against the United States, according to nineteenth-century legal materials, by playing any role in an attempt for public reasons to resist by force the implementation of any law of the United States. Americans before, during, and immediately after the Civil War accepted Blackstone’s dictum: “in treason, all are principals.”²³⁴ Justice Samuel Chase in *Case of Fries* maintained, “In treason, all the participes criminis are principals; there are no accessories to this crime.”²³⁵ Elaborating, Chase insisted:

If a number of persons assemble and set out upon a common design, as to resist and prevent, by force, the execution of any law, and some of them commit acts of force and violence, with intent to oppose the execution of any law, and others are present to aid and assist, if necessary, they are all principals. If any man joins and acts with an assembly of people, his intent is always to be considered and adjudged to be the same as theirs; and the law, in this case, judgeth of the intent by the fact. If a number of persons combine or conspire to effect a certain purpose, as to oppose, by force, the execution of a law, any act of violence done by any one of them, in pursuance of such combination, and with intent to effect such object, is, in consideration of law, the act of all who are present when such act of violence is committed.²³⁶

²³³ *Id.*

²³⁴ See *United States v. Burr*, 25 F. Cas. 55, 178 (C.C.D. Va. 1807) (No. 14,693).

²³⁵ 9 F. Cas. 924, 931 (C.C.D. Pa. 1800) (No. 5,127); see Wilson, *supra* note 27, at 125 (“In treason, there are no accessories either before or after the fact; for all consenters, aiders, abettors, and knowing receivers and comforters of traitors, are themselves principals.”); 6 DANE, *supra* note 27, at 14, 16, 17, 19, 78, 321.

²³⁶ *Case of Fries*, 9 F. Cas. at 931.

Supreme Court Justices Benjamin Curtis immediately before the Civil War and Stephen Field during the Civil War similarly observed that “the law knows no accessories in treason; but that every one who, if it were a felony, would be an accessory, is, in the law of treason, a principal traitor.”²³⁷ Dane pointed out that while “[o]bstructing process” was normally a “high misdemeanor,” persons who committed that crime to further an insurrection became a “principal in treason.”²³⁸ Members of Congress during the Civil War quoted this principle on the floor of the House and Senate.²³⁹ State court justices provided numerous instances of persons who, while accessories to ordinary crimes, were deemed principals when assisting treason. Several Reconstruction cases held that supplying money or horses to the confederacy was treason.²⁴⁰

Blackstone’s analysis was broadly shared. Numerous state cases repeated or played variations on his theme of accessory liability. The Supreme Court of North Carolina in 1821 declared, “In treason there are no accessories.”²⁴¹ The Supreme Court of Ohio during the Civil War stated that “whatsoever will make a man an accessory before the fact, in felony, will make him a principal in treason.”²⁴² Treatise writers echoed the same conclusion. Joel Prentiss Bishop’s 1868 edition of *Commentaries on the Criminal Law* stated, “[I]n treason there are no accessories; but that they who in felony would be such are in treason principal offenders.”²⁴³ *State v.*

²³⁷ Field, *supra* note 24, at 43 (quoting Curtis, J.); see *Judge Kane’s Hanway Charge*, *supra* note 25, at 104 (“In treason there are no accessories.”); RAWLE, *supra* note 27, at 306 (“[N]ot only those who bear arms, but those who perform the various and essential parts which must be assigned to different persons for the purpose of prosecuting the war, are guilty of the crime.”).

²³⁸ 6 DANE, *supra* note 27, at 19.

²³⁹ See CONG. GLOBE, 37th Cong., 2d Sess. 2167 (1862).

²⁴⁰ *Smitherman v. Sanders*, 64 N.C. 522, 524–25 (1870) (“[T]he plaintiff . . . furnished money to equip rebel soldiers. So the act *per se* aided the rebellion, and amounted as much to treason against the government of the United States, as if he had furnished arms, or volunteered as a soldier. . . . This is the principle of the decision in *Martin v. McMillan*, 63 N.C. 486 [(1869)]. There, the fact of furnishing horses for the Confederate army, was an act which of itself aided the rebellion, and amounted to treason.”).

²⁴¹ *State v. Goode*, 8 N.C. (1 Hawks) 463, 464 (1821); see *State v. Chapman*, 6 Nev. 320, 331 (1871); *State v. Beebe*, 17 Minn. 241, 247 (1871); *Bonsell v. United States*, 1 Greene 111, 113 (Iowa 1848); *Solomon v. State*, 27 Ala. 26, 28 (1855); *State v. Mooney*, 64 N.C. 54, 55 (1870); *Salisbury Hubbard & Co. v. Harnden Express Co.*, 10 R.I. 244, 246 (1872).

²⁴² *Baker v. State*, 12 Ohio St. 214, 217 (1861); see *Tindle v. Nichols*, 20 Mo. 326, 329 (1855); *People v. Rathbun*, 21 Wend. 509, 540 (N.Y. 1839); *Ward v. People*, 6 Hill 144, 146 (N.Y. 1843).

²⁴³ 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 358 (Bos., Little, Brown & Co. 1868); see GREENLEAF, *supra* note 27, at 417 (“[T]he law knows no accessories in treason; but that every one who, if it were a felony, would be an accessory, is, in the law of treason, a principal traitor.”); *id.* at 418 (“[E]very person, doing an act in regard to levying war, which, in a case of felony, would render him an accessory before the fact, is guilty of the treason of levying war.”); *Whitaker v. English*, 1 S.C.L. (1 Bay) 15, 15 (1784) (“[I]n treasons and trespasses, the highest and lowest offences, there are no accessories or

Goode explained the logic of this rule. “[T]he Law knowing no greater crime than treason, and the aider or adviser being guilty of that offence,” the Supreme Court of North Carolina opined, “it has no standard by which the different degrees of guilt between the two species of offences or treason can be measured or graduated.”²⁴⁴

Republicans during the Civil War agreed. Senator Wade of Ohio during the debates over the Second Confiscation Act repeated the common law adage that “in treason there are no accessories,” that “[i]f a man does anything to aid, abet, or assist, so that he would be an accessory before the fact in a felony, he becomes a principal traitor.”²⁴⁵ Representative William Sheffield of Rhode Island declared, “[E]very citizen who gives aid and comfort to the rebels is guilty of treason, and is, in fact, levying war within the meaning of the Constitution.”²⁴⁶ He supported his theory of accessory liability in treason by quoting Justice Story’s claim that “all those who perform any part, *however* minute, or *however* remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.”²⁴⁷

One consequence of the principle that “in treason there are no accessories” is that persons who give aid and comfort to an insurrection are as guilty of treason as persons who give aid and comfort to the enemies of the United States.²⁴⁸ Field pointed out:

[E]very species of aid and comfort which, if given to a foreign enemy, would constitute treason within the second clause of the constitutional provision—adhering to the enemies of the United States—would, if given to the rebels in insurrection against the government, constitute a levying of war under the first clause.²⁴⁹

No difference exists between the persons who are allied with enemies and persons who are allied with rebels. “[W]hat motive can be suggested for attaching any less guilt to him who aids and comforts a rebellion, than to him who aids and comforts

subordinate offenders. All are principals; and wherever men go to do an unlawful act of this kind, all and every of them are liable to the full extent.”); *State v. Lymburn*, 3 S.C.L. (1 Brev.) 397, 398 (1804) (“‘It seems to have been always agreed,’ says Hawkins, see P. C. book 2, c. 29, § 2, ‘that whatsoever will make a man an accessory before in felony, will make him a principal in high treason.’”).

²⁴⁴ *State v. Goode*, 8 N.C. (1 Hawks) 463, 464 (1821).

²⁴⁵ CONG. GLOBE, 37th Cong., 2d Sess. 2167 (1862).

²⁴⁶ CONG. GLOBE, 37th Cong., 2d Sess. app. 147 (1862).

²⁴⁷ *Id.* at 169 (internal quotations omitted).

²⁴⁸ CONG. GLOBE, 37th Cong., 2d Sess. 2167 (1862).

²⁴⁹ *United States v. Greathouse*, 26 F. Cas 18, 23 (C.C.N.D. Cal. 1863) (No. 15,254); *see also id.* at 25 (charge of Hoffman, J.) (“Every act which, if performed with regard to a public and foreign enemy, would amount to ‘an adhering to him, giving him aid and comfort,’ will, with regard to a domestic rebellion, constitute a levying of war.” (quoting 1 EAST, TREATISE OF THE PLEAS OF THE CROWN 78 (1806))).

a public enemy?” Judge Hoffman asked.²⁵⁰ Judge Hoffman in the same case informed the jury, “[T]he mere sending of money, provisions or intelligence to the enemy, is giving him aid and comfort, though on the way they should happen to be intercepted, and never reach him.”²⁵¹ Attempts to run a blockade to provide arms is treason, whether the intended recipient was a foreign nation or Confederate insurgents.²⁵² The sole issue, Hoffman charged, is whether “the defendants leagued themselves with the rebellion, and in furtherance of the common design, performed a part, however minute, toward its accomplishment.”²⁵³

Judge Hoffman’s charge informed the jury of the broadly accepted understanding that whether a person was guilty of treason depended on whether the person was “leagued with traitors,” and not on whether the person used force to resist a federal law for public reasons.²⁵⁴ The principle that “in treason all are principals” means that a person need not participate in every element or the violent element of an insurrection to be an insurrectionist. As the quotations above indicate, a person who merely plans to resist laws by force or intimidation by numbers is guilty of treason if that person’s confederates act on the plan. Similarly, a person who was not part of the original conspiracy to commit insurrection is an insurrectionist if they join the insurrection. Any participation, either in the planning or the action, makes one an insurrectionist. Story and Sheffield, two of many legal authorities who quoted Chief Justice John Marshall’s assertion in *Ex parte Bollman*, asserted, “[I]f a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.”²⁵⁵ Judge Kane charged a grand jury:

[I]t is not necessary to prove that the individual accused, was a direct, personal actor in the violence. If he was present, directing, aiding, abetting, counselling, or countenancing it, he is in law guilty of the forcible act. Nor is even his personal presence indispensable. Though he be absent at the time of its actual perpetration, yet if he directed the act, devised or knowingly furnished the means, for carrying it into effect, instigating others to perform it, he shares their guilt.²⁵⁶

²⁵⁰ *Id.* at 25 (charge of Hoffman, J.).

²⁵¹ *Id.* at 27.

²⁵² *Id.* at 23–24 (charge of Field, J.).

²⁵³ *Id.* at 26 (charge of Hoffman, J.).

²⁵⁴ *See id.* at 25–26.

²⁵⁵ *Ex parte Bollman*, 8 U.S. 75, 126 (1807); *see* *United States v. Burr*, 25 F. Cas. 55, 131 (C.C.D. Va. 1807) (No. 14,693); *id.* at 161 (“leagued in the general conspiracy”); *Latham v. Clark*, 25 Ark. 574, 579 (1869); *Greathouse*, 26 F. Cas. at 26; Charge to Grand Jury—Treason, 30 F. Cas. 1032, 1033 (C.C.S.D.N.Y. 1861) (No. 18,270).

²⁵⁶ Charge to Grand Jury—Treason, 30 F. Cas. 1047, 1048 (C.C.E.D. Pa. 1851) (No. 18,276).

Supreme Court Justice John Catron explained to a grand jury in 1861 that all persons who play a part in an insurrection are insurrectionists, even if they did not personally perform an act of violence. Catron's charge to the jury declared:

If war be actually levied, . . . all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. . . . It is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part; that *part* is the act of levying war. That part, it is true, may be minute; it may not be the actual appearance in arms, and it may be remote from the scene of action—that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. . . . [W]hen war is actually levied, not only those who bear arms, but those also who are leagued in the conspiracy, and who perform the various distinct parts which are necessary for the prosecution of the war, do, in the sense of the Constitution, levy war.²⁵⁷

Justice Stephen Field agreed that “when war is actually levied in any part of the country, any person, however far removed from the scene of military operations, who aids in its prosecution, is equally involved in the guilt of treason.”²⁵⁸ Curtis and Field declared that any person who participates in an insurrection, even if the engaged in no violence, has levied war against the United States. “[T]reason may be committed by those not personally present at the immediate scene of violence,” each stated when charging grand juries.²⁵⁹ They continued with the mantra of legal authorities before and during the Civil War: “If a body of men be actually assembled to effect by force a treasonable purpose, all those who perform any part, however

²⁵⁷ CATRON ET AL., *supra* note 24, at 5–6; see *Greathouse*, 26 F. Cas. at 22; GREENLEAF, *supra* note 27, at 416 (“All that is essential to implicate them is, that they be leagued in the conspiracy, and perform a part which will furnish the overt act.”); see also Charge to Grand Jury—Treason & Piracy, 30 F. Cas. 1049, 1049 (C.C.D. Mass. 1861) (No. 18,277); *Ex parte Vallandigham*, 28 F. Cas. 874, 889 (C.C.S.D. Ohio 1863) (No. 16,816); Charge to Grand Jury—Treason, 30 F. Cas. 1036, 1037 (C.C.S.D. Ohio 1861) (No. 18,272); BRIGHTLY, *supra* note 27, at 214.

²⁵⁸ Field, *supra* note 24, at 30; see *Greathouse*, 26 F. Cas. at 22 (“In treason there are no accessories; all who engage in the rebellion at any stage of its existence, or who designedly give to it any species of aid and comfort, in whatever part of the country they may be, stand on the same platform; they are all principals in the commission of the crime; they are all levying war against the United States.”).

²⁵⁹ Field, *supra* note 24, at 43.

minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered guilty of treason.”²⁶⁰

During the Civil War and Reconstruction, persons were convicted of insurrection who had engaged in no violence. *United States v. Greathouse* concerned a ship that had a letter of marque and reprisal from the Confederate Government but had not yet fired at any Union ship.²⁶¹ When charging the jury, Judge Hoffman stated:

[A] vessel equipped, manned and armed as a privateer, and sailing with that intention, is to be deemed to be engaged or employed on a privateering cruise from the inception of the voyage, notwithstanding she has committed no hostilities and does not design to commit any until certain preliminary arrangements have been consummated.²⁶²

Violence was optional once assistance was rendered. *Latham v. Clark* stated the rule that “all persons voluntarily engaged in them, and all who aided them, or the Confederate Government, however minute or remote, were traitors to their country, and guilty of treason.”²⁶³

Nineteenth-century Americans believed that a person engaged in an insurrection by performing an act knowingly supporting an effort by more than one person to interfere with the implementation of a federal law by force for a public purpose. Prominent Republicans scorned Democratic calls to limit bans on office-holding to persons who “voluntarily” supported the Confederacy. Republicans maintained the persons disqualified by Section Three were unlikely to have been coerced into confederate service. Senator Howard pointed out, “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.”²⁶⁴ Senator Waitman T. Willey of West Virginia noted that limiting the ban to those who voluntarily joined the rebellion would create intractable proof problems.²⁶⁵ Even the most guilty Confederates could find some excuse

²⁶⁰ *Id.*; GREENLEAF, *supra* note 27, at 414–15; *see* Charge to Grand Jury—Fugitive Slave Law, 30 F. Cas. 1015, 1015 (C.C.D. Mass. 1851) (No. 18,263); *Anderson v. Baker*, 23 Md. 531, 625 (Md. 1865) (quoting Field, J.); TRIGG, *supra* note 25, at 9; STORY, *supra* note 27, at 669–71; DUER, *supra* note 27, at 183–84; FLANDERS, *supra* note 27, at 229; AGNEW, *supra* note 27, at 8.

²⁶¹ 26 F. Cas. at 19, 24.

²⁶² *Id.* at 29 (charge of Hoffman, J.).

²⁶³ 25 Ark. 574, 580 (1869); *see* *Leak v. Richmond Cnty. Comm’rs*, 64 N.C. 132, 136 (1870) (“Any act which would not have been done except for the existence of the rebellion, and which was calculated to counteract the measures adopted by the government of the United States, for its suppression, and to enable the people in insurrection to protract the struggle, was in aid of the rebellion.”).

²⁶⁴ CONG. GLOBE, 39th Cong., 1st Sess. 2771 (1866).

²⁶⁵ *Id.* at 2918.

for claiming coercion. The Vice-President of the Confederacy, Alexander Stephens, Willey noted, had maintained in testimony before the Joint Committee on Reconstruction “that he never entered into the rebellion voluntarily.”²⁶⁶ Other means existed for dealing with exceptions. Poland maintained that Congress could easily grant amnesty “[i]f there be any included in this class . . . who were really forced into the rebellion against their will.”²⁶⁷ Republicans refused to modify the Ironclad Oath so as to allow persons to hold office who were conscripted by the confederacy on the ground that they had not voluntarily served the Confederacy.²⁶⁸

Congress applied a “knowingly” standard when refusing to seat Senator-elect Philip F. Thomas of Maryland in 1867.²⁶⁹ The facts were undisputed. Thomas was loyal to the Union, but his son was not.²⁷⁰ After a failed attempt to persuade his son not to join the Confederate Army, Thomas gave his son \$100 and told him to be on his way.²⁷¹ He was barred from the Senate under Section Three.²⁷² No one thought Thomas was intentionally aiding the Confederate insurrection. He would have been much happier if his son spent the money investing in a farm or even drinking. But Thomas gave his son \$100 knowing that the money would most likely be spent in ways that aided the Confederate insurgence.²⁷³ Congress similarly determined William Vasser had aided and supported the insurrection by accepting a commissary position rather than being drafted into the Confederate army.²⁷⁴

Holding office in the Confederacy was sufficient to have engaged in insurrection or rebellion against the United States, but only when combined with any act supporting the Confederacy. The House of Representatives determined that Representative-elect Roderick R. Butler was covered by Section Three because he had, as a member of the Tennessee state legislature after secession, supported secession resolutions.²⁷⁵ Butler was seated because both Houses of the Congress, impressed by latter acts of loyalty, voted by a two-thirds majority to remove his disability.²⁷⁶ By comparison, the Senate allowed Senator-elect David Patterson to take the oath of office, even

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 2964.

²⁶⁸ HAROLD MELVIN HYMAN, *ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION* 63, 66 (1954).

²⁶⁹ Lynch, *supra* note 48, at 201.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *See id.*; 1 ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* 469–70 (1907); HYMAN, *supra* note 268, at 127–28. Congress seems to have thought trading with Confederates sufficed as aid and support, but not when done as a federal agent. *See* HYMAN, *supra* note 268, at 129.

²⁷⁴ HYMAN, *supra* note 268, at 76–78. For similar cases, see *id.* at 79–80.

²⁷⁵ HINDS, *supra* note 273, at 463.

²⁷⁶ *Id.* at 463–64.

though he had been a judge in Tennessee under the Confederacy, because the evidence showed that Patterson consistently supported the Union cause.²⁷⁷

The one federal court decision that discussed the necessary state of mind for engaging in an insurrection was more lenient, preferring a “voluntarily” to a “knowingly” standard for participating in an insurrection. Judge Bond in *United States v. Powell* declared that “the word ‘engage’ implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellion [sic].”²⁷⁸ The prosecution had to demonstrate that the “defendant did some act in aid of the Insurrection or Rebellion.”²⁷⁹ “Compulsion” was a defense, but only if the “[d]efendant’s conduct [was] prompted by a well grounded fear of great bodily harm and the result of force, which the defendant was neither able to escape or resist.”²⁸⁰ Compulsion had to “spring from . . . want of sympathy with the insurrectionary movement, and not from . . . repugnance to being in an army.”²⁸¹ Powell was declared ineligible for public office because he had supported the Confederacy by avoiding conscription by purchasing a substitute.

The relationship between speech and insurrection was not entirely clear from the framing of the Constitution to the Civil War. Words constituted evidence that persons were leagued with insurrectionists. Kane stated:

The highest, or at least the direct proof of the combining may be found in the declared purposes of the individual party before the actual outbreak; or it may be derived from the proceedings of meeting, in which he took part openly, or which he either prompted, or made effective by his countenance or sanction—commending, counselling or instigating forcible resistance, to the law.²⁸²

When and whether words were sufficient to constitute an insurrection was not firmly established. Dane thought so. He declared, “*Writing* is held to be an *overt act*, when published.”²⁸³ Justice Samuel Nelson disagreed. He indicated that while words without more were not treasonous, words that instigated treason were.²⁸⁴ Nelson informed the jury:

Words oral, written or printed, however treasonable, seditious or criminal of themselves, do not constitute an overt act of treason,

²⁷⁷ *Id.* at 460–61.

²⁷⁸ 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (No. 16,080).

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Judge Kane’s Hanway Charge*, *supra* note 25, at 103–04.

²⁸³ 6 DANE, *supra* note 27, at 689.

²⁸⁴ Charge to Grand Jury—Treason, 30 F. Cas. 1034, 1035 (C.C.S.D.N.Y. 1861) (No. 18,271).

within the definition of the crime. When spoken, written or printed in relation to an act or acts which, if committed with a treasonable design, might constitute such overt act, they are admissible as evidence tending to characterize it, and to show the intent with which the act was committed. They may also furnish some evidence of the act itself, against the accused.²⁸⁵

More general agreement existed that words that inspired or were intended to inspire insurrection were treasonous. Constitutional protections for free speech during the nineteenth century did not extend to speech that urged resistance by force to federal law. Curtis informed a grand jury that treason or insurrection was committed by “every one who counsels, commands, or procures others to commit an overt act of treason, which is accordingly committed.”²⁸⁶ Judge Kane, after speaking of those who “counsel and instigate others to acts of forcible oppugnation to the provisions of a statute—to inflame the minds of the ignorant by appeals to passion, and denunciations of the law as oppressive, unjust, revolting to the conscience, and not binding on the actions of men,” concluded that “successfully to instigate treason is to commit it.”²⁸⁷ Persons need not follow the inciter precisely. All that was necessary was that the speaker’s wishes “have been substantially complied with.”²⁸⁸ Government officials when enforcing loyalty or loyalty oaths during the Civil War routinely banned or removed from office persons who had merely advocated for secession, strongly criticized the Union, or had family or friends who engaged in those activities.²⁸⁹ Judge Trigg appears to have disagreed, at least in part. He maintained that treason was not committed by “a person who *advises* or *procures* an assemblage, and does nothing further.”²⁹⁰ In his view, the “advising certainly, and perhaps the procuring, is more in the nature of a conspiracy to levy war, than of the actual levying of war.”²⁹¹

Several persons were excluded from Congress for making comments that most contemporary commentators believe are protected by the freedom of speech. Under pre-New Deal conceptions of constitutional speech rights, the First Amendment gave no constitutional protection to persons who made speeches supporting an insurrection or otherwise through speech acts gave aid and comfort to the enemies of

²⁸⁵ *Id.*

²⁸⁶ GREENLEAF, *supra* note 27, at 419–20.

²⁸⁷ *Id.* at 420 (quoting Kane, J.); see Charge to Grand Jury—Treason, 30 F. Cas. 1047, 1048 (C.C.E.D. Pa. 1851) (No. 18,276) (declaring to be treasonous efforts “to counsel and instigate others to acts of forcible oppugnation to the provisions of a statute”); GREENLEAF, *supra* note 27, at 420 (“direct and urgent incitement to crime” (quoting Curtis, J.)).

²⁸⁸ GREENLEAF, *supra* note 27, at 419.

²⁸⁹ See HYMAN, *supra* note 268, at 6–7, 10–11, 14. Only some governing officials required “overt action.” *Id.* at 11.

²⁹⁰ TRIGG, *supra* note 25, at 9.

²⁹¹ *Id.*

the United States, even if those speeches would be protected today under the standards laid down by *Brandenburg v. Ohio*.²⁹² A House report in 1867 declared that “whenever it is shown by proof that the claimant has by act or speech given aid or countenance to the rebellion, he should not be permitted to take the oath” of office.²⁹³ Representative-elect John Young Brown of Kentucky was excluded from Congress on the basis of a letter he had written declaring, “I would not send one solitary man to aid that Government, and those who volunteer should be shot down in their tracks.”²⁹⁴ Other persons were excluded from office under the Ironclad Oath for making similar comments.²⁹⁵ Freedom of speech was given similar short shrift during the early twentieth century. Victor Berger was disqualified from Congress in 1920 because he had vigorously opposed the decision to declare war against Germany and urged resistance to the draft.²⁹⁶

Members of the Thirty-Ninth Congress did not think the persons disqualified by Section Three’s reference to “engaged in insurrection or rebellion” differed from the persons disqualified by the variations on these themes found in other congressional measures of the time.²⁹⁷ Republicans during and immediately after the Civil War insisted that participants in insurrections be disqualified from office, disenfranchised, or both. Federal law, proposed federal law, and proposed constitutional amendments used different phrases to describe the behaviors that warranted these civil sanctions. The original version of Section Three spoke of “all persons who voluntarily adhered to the late insurrection, giving it aid and comfort.”²⁹⁸ Proposed substitutes included “voluntarily adhered to the late insurrection.”²⁹⁹ Senator Van Winkle proposed a constitutional provision that began with persons “who shall have engaged in insurrection” and then described the same conduct as “participation in

²⁹² 395 U.S. 444, 449, 449 n.4 (1969). Whether Section Three should be interpreted consistently with contemporary free speech doctrine, see Baude & Paulsen, *supra* note 1, at 610–12, is not a question on which nineteenth-century legal materials shed light.

²⁹³ HINDS, *supra* note 273, at 443. Another House Report similarly concluded “that ‘aid and comfort’ may be given to an enemy by words of encouragement, or the expression of an opinion, from one occupying an influential position.” *Id.* at 452.

²⁹⁴ *Id.* at 445.

²⁹⁵ The Senate in 1862 debated at length whether to exclude Senate-elect Benjamin Starks who was accused of being “an ardent advocate of the cause of the rebellious States.” Who had “openly declared his admiration for [the confederacy] and advocated the absorption of the loyal States of the Union into the Southern Confederacy under that constitution as the only means of peace, warmly avowing his sympathies with the South.” *Id.* at 439. The motion to exclude was rejected by a 21–16 vote.

²⁹⁶ 6 CLARENCE CANNON, CANNON’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 56–58 (2nd ed. 1935). Berger was excluded under the “aid or comfort” prong of Section Three.

²⁹⁷ CONG. GLOBE, 39th Cong., 1st Sess. 3036 (1886).

²⁹⁸ *Id.* at 2286; *see id.* at 2768 (“shall have voluntarily engaged in any insurrection or rebellion against the United States, or given aid or comfort thereto”).

²⁹⁹ *Id.* at 2463.

such insurrection.”³⁰⁰ The Ironclad Oath mandated in 1862 required persons to swear that they had “voluntarily given no aid, countenance, counsel or encouragement to persons engaged in armed hostilit[ies] thereto.”³⁰¹ Another federal oath required persons to swear that they had “not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto.”³⁰² All these phrases were designed to disqualify persons who had engaged in common or constitutional law treason. No member of Congress even hinted that the disqualifying behaviors under the Ironclad Oath, some other oath, some other federal statute, or some proposed federal statute or constitutional amendment differed from the behaviors that merited disqualification under Section Three.

A. The Second Confiscation Act

The Second Confiscation Act³⁰³ supports the view that the persons responsible for Section Three of the Fourteenth Amendment understood “engaged in insurrection” broadly and as reflecting the inherited common/constitutional law of treason. Republicans in the House and Senate declared that the Second Confiscation Act should punish treason and confiscate the property of traitors. Representative Thomas D. Eliot when introducing the bill that would become the Second Confiscation Act stated, “each traitor whose property is to be taken to pay in part the cost of this rebellion, is an ‘armed enemy’ engaged in fierce civil war.”³⁰⁴ “The leading and official traitors, against whose property this legislation proceeds,” he continued, “devoted their estates to the successful prosecution of this nefarious war.”³⁰⁵ Several early drafts of the act explicitly declared any form of participation in an insurrection to be treason. The first bill before the House of Representatives proposed confiscating the property of and disqualifying from office any person who “shall . . . wilfully engage in armed rebellion against the Government of the United States, or shall wilfully aid or abet such rebellion, or adhere to those engaged in such rebellion, giving them aid or comfort.”³⁰⁶ Both the legislative history and structure of the final Second Confiscation Act demonstrate that Congress made no legal distinction between inciting, setting on foot, assisting, and engaging in an insurrection. All these activities were treasons that merited disqualification from office.

The first drafts of the Second Confiscation Act spoke of treason more generally and adopted the traditional common law view that anyone who aided an insurrection

³⁰⁰ *Id.* at 2941.

³⁰¹ An Act To Prescribe an Oath of Office, and for Other Purposes, ch. 128, 12 Stat. 502, 37th Cong., 2d Sess. (1862).

³⁰² *Id.*

³⁰³ An Act To Suppress Insurrection, To Punish Treason and Rebellion, To Seize and Confiscate the Rebels, and for Other Purposes, ch. 195, 12 Stat. 589, 37th Cong., 2d Sess. (1862).

³⁰⁴ CONG. GLOBE, 37th Cong., 2d Sess. 2235 (1862).

³⁰⁵ *Id.* at 2237.

³⁰⁶ *Id.* at 2233.

was an insurrectionist.³⁰⁷ Representative Fernando Beaman of Michigan observed that these drafts acknowledged that a person who sold a shoe knowing that shoe would be used in battle was a traitor subject to the death penalty and loss of their entire property.³⁰⁸ Traitors, Republicans agreed, had forfeited their property to the government. The only issues were whether the treason clause mandated a judicial proceeding before a rebel's property was subject to forfeiture and whether forfeiture was limited to a life estate.³⁰⁹ No one disputed the provision in most drafts of the Second Confiscation Act that persons who, after taking an oath, were "actively concerned in rebellion" should be "declared ineligible for any office of honor, profit, or trust under the Federal Government."³¹⁰

Congressional debate took a new turn in May 1862 when some members of Congress pointed to two problems with making no distinction among persons who engaged in treason as treason was commonly understood. Several senators and representatives, most notably Senator Daniel Clark, the Chair of a Senate Select Committee on Confiscation, recognized that neither the American people nor they wanted to execute more than a minute fraction of the rebels who committed treason during the Civil War. "We have laws which make treason a capital offense," Representative Alfred Ely of New York stated, "but nobody anywhere expects to see such laws executed against millions of people."³¹¹ Senator Ira Harris of New York asked, "Is it to be contemplated for a moment that all these men are to be indicted for treason and to be executed?"³¹² Congress needed to find a means by which juries and judges could punish treason without mandating the execution of every offender. Members of Congress were also concerned with the possible impact of judicial opinions, most notably Justice Noah Swayne's opinion in *United States v. Chenoweth*, quashing indictments for treason that charged defendants with providing "aid and comfort to foreign enemies" of the United States.³¹³ Although Justice Swayne stated in his opinion and afterwards³¹⁴ that the same indictment would have merit had the government charged the defendants with levying war against the United States, some newspapers reported and some members of Congress feared that Swayne and other federal justices were rejecting the common law view that all participants in treason were principals.³¹⁵ Senator John Ten Eyck of New Jersey declared the court had ruled that

³⁰⁷ See CONG. GLOBE, 37th Cong., 2d Sess. app. 169, 275 (1862).

³⁰⁸ *Id.* at 204.

³⁰⁹ See DANIEL W. HAMILTON, *THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND CONFEDERACY DURING THE CIVIL WAR* 12 (2007).

³¹⁰ CONG. GLOBE, 37th Cong., 2d Sess. app. 275 (1862).

³¹¹ *Id.* at 194; see also CONG. GLOBE, 37th Cong., 2d Sess. 2199 (1862); CONG. GLOBE, 37th Cong., 2d Sess. app. 145 (1862).

³¹² CONG. GLOBE, 37th Cong., 1st Sess. 2169 (1862).

³¹³ SWAYNE, *supra* note 24, at 109.

³¹⁴ *United States v. Burr*, 25 F. Cas. 55, 186 (C.C.D. Va. 1807) (No. 14,693).

³¹⁵ See CONG. GLOBE, 37th Cong., 2d Sess. 2166–67, 2167, 2169 (1862); CONG. GLOBE, 37th Cong., 2d Sess. app. 147, 264 (1862).

the words “aid and comfort” “in the Constitution are solely applicable to aiding and assisting a foreign enemy, and do not apply to aid and assistance rendered now to persons in rebellion within the limits of the Union.”³¹⁶ Other Republicans pointed out that *Chenoweth* turned on a pleading error, that Swayne had explicitly endorsed longstanding principles of treason.³¹⁷ Senator Benjamin Wade of Ohio correctly informed Ten Eyck and others that “in the case of a foreign war you may indict a man for giving aid and comfort to the enemy, but that in a domestic war your indictments must be under the other clause of the Constitution, and you must charge the man with levying war,”³¹⁸ but the elements of each prong of treason were the same.³¹⁹ Wade, at this point, repeated the common law adage that “in treason there are no accessories,” that “[i]f a man does anything to aid, abet, or assist, so that he would be an accessory before the fact in a felony, he becomes a principal traitor.”³²⁰ Nevertheless, other members still wanted insurance against the course of future judicial decisions leaving some treasons unpunished.³²¹

Clark and his Republican allies solved the problems of jury nullification and judicial narrowing by creating two separate offenses. Section One of the Second Confiscation Act prescribes punishments for “every person who shall hereafter commit the crime of treason against the United States.”³²² Persons so convicted could be sentenced to death or imprisoned for at least five years and fined at least ten thousand dollars.³²³ Section Two prescribes punishments for “any person [who] shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States.”³²⁴ Persons so convicted could be sentenced to prison for no more than ten years and fined no more than ten thousand dollars or both.³²⁵ Sections One and Two liberate the slaves of all persons convicted under these provisions.³²⁶ The remaining twelve sections of the Confiscation Act make no distinctions between persons who “commit the crime of treason” and persons who “incite, set on foot, assist, or engage in any rebellion or insurrection.”³²⁷ Most notably, Section Three states, “That every person guilty of either of the offences described in this act shall be forever incapable and disqualified to hold any office under the United States.”³²⁸

³¹⁶ CONG. GLOBE, 37th Cong., 2d Sess. 2166 (1862).

³¹⁷ *Id.* at 2167.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ CONG. GLOBE, 37th Cong., 2d Sess. app. 264 (1862); CONG. GLOBE, 37th Cong., 2d Sess. 2166–67, 2169 (1862).

³²² Second Confiscation Act, ch. 195, 12 Stat. 589, 589 (July 17, 1862).

³²³ *Id.* at 590.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 589–90.

³²⁷ *Id.* at 590–92.

³²⁸ *Id.* at 590.

The drafters of the Second Confiscation Act, many of whom would later draft Section Three of the Fourteenth Amendment, maintained that Section Two of the former established a single offense and not four distinctive offenses consisting of: (1) inciting; (2) setting on foot; (3) assisting; and (4) engaging in an insurrection.³²⁹ Republicans maintained that no legal difference existed between inciting an insurrection and engaging in an insurrection. Clark informed the Senate that the select committee did “not apprehend that [Section Two] creates more than one offense. . . . We did not intend that it should create more than one offense, and all to be punished alike.”³³⁰ When specifically asked by Senator Jacob Howard of Michigan whether the phrase “incite, set on foot, assist or engage in any rebellion or insurrection against the authority of the United States” described four offenses or one, Clark stated that only one offense was intended.³³¹ Howard more specifically asked Clark to confirm that “the Senator from New Hampshire sets up no distinction between inciting a rebellion or insurrection, setting on foot a rebellion or insurrection, assisting in a rebellion or insurrection, or engaging in a rebellion or insurrection. He regards all these acts as constituting one and the same offense.”³³² Clark replied, “certainly.”³³³ “We did not mean to multiply the offenses,” he added, “but to give a description broad enough to bring the offender to trial.”³³⁴

No Republican who supported the Second Confiscation Act and later Section Three of the Fourteenth Amendment discerned a significant difference between the offenses set out in Section One and Section Two of the Second Confiscation Act. Senators Howard and Wade declared the offenses identical. Wade stated that “the second section of this bill described precisely the same crime as is punished under the denomination of treason in the first section of the bill. . . . [T]hat the acts punished by the second section are in and of themselves nothing more nor less than treason.”³³⁵ Senator Ira Harris of New York observed that any competent prosecutor would charge an offender with violating both Sections One and Section Two.³³⁶ Harris did not point to any offenses he thought were crimes under Section Two, but not under Section One. Section Two, in his view, was merely insurance against a judge who rejected the inherited common/constitutional law of treason or a jury that did not wish to punish as traitor with the more severe penalties marked out in Section One. Harris observed, “[T]here is no harm in making this provision so that if the court shall hold that the conduct of a man brought in question upon an indictment for treason does not amount to treason, he shall not therefore be acquitted.”³³⁷

³²⁹ CONG. GLOBE, 37th Cong., 2d Sess. 2169 (1862).

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.* at 2173; *see id.* at 2169.

³³⁶ *Id.* at 2169.

³³⁷ *Id.*

Clark similarly wanted to give judges and juries the option of offering lighter punishments for less severe treasons. “I want the court to have some discretion,” he added, “because it may turn out on the trial that there are circumstances mitigating it which the attorney who indicted him for treason did not know of.”³³⁸

Clark acknowledged that every offense stated in Section Two “might amount to treason.”³³⁹ His reservation concerned an idiosyncratic reading of the law of insurrection/treason not relevant to the Civil War or, for that matter, the events of January 6, 2021. Clark suggested the possibility of “a rebellion which may not amount to a levying of war” by not being “an armed rebellion.”³⁴⁰ No case or treatise published at that time acknowledged the possibility of a rebellion that did not rely on force. The Civil War was an armed rebellion. No party to *Trump v. Anderson* or related cases maintains that no violence took place on January 6, or that Trump should be disqualified even if no force or intimidation by numbers took place on January 6.

The Republicans responsible for Section One and Section Two of the Confiscation Act maintained that the offences described by Section One covered persons who engaged in incitement. Harris asserted that execution under Section One was the appropriate punishment for persons who “incited and led on this rebellion.”³⁴¹ Incitement to insurrection/rebellion/treason, in the Republican view, was one of the worst form of treasons. Clark declared, “In the circumstances of this rebellion, where there is a great variety of shades of guilt, where there is the man who leads on and incites the rebellion, and the man who is drawn into it, the committee thought there should be a difference in punishment.”³⁴²

Every provision of the Second Confiscation Act set out the legal consequences of what Republicans in 1862 thought was treason. Members of Congress, both before and

³³⁸ *Id.* at 2166. Senator Garrett Davis of Kentucky, a Unionist who opposed both the Second Confiscation Act and the Fourteenth Amendment was the only member of Congress who confidently claimed that some actions might violate Section One, but not Section Two of the Second Confiscation Act. Davis pointed out that Chief Justice Marshall in *United States v. Burr* pointed to some actions that were not levying war against the United States but might constitute providing aid and comfort to the enemies of the United States. As noted above, Marshall in *Bollman* accepted the common law rule that “if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all of those who perform any part, however minute or remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.” *Ex parte Bollman*, 8 U.S. 75, 126 (1807). What Davis may have had in mind was Marshall’s claim that “[t]o conspire to levy war, and actually to levy war, are distinct offenses.” *Id.* This would align Davis to some degree with Clark. “Levying war,” requires an act of violence, force or intimidation. Providing aid and comfort to an enemy of the United States may not.

³³⁹ CONG. GLOBE, 37th Cong., 2d Sess. 2166 (1862).

³⁴⁰ *Id.* I have been unable to find any source that supports Clark’s suggestion that a rebellion or insurrection might occur without force.

³⁴¹ *Id.* at 2169.

³⁴² *Id.* at 2166.

after Sections One and Two took their final form, claimed that the point of the Second Confiscation Act was to confiscate the property and provide other sanctions for “traitors.”³⁴³ No one suggested that the Second Confiscation Act authorized confiscating the property of and disqualifying from office persons who were not traitors, who had not engaged in rebellion or insurrection. A crucial issue in the debate was the constitutional command that “[n]o attainder of treason shall work corruption of blood or forfeiture beyond the life of the person attainted”³⁴⁴ Many Republicans, including Abraham Lincoln, insisted that confiscation had to be limited to a life estate that with the heirs of traitors maintaining a reversion interest.³⁴⁵ More radical Republicans insisted that international law permitted confiscation of all property interests during wartime.³⁴⁶ No Republican took the view that the Treason Clause did not apply to persons who incited, set on foot, assisted, or engaged in insurrection because none of those acts constituted treason.

The plain text of the Second Confiscation Act is consistent with the inherited common/constitutional law of treason, even when read without the benefit of the legislative history. The text provides no hint as to the distinction between “inciting,” “setting on foot,” “assisting” and “engaging” or explanation of the difference between committing treason and the activities mentioned in Section Two.³⁴⁷ Principles and accessories in both Section One and Section Two are treated identically. The punishment for those who incite, set on foot, or assist an insurrection is the same as for those who engage in an insurrection. The slaves of persons who violate Section One and Section Two have the same legal status. No difference exists in presidential power to begin condemnation proceedings for persons who violate Section One or Section Two.³⁴⁸ All persons who violate Section One or Section Two are disqualified from holding office.³⁴⁹

Interpreting Sections One and Two as stating five or two separate offenses leads to absurd results both with respect to the Second Confiscation Act, and, if imputed to constitutional disqualification, Section Three of the Fourteen Amendment. Section Nine of the Second Confiscation Act frees “all slaves of persons who shall hereafter be engaged in rebellion against . . . the United States.”³⁵⁰ If Sections One and Two of the Second Confiscation Act establish five distinct offenses, then Section Nine does not free slaves of persons who after July 17, 1862, committed treason against the United States, whether by inciting rebellion, setting on foot rebellion, or

³⁴³ *Id.* at 2234.

³⁴⁴ *Id.* at 2166.

³⁴⁵ See HAMILTON, *supra* note 309, at 41–56.

³⁴⁶ See *id.* at 20–40.

³⁴⁷ An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Rebels, and for other Purposes, ch. 195, 12 Stat. 589, 590 37th Cong., 2d Sess. (1862).

³⁴⁸ *Id.* at 591.

³⁴⁹ *Id.* at 590.

³⁵⁰ *Id.* at 591.

assisting rebellion. Interpreted consistently with this reading of the Second Confiscation Act, Jefferson Davis, Robert W. Lee and others could have avoided constitutional disqualification by claiming that they had committed treason which, by placement in Section One of the Second Confiscation Act,³⁵¹ was understood to be a different offence than engaging in insurrection as set out in Section Two of the Second Confiscation Act and Section Three of the Fourteenth Amendment.³⁵²

B. The Contemporary State Decisionmakers

The three state decisionmakers adopted the correct historical understanding of “engaged in” an insurrection, with the proviso, as noted above, that Judge Porter of Illinois simply announced that the Colorado Supreme Court made the correct decision. *Anderson v. Griswold* correctly asserted that “engaging in” requires “an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose.”³⁵³ The justices carefully reviewed the historical sources. Both Marshall and Curtis were correctly cited for the proposition that “an individual need not directly participate in the overt act of levying war or insurrection for the law to hold him accountable as if he had.”³⁵⁴ The Maine Secretary of State when reaching the same conclusions cited the rule that “[i]n treason, all are principals” and the case law holding that “levying war” includes “‘inciting and encouraging others’ to commit treason.”³⁵⁵

IV. BY THE LEGAL STANDARDS AT THE TIME SECTION THREE WAS FRAMED, DONALD TRUMP PARTICIPATED IN THE JANUARY 6TH INSURRECTION IF HE WAS LEAGUED WITH THE PERSONS WHO ATTEMPTED BY FORCE TO PREVENT THE TRANSITION OF PRESIDENTIAL POWER

The materials from the nineteenth century that establish the legal standards then used for determining whether an event was an insurrection and whether someone participated in an insurrection are obviously insufficient for determining whether Donald Trump in the twenty-first century participated in an insurrection. If Trump did “incit[e] a mob to march on the Capitol and impede the works of Congress,” then he participated in the January 6th insurrection.³⁵⁶ As noted in the previous Part, nineteenth-century legal authorities maintained that “every one who counsels, commands, or procures others to commit an overt act of treason, which is

³⁵¹ *Id.* at 589–90.

³⁵² *Id.* at 590; U.S. CONST. amend. XIV, § 3.

³⁵³ *Anderson v. Griswold*, 543 P.3d 283, 331–32 (Colo. 2023), *rev’d*, 601 U.S. 100 (2024).

³⁵⁴ *Id.* at 332.

³⁵⁵ Ruling of the Secretary of State, *supra* note 21, at 27.

³⁵⁶ SELECT COMMITTEE, FINAL REPORT, *supra* note 20, at xi.

accordingly committed,”³⁵⁷ as well as those who “counsel and instigate others to acts of forcible oppugnation to the provisions of a statute,”³⁵⁸ was considered an insurrectionist. No free speech defense to insurrection existed. Judge Kane maintained that “successfully to instigate treason is to commit it.”³⁵⁹ Whether Trump did, in fact, “counsel and instigate others to acts of forcible oppugnation to the provisions of a statute” or otherwise perform acts that supported the insurrection of January 6th is, however, a fact question on which nineteenth-century materials shed no light.³⁶⁰

What can be said with confidence is that legal authorities during the Civil War and Reconstruction would have considered Donald Trump a participant in the January 6th insurrection if they found that he was knowingly or voluntarily leagued with the persons who attempted by force to prevent the transition of presidential power. The crucial issue would have been whether Trump knowingly or voluntarily participated in a use of force, violence or intimidation to achieve his goal of maintaining power in defiance of federal law. That Trump “merely” incited an insurrection would not have exempted him from disqualification. As Howard asserted and Clark agreed, “no distinction [existed] between inciting a rebellion or insurrection, setting on foot a rebellion or insurrection, assisting in a rebellion or insurrection, or engaging in a rebellion or insurrection.”³⁶¹

Evidence that Trump lied about election results, brought frivolous lawsuits challenging those elections, was involved in fraudulent schemes to alter election results, and applied political pressure to induce governing officials to support his claims³⁶² do not, standing alone, suffice to justify disqualification, but may be used to prove intention under nineteenth-century standards. Clark’s reference to a non-violent rebellion aside, the overwhelming majority of nineteenth-century sources require violence, force, or physical intimidation to prove insurrection. Persons who make false claims when resisting the implementation of a federal law are not insurrectionists. Persons who make false claims when inciting others to resist federal law by force are insurrectionists under the legal standards in place when Section Three was framed. Evidence of other crimes was, however, relevant to determine intention. Brightly observed that “everything tending to show that there was an intention to make public resistance to a law of the United States” was relevant to determining whether a person had engaged in treason. He continued, “it is competent to show, that a long time before the alleged treasonable occurrence, facts had occurred, . . . which would explain certain particulars relied on to show a treasonable intent, and make them show a different intent.”³⁶³ Evidence that Trump was willing to overturn

³⁵⁷ GREENLEAF, *supra* note 27, at 419–20.

³⁵⁸ Charge to Grand Jury—Treason, 30 F. Cas. 1047, 1048 (C.C.E.D. Pa. 1851) (No. 18,276).

³⁵⁹ *Id.* at 1047.

³⁶⁰ *Id.* at 1048.

³⁶¹ CONG. GLOBE, 37th Cong., 2d Sess. 2169 (1862).

³⁶² SELECT COMMITTEE, FINAL REPORT, *supra* note 20, at 3–5; *see id.* at x; *id.* at xv.

³⁶³ BRIGHTLY, *supra* note 27, at 215–16.

the 2020 national election by illegal means, this principle of nineteenth-century law indicates, supports the inference that his intention on January 6, 2021, was to provoke a mob to interfere illegally with the presidential transition process.

The Colorado Supreme Court and Maine Secretary of State made ample findings supporting the conclusion that Trump engaged in an insurrection under the standards in place when Section Three was framed and ratified. Specifically, the Colorado justices declared:

President Trump’s direct and express efforts, over several months, exhorting his supporters to march to the Capitol to prevent what he falsely characterized as an alleged fraud on the people of this country were indisputably overt and voluntary. Moreover, the evidence amply showed that President Trump undertook all these actions to aid and further a common unlawful purpose that he himself conceived and set in motion: prevent Congress from certifying the 2020 presidential election and stop the peaceful transfer of power.³⁶⁴

The Maine Secretary of State found that Trump engaged in this incendiary rhetoric knowing that he was incited violence. Her ruling stated:

In response to Mr. Trump’s inflammatory rhetoric, Gabriel Sterling, a Republican election official in the state of Georgia, publicly warned President Trump to “stop inspiring people to commit potential acts of violence” or “[s]omeone’s going to get killed.” Mr. Trump responded by retweeting a video of the press conference, proclaiming “Rigged Election” and “Expose the massive voter fraud in Georgia.” And when a November 14, 2020 rally in Washington, D.C. inspired by his continued attempts to “stop the steal” turned violent—there was a stabbing, numerous injuries, and multiple arrests—Mr. Trump justified the violence as self-defense against “ANTIFA SCUM.”³⁶⁵

The Colorado Supreme Court observed that Trump’s role in the insurrection went beyond incitement. The justices concluded:

President Trump did not merely incite the insurrection. Even when the siege on the Capitol was fully underway, he continued to support it by repeatedly demanding that Vice President Pence refuse to perform his constitutional duty and by calling Senators

³⁶⁴ Anderson v. Griswold, 543 P.3d 283, 336 (Colo. 2023), *rev’d*, 601 U.S. 100 (2024).

³⁶⁵ Ruling of the Secretary of State, *supra* note 21, at 28 (citations omitted).

to persuade them to stop the counting of electoral votes. These actions constituted overt, voluntary, and direct participation in the insurrection.³⁶⁶

The Maine Secretary of State reached the same conclusions in her report. She stated:

Mr. Trump was aware of the likelihood for violence and at least initially supported its use given he both encouraged it with incendiary rhetoric and took no timely action to stop it. . . . Mr. Trump was aware of the tinder laid by his multi-month effort to delegitimize a democratic election, and then chose to light a match.³⁶⁷

The Select Committee to Investigate the January 6th Attack on the U.S. Capitol reached three conclusions that are relevant for determining whether Trump met nineteenth-century standards for participating in an insurrection. They are:

[1] Based on false allegations that the election was stolen, Donald Trump summoned tens of thousands of supporters to Washington for January 6th. Although these supporters were angry and some were armed, Donald Trump instructed them to march to the Capitol on January 6th to “take back” their country.

[2] Knowing that a violent attack on the Capitol was underway and knowing that his words would incite further violence, Donald Trump purposely sent a social media message publicly condemning Vice President Pence at 2:24 p.m. on January 6th.

[3] Knowing that violence was underway at the Capitol, and despite his duty to ensure that the laws are faithfully executed, Donald Trump refused repeated requests over a multiple hour period that he instruct his violent supporters to disperse and leave the Capitol, and instead watched the violent attack unfold on television. This failure to act perpetuated the violence at the Capitol and obstructed Congress’s proceeding to count electoral votes.³⁶⁸

The crucial question is the connection between these actions and the insurrection. If Trump’s messages and actions as president were done intentionally and, perhaps,

³⁶⁶ *Anderson*, 543 P.3d at 336.

³⁶⁷ Ruling of the Secretary of State, *supra* note 21, at 32.

³⁶⁸ SELECT COMMITTEE, FINAL REPORT, *supra* note 20, at 5.

knowingly, in support of the insurrection, then he meets the legal standards for participating in an insurrection as insurrection was understood when Section Three was framed. The leadership of the Select Committee believed this to be the case. Representative Bennie Thompson, the Chair of the Committee declared, “The rioters were inside the halls of Congress because the head of the executive branch of our government, the then-President of the United States, told them to attack.”³⁶⁹ “The President of the United States,” he wrote, “incit[ed] a mob to march on the Capitol and impede the works of Congress.”³⁷⁰ These assertions, if proved in a hearing on the application of Section Three to Donald Trump, are sufficient to warrant disqualification under the legal standards in place in 1866.

CONCLUSION: THE FUTURE OF CONSTITUTIONAL INSURRECTION

Days before the events of January 6, I finished a chapter for a still forthcoming book on the framing of Section Three of the Fourteenth Amendment that began with the declaration: “Section Three is the most forgotten provision of the forgotten Fourteenth Amendment.”³⁷¹ My prophetic license was revoked immediately. Section Three spent nearly three years in the news. I (and Gerard Magliocca)³⁷² had more than our fifteen minutes of fame. The decision in *Trump v. Anderson* threatens to return Section Three and those that explored that provision to a well-deserved and desired obscurity. A fair chance exists that an essay on Section Three published in 2074 might begin with “Section Three is the most forgotten provision of the forgotten Fourteenth Amendment” with a footnote referencing the past three years.

Section Three may nevertheless live a somewhat longer life. The Supreme Court in *Trump* left open the possibility that Congress could take steps to disqualify the former President. Voters who are convinced that Donald Trump meets the conditions for constitutional disqualification have the power to prevent Trump from occupying public office by voting for other candidates. Much evidence exists that American politics is becoming more violent with many people worried about an impending civil war. Perhaps an essay published on constitutional disqualification in 2074 may begin by noting that Section Three has become the most litigated and most discussed provision of the Constitution.

The main legacy of Section Three may be to remind the United States and the world that a version of militant democracy exists in the United States. Proponents of militant democracy insist that democracy limits the democratic menu of choice. The

³⁶⁹ *Id.* at ix.

³⁷⁰ *Id.* at xi.

³⁷¹ See “Section Three of the Fourteenth Amendment: Drafting History” (on file with author).

³⁷² See generally Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87 (2021).

people may not vote for parties or propositions that threaten to abolish the democratic order. No one may advocate that democracy be abolished. The ballot may not include parties that claim some group of citizens are not fully human. Section Three demonstrates that the United States, thought to be the one constitutional democracy immune to the appeal of militant democracy, is merely a different kind of militant democracy. Most western European countries ban parties that promise the overthrow of democratic governments. The Constitution of the United States bans former officeholders who have attempted to prevent by violence the implementation of the law of the land. The merits of American-style militant democracy are now up for discussion. The results of that discussion are for the future to determine.