THE *GRIFFIN'S CASE* PHENOMENON AND THE PROBLEM OF HISTORICAL KNOWLEDGE IN LEGAL ARGUMENTS

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When it comes to using history in constitutional arguments, Jack Balkin is clearly an optimist. In his new book, *Memory and Authority: The Uses of History in Constitutional Interpretation*, Balkin maintains that those who hope to make effective arguments about the meaning of the Constitution should not shy away from using history in an effort to avoid the originalist brand.[1] Indeed, he explains, many forms of constitutional argumentation—not just originalism—already use history as an interpretive tool.[2] And if lawyers can adopt a broader notion of a "usable past," historians, too, will find a more comfortable place in constitutional conversations—especially the kinds of conversations that have increasingly made their way in front of the U.S. Supreme Court.[3]

Balkin's view may already be ascendant. Professional historians have long debated the ethical and methodological benefits and drawbacks of writing amicus briefs.[4] Yet, as M. Henry Ishitani argues in a recent article, in addition to history-based briefs by legal scholars and practitioners, historians have not only submitted a greater number of amicus briefs to the U.S. Supreme Court over the past thirty-five years, those briefs have also "been comparatively influential in the process of Supreme Court opinion writing."[5]

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[1] JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 11–14 (2024) [hereinafter MEMORY AND AUTHORITY].

[2] *Id.* at 20–24.

[3] *Id.* at 235–39.

[4] For an overview of this debate, see generally Sam Erman & Nathan Perl-Rosenthal, *Historians' Amicus Briefs: Practice and Prospect*, *in* THE OXFORD HANDBOOK OF LEGAL HISTORY 1095, 1095–111 (Markus D. Dubber & Christopher Tomlins eds., 2018).

[5] M. Henry Ishitani, *Today's Brandeis Brief? The Fate of the Historians' Brief Amidst the Rise of an Originalist Court*, 2 J. AM. CONST. HIST. 6, 6 (2024). A critical part of Ishitani's argument is the distinction between historically informed ("history-based") briefs and "'core historians' amicus brief[s]," which he defines by two essential traits: those with a signer or writer who either "(a) [c]laims to be a 'historian' or otherwise an expert in the offered relevant history, *or* (b) [h]as an academic or other institutional position as a professional scholar of history or professional historical organization *and* [t]he majority of the brief's analytical content is historical or historiographical." *Id.* at 23.

Perhaps no recent case better illustrates how much history has been floating around constitutional arguments as *Trump v. Anderson*.[6] A cursory look at the amicus briefs, public conversation, and relevant legal literature about the case shows just how many professional historians got involved in the legal arguments and how many lawyers seemed to expand their use of context to approach history in more textured ways.[7] In some sense, the timing of *Memory and Authority*'s publication could not have been more perfect, coinciding as it did with a case that offered a panoply of historical references and interpretations from authorities across the political and ideological spectrum and in nearly every mode of constitutional argument.[8] (Whether these references were effective might be another matter.)

As in many recent cases, each party presented a version of the history best suited to their agenda. But among the varied historical references in *Trump v. Anderson*, I found myself particularly struck by the discussion of *Griffin's Case* and the underlying motivations of Chief Justice Salmon Chase, who presided over the case while riding circuit in Virginia in 1869.[9] References to this decision and the Justice who

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[6] *See generally* 601 U.S. 100 (2024).

[7] For public conversation and legal literature see *infra* notes 27–39 and accompanying text. In addition to the many amici that cited history to justify various perspectives on the case, historians filed two separate briefs. *See generally* Brief for Professors Orville Vernon Burton et al. as Amici Curiae Supporting Respondents, *Trump*, 601 U.S. 100 (No. 23-719) [hereinafter Brief for Professors]; Brief for American Historians as Amici Curiae Supporting Respondents, *Trump*, 601 U.S. 100 (No. 23-719) [hereinafter Brief for American Historians].

[8] *See* MEMORY AND AUTHORITY, *supra* note 1, at 18–20. *Memory and Authority* had a publication date of February 27, 2024. *Memory and Authority*, YALE UNIV. PRESS, https://yalebooks.yale.edu/book/9780300272222/memory-and-authority/ [https://perma.cc/Y424-4W7R] (last visited Nov. 27, 2024). On January 5, 2024, the U.S. Supreme Court granted former President Donald Trump's petition for a writ of certiorari seeking review of the Colorado Supreme Court's ruling in *Anderson v. Griswold*. *Trump v. Anderson*, SCOTUS BLOG, https://www.scotusblog.com/case-files/cases/trump-v-anderson/ [https://perma.cc/3BFC-SBU7] (last visited Nov. 27, 2024). Oral arguments were held February 8, 2024. *Id.* The Court ruled on March 4, 2024. *Id.*

[9] *See* Griffin's Case, 11 F. Cas. 7, 7 (No. 5,815) (C.C.D. Va. 1869). (This case is sometimes written as *In re* Griffin.) *Griffin's Case* concerned the petition of Caesar Griffin, a Black man who had been indicted in Rockbridge County, Virginia for assault with intent to kill. *Id.* at 8. In the county case, the jury found Griffin guilty and sentenced him to two years in the penitentiary. *Id.* Once sentenced, Griffin filed a petition of habeas corpus alleging he had been unlawfully restrained because the judge who presided over the trial, Judge H. W. Sheffey, had served the Confederacy as a member of the Virginia state legislature and therefore was, at the time of Griffin's trial, disqualified from holding office under Section Three of the Fourteenth Amendment. *See id.* The U.S. District Judge in Virginia, John Underwood, received the petition for a writ of habeas corpus, who granted it under the terms of Section Three. *See id.* When the sheriff appealed to the circuit court where Chief Justice Chase was presiding as a circuit judge, Chase reversed the decision on the grounds that Section Three was not self-executing. *See generally id.* As will become clear in the remainder of this Essay, the case facts and decision, while intriguing, are not the subject at issue here.

made it could be found nearly everywhere in relationship to the force and meaning of Section Three of the Fourteenth Amendment: in addition to a series of law review articles and blog posts framing the discussion in 2022 and 2023,[10] the case was central to Colorado Supreme Court Justice Carlos Samour, Jr.'s dissent in *Anderson v. Griswold*.[11] Once scheduled for argument before the U.S. Justices, nearly half of briefs from *amici* featured references to *Griffin's Case*.[12] Justice Brett Kavanaugh pursued a line of questioning about the case in oral argument, and both the per curiam opinion and the concurrence by Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson reference the case.[13] Many of these discussions—both among the *amici* and in public—also took on a political valence; those who opposed *Griffin's Case* sought to discredit Chase while those who hoped to use the decision to their advantage promoted his heroic qualities as, in the words of one proponent, "a leading light of antebellum anti-slavery litigation" who "do[es] not deserve this *ex post* extirpation."[14]

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[10] *See infra* notes 27–39 and accompanying text.

[11] *See* 543 P.3d 283, 348–55 (Colo. 2023) (Samour, J., dissenting); *supra* note 8 and accompanying text.

[12] Roughly forty-one of ninety-seven briefs include references. *See generally* Brief for Professors, *supra* note 7; Brief for American Historians, *supra* note 7. Among others that discuss *Griffin's Case* in service of or in relation to arguments for petitioner, respondent, and neither party, see Brief for Republican National Committee and National Republican Congressional Committee as Amici Curiae Supporting Petitioner at 15–16, *Trump*, 601 U.S. 100 (No. 23-719); Brief for States of Indiana, West Virginia, 25 Other States, and the Arizona Legislature as Amici Curiae Supporting Petitioner at 11–12, *Trump*, 601 U.S. 100 (No. 23-719); Brief for Professor Seth Barrett Tillman as Amicus Curiae Supporting Petitioner at 2, 4–9, *Trump*, 601 U.S. 100 (No. 23-719) [hereinafter Brief for Professor Tillman]; Brief for Landmark Legal Foundation as Amicus Curiae Supporting Petitioner at 13–15, *Trump*, 601 U.S. 100 (No. 23-719); Brief for Public Interest Legal Foundation and Hans A. Von Spakovsky as Amici Curiae Supporting Petitioner at 10–11, *Trump*, 601 U.S. 100 (No. 23-719); Brief for Claremont Institute's Center for Constitutional Jurisprudence as Amici Curiae Supporting Petitioner at 15–20, *Trump*, 601 U.S. 100 (No. 23-719); Brief for G. Antaeus B. Edelsohn as Amici Curiae Supporting Respondents at 25, *Trump*, 601 U.S. 100 (No. 23-719); Brief for Professor Kermit Roosevelt as Amici Curiae Supporting Respondents at 15–21, *Trump*, 601 U.S. 100 (No. 23-719); Brief for Akhil Reed Amar and Vikram David Amar as Amici Curiae Supporting Neither Party at 14, *Trump*, 601 U.S. 100 (No. 23-719); Brief for the Secretaries of State of Missouri, Alabama, Arkansas, Idaho, Indiana, Kansas, Montana, Nebraska, Ohio, Tennessee, and West Virginia as Amici Curiae Supporting Neither Party at 6–7, *Trump*, 601 U.S. 100 (No. 23-719).

[13] Transcript of Oral Argument at 35, *Trump*, 601 U.S. 100 (No. 23-719); *Trump*, 601 U.S. at 109 (per curiam); *id.* at 120–21 (Sotomayor, Kagan & Jackson, JJ., concurring).

[14] *See* Brief for Professor Tillman, *supra* note 12, at 7–8; *see also* Jason Willick, *The Antislavery Giant at the Center of the Trump Disqualification Case*, WASH. POST (Feb. 5, 2024, 6:45 AM), https://www.washingtonpost.com/opinions/2024/02/05/trump-insurrection-case-supreme-court-salmon-chase/ [https://perma.cc/8YS5-9F7D]; Lawrence Hurley, *Supreme Court May Look to the Civil War to Resolve Whether Trump Can Be on the Ballot*, NBC NEWS (Feb. 3, 2024, 7:00 AM), https://www.nbcnews.com/politics/supreme-court/trump-jefferson-david-14th-amendment-rcna136369 [https://perma.cc/9FUK-SVYC].

On one level, the debates about *Griffin's Case* highlight precisely the kind of historical argumentation Balkin identifies in *Memory and Authority*. In fact, those who defended Salmon Chase and his decision as a useful precedent in the disqualification case frequently relied on what Balkin identifies as the most common form of historical argument in our constitutional culture: those based in "ethos, tradition, and honored authority."[15] Opponents, for their part, attempted to "use history critically," in Balkin's words, portraying Chase and the decision in dishonorable terms.[16] Each side made reference to "what is honorable about the nation's history and values judged from the standpoint of the present."[17]

Yet, on another level, these discussions and debates did something entirely different from engaging with established tradition or deeply held honored authority. Because, before 2022, few lawyers and historians had ever heard of *Griffin's Case*.[18] In the years after the 1869 decision, it rarely appeared in federal cases and was mostly ignored by legal commentators. Contemporaries of Chase who wrote about his career did not include the case in their publications, and later biographies also generally ignored it.[19] Studies of the federal courts during Reconstruction have also paid very little attention to the case, both historically and in the present day.[20] Now, though, it seems quite likely that the next generation of lawyers and historians will be forced to grapple with *Griffin's Case* and its context—and after the per curiam opinion in *Trump v. Anderson*, one suspects it will be added to constitutional law casebooks and law school curricula.[21]

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[15] *See* MEMORY AND AUTHORITY, *supra* note 1, at 49.

[16] *Id.* at 49–50.

[17] *Id.* at 34–35.

[18] Among modern scholars, Gerard Magliocca began writing about *Griffin's Case* at least as early as 2020, though perhaps earlier. *See In re* Griffin *and the Fourteenth Amendment*, PRAWFSBLAWG (Dec. 2, 2020, 7:14 PM), https://prawfsblawg.blogs.com/prawfsblawg/2020/12/in-re-griffin-and-self-execution.html [https://perma.cc/599D-RBJJ]; Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 102–08 (2021) [hereinafter *Amnesty and Section Three*]. As I explain below, Magliocca's treatment of the case appears to be the earliest among contemporary scholars. There is a nearly fifty-year gap between Magliocca and previous significant scholarly interest by Charles Fairman. *See generally* 4 CHARLES FAIRMAN, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864–88, PART ONE (1971).

[19] *See infra* notes 51–54 and accompanying text.

[20] *See infra* notes 46–50 and accompanying text.

[21] One small data point: the winner of the Supreme Court Historical Society's Henry J. Abraham Early Career Research Grant went to a JD-PhD student at Yale studying "the Chase Court's rejection of the legal mechanisms designed to exclude ex-Confederates from power," focusing specifically on Chase and Stephen Field and their decisions in four cases that include *Griffin's Case*. *Ishitani Receives SCHS Early Career Research Grant*, LEGAL HIST. BLOG (July 14, 2023, 9:30 AM), https://legalhistoryblog.blogspot.com/2023/07/ishitani-receives-schs-early-career.html [https://perma.cc/NF4X-NCDC].

The sudden relevance of a formerly little-known historic case is surely not new; much of legal history is necessarily about discovery and rediscovery of the past.[22] Still, I think the clarity with which we can outline the development of the *Griffin's Case* phenomenon offers an opportunity to think carefully about the role of history in constitutional conversation. What follows, then, is a short exploration of the case's recent (re)entry into our historical consciousness. Tracing this phenomenon highlights (at least for me) some potential difficulties embedded in the interaction between legal advocacy and what we know about the past.

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If nothing else, the *Griffin's Case* phenomenon is a perfect encapsulation of the different kinds of disciplinary assumptions embedded in the legal profession and academic history. Balkin himself highlights some of these differences, though perhaps he does not go far enough. In his chapter "Why It's Better to be Thin," Balkin points out that "some degree of anachronism is unavoidable in legal argument," by the mere fact that a lawyer is attempting to apply historic issues to a present problem.[23] Still, he draws a distinction between good and bad historical engagement. In particular, Balkin criticizes thick theories of original meaning that "tend to focus on specific legal materials" that are "divorced from the historical contexts that produced them" and that assume "lawyers are better equipped and trained to understand and use these materials than anyone else—including, in particular historians."[24] It is better, in his view, to approach "a past that is very different from our own" by engaging in constitutional construction—a task that involves "[n]ormative judgment, imagination, and creativity," and also allows more historical flexibility.[25]

Historians will undoubtedly appreciate Balkin's recognition of history's complexity and contingency. Yet, even with this broader view of history, there remains a fundamental difference in how legal advocates and academic historians approach the past. For advocates, the first (and sometimes the last) place to look for history is in its case law. It is, after all, quite easy to search Westlaw and instantly pull up specific precedents for any given point. This is not the automatic move for the historian, whose world of research is considerably larger. In other words, historians seeking historical answers to legal or constitutional history questions do not assume that case law is necessarily significant historical evidence,[26] even as legal advocacy almost necessarily does exactly that. *Griffin's Case* is a perfect example of how this works.

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[22] On this point, see generally Laura F. Edwards, *Sarah Allingham's Sheet and Other Lessons from Legal History*, 38 J. EARLY REPUBLIC 121 (2018).

[23] MEMORY AND AUTHORITY, *supra* note 1, at 138–39.

[24] *Id.* at 139–40.

[25] *Id.* at 141.

[26] There is an extensive scholarship on nondoctrinal history and many of the leading practitioners in history departments specialize in legal, political, and constitutional culture. In fact, legal and political culture are two thriving fields in nineteenth-century American history.

The ubiquity of *Griffin's Case* in current constitutional conversation might suggest that it was always part of our public knowledge, but in reality, the decision appears to have popped up in contemporary scholarly conversation for the first time in late December 2020. Just a few weeks before the January 6, 2021, attack on the U.S. Capitol, Gerard Magliocca first published his research on Section Three of the Fourteenth Amendment in which he mentioned the 1869 case.[27] As the timeline indicates, Magliocca was interested in Section Three before January 6 made it particularly significant, but he approached the subject by looking back at the *cases* concerning that section of the amendment.[28]

After January 6, Magliocca's initial findings became so relevant that he began answering questions related to *Griffin's Case* and its relationship to contemporary issues on the Balkinization blog.[29] In the next two years he published additional work that considered his original findings in the new national context.[30] Others also began to consider Chase and his views in the wake of current events.[31] Interest in the case increased substantially, however, when William Baude and Michael Stokes Paulsen first published a draft of their *Pennsylvania Law Review* article "The Sweep and Force of Section Three," on SSRN in August 2023.[32] As prominent conservatives

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See generally Edwards, *supra* note 22; Rachel A. Shelden, *The Politics of Continuity and Change in the Long Civil War Era*, 65 CIV. WAR HIST. 319 (2019).

[27] *Amnesty and Section Three*, *supra* note 18. Magliocca described the process by which he became interested in Section Three in an AP article in February 2024. Nicholas Riccardi, *Here's How 2 Sentences in the Constitution Rose from Obscurity to Ensnare Donald Trump*, AP NEWS (Feb. 5, 2024, 12:14 PM), https://apnews.com/article/trump-14th-amendment-insurrection-supreme-court-colorado-2b9d5b628cb2779fc84212cdc651e4e7 [https://perma.cc/8L97-NXRM]. In addition to Magliocca, Myles Lynch also published a draft of an article on SSRN considering Section Three in mid-December 2020. *See generally* Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153 (2021).

[28] Magliocca confirmed this for me in an email when I asked him about the process.

[29] See, among other posts, Gerard N. Magliocca, *Section Three Questions Answered*, BALKINIZATION (Jan. 17, 2021, 7:19 PM), https://balkin.blogspot.com/2021/01/section-three-questions-answered.html [https://perma.cc/BQ77-XR28]; Gerard N. Magliocca, *State Enforcement of Section Three*, BALKINIZATION (Jan. 28, 2021, 11:09 AM), https://balkin.blogspot.com/2021/01/state-enforcement-of-section-three.html [https://perma.cc/73TQ-3D5A].

[30] *See generally* Gerard N. Magliocca, *Background as Foreground: Section Three of the Fourteenth Amendment and January 6th*, 25 U. PA. J. CONST. L. 1059 (2023). Magliocca first published this piece on SSRN in December 2022. *Background as Foreground*, SSRN (Jan. 25, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4306094 [https://perma.cc/2AFH-T7XJ].

[31] See, for example, Tom Ginsburg et al., *The Law of Democratic Disqualification*, PUB. L. & LEGAL THEORY WORKING PAPER 1, 11, 51 (2021); Daniel J. Hemel, *Disqualifying Insurrectionists and Rebels: A How-To Guide*, LAWFARE (Jan. 19, 2021, 1:43 PM), https://www.lawfaremedia.org/article/disqualifying-insurrectionists-and-rebels-how-guide [https://perma.cc/2PCG-FNXA].

[32] *See generally* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605 (2024).

arguing in favor of Trump's disqualification, Baude and Paulsen drew the attention of *New York Times'* columnist Adam Liptak and others, giving the article the kind of public spotlight not usually afforded to work on SSRN.[33] Since then, *Griffin's Case* has become the focus of a wide variety of law review articles and scholarly public writing, ranging from a defense by Seth Barrett Tillman and Josh Blackman[34] to additional efforts to discredit or recontextualize Chase's opinion.[35]

With only a few exceptions, the majority of these scholarly and popular articles are devoted to explaining the errors of logic and legal reasoning that Chase made in his decision in *Griffin's Case*. Baude and Paulsen offer a brutal assessment of the Chief Justice in their piece. In one passage, they argue that "for his opinion in *Griffin's Case*," Chase is really more deserving of the "criticisms sometimes leveled against the [C]hief [J]ustices who wrote the famous (or infamous) opinions in *Marbury v. Madison*, and *Dred Scott v. Sandford*, for having reached out to decide, gratuitously, unnecessarily, and improperly, grand questions of constitutional law."[36] The "Reconstruction [J]ustices," writ large, they write shortly thereafter, are more deserving of "the criticisms levelled today at the shenanigans allegedly perpetrated on the Supreme Court's 'shadow docket.'"[37] In perhaps the most striking passage, the authors use a well-known quip by Charles Sumner in reference to Chief Justice Roger Taney[38] to argue the case "should be hooted down the pages of history, purged from our constitutional understanding of Section Three."[39]

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[33] *See* Adam Liptak, *Conservative Case Emerges to Disqualify Trump for Role on Jan. 6*, N.Y. TIMES (Aug. 11, 2023), https://www.nytimes.com/2023/08/10/us/trump-jan-6-insurrection-conservatives.html [https://perma.cc/U7GK-453F]. At one point, Baude and Paulsen were the top law authors, with more than double the number of downloads than the next author (Cass Sunstein) on SSRN. *See SSRN Top 3,000 Law Authors*, https://hq.ssrn.com/rankings/Ranking_Display.cfm?TMY_gID=2&TRN_gID=6 (Oct. 1, 2024) [https://perma.cc/3VGD-5GLN]. As of August 1, 2024, *The Sweep and Force of Section Three* had been downloaded 107,535 times since first published in August 2023. It was last updated with its final published form February 2024.

[34] Josh Blackman & S.B. Tillman, *Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene*, N.Y. TIMES (Apr. 20, 2022), https://www.nytimes.com/2022/04/20/opinion/madison-cawthorn-marjorie-taylor-green-section-3.html [https://perma.cc/JWU7-999Q]. *See generally* Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL'Y 350 (forthcoming 2024).

[35] *See generally* Mark A. Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers*, SSRN (Oct. 4, 2023), https://ssrn.com/abstract=4591133 [https://perma.cc/5H5R-CC2E]; Henry Ishitanti, *The Fourteenth Amendment Is Not a Bill of Attainder*, HARV. L. REV. BLOG (Jan. 28, 2024), https://harvardlawreview.org/blog/2024/01/section-three-is-not-a-bill-of-attainder/ [https://perma.cc/827R-7FWM].

[36] Baude & Paulsen, *supra* note 32, at 657.

[37] *Id.* at 658.

[38] When Congress considered commissioning a marble bust of Taney in February 1865, Sumner replied that "the name of Taney is to be hooted down the page of history." CONG. GLOBE, 38th Cong., Special Sess. 1012 (1865) (statement of Senator Sumner).

[39] Baude & Paulsen, *supra* note 32, at 611.

There is an inherent assumption in each of the arguments that Baude and Paulsen—and, in fact, all of the scholarly treatments—make, however: that the case needs explaining. *Griffin's Case* apparently needed to be excavated, evaluated, and incorporated into twenty-first century constitutional thinking in order to then be "purged from our constitutional thinking." Excavated is the operative word because it is difficult to emphasize just how little *Griffin's Case* featured in contemporary conversations or later historical accounts of Reconstruction, the federal courts, and Salmon Chase until the 2020s.

The case rarely appeared in arguments, petitions, and decisions after 1869.[40] As others have noted, there were only three references to *Griffin's Case* in Congress in the year after the decision.[41] The famed Virginia lawyer Conway Robinson cited the case in conjunction with *Texas v. White* in an argument before the Supreme Court the following year, but Associate Justice Joseph Bradley did not consider *Griffin's Case* or cite it in his opinion.[42] Newspaper evidence illustrates that Virginians were aware of the decision in 1869 and 1870 and that the case was published (and in some places celebrated) in Democratic newspapers in the former Confederate states. Yet, at the same time, coverage of the case was minimal in northern states, including among widely read national newspapers.[43]

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[40] There are few references to the case in petitions, decisions, and other judicial ephemera in years immediately following *Griffin's Case* or in the decades after. I have located fewer than twenty despite extensive searching. In some cases, the references have little to do with Section Three of the Fourteenth Amendment. *See, e.g.*, Complainant's Brief at 14, 32, United States v. S. Pac. R.R. Co., 146 U.S. 570 (1892) (Nos. 921, 922).

[41] CONG. GLOBE, 41st Cong., 2d Sess. 431 (1870) (statement of Representative Lawrence); *id.* at 484 (statement of Representative Ward); *id.* at 1161 (statement of Representative Lawrence). Several of the bloggers at Balkinization dug into the congressional debates and newspapers, partially in service of questions about the Enforcement Act of 1870. *See* Samarth Desai, *Was Griffin's Case the Backdrop Against Which Congress Legislated the Enforcement Act of 1870?*, BALKINIZATION (Feb. 18, 2024, 3:00 PM), https://balkin.blogspot.com/2024/02/was-griffins-case-backdrop-against.html [https://perma.cc/MKD6-JQR5]; Mark Graber, *The Enforcement Act of 1870: Disqualification Myths and Realities*, BALKINIZATION (Feb. 15, 2024, 7:33 AM), https://balkin.blogspot.com/2024/02/the-enforcement-act-of-1870.html [https://perma.cc/Y44Q-EEQA]; Gerard N. Magliocca, *Newspaper Commentary on Griffin's Case*, BALKINIZATION (Oct. 16, 2023, 8:53 AM), https://balkin.blogspot.com/2023/10/newspaper-commentary-on-griffins-case.html [https://perma.cc/M3VN-BCN7]. As I have argued elsewhere, the *Congressional Globe* was a critical source of communication between representatives and constituents in the mid-nineteenth century. The case's absence in congressional debate is a strong indication that it held little salience in contemporary politics. *See generally* Rachel A. Shelden, *Finding Meaning in the* Congressional Globe*: The Fourteenth Amendment and the Problem of Constitutional Archives*, 2 J. AM. CONST. HIST. 715 (2024).

[42] *See* Thomas v. Richmond, 79 U.S. 349, 352 (1871).

[43] It is difficult to prove a negative—it may be possible to unearth more evidence from newspapers of the time. Yet, comprehensive searches in newspapers.com and the databases "Chronicling America," "America's Historical Newspapers, 1690–1922 (Readex)," and "Nineteenth Century U.S. Newspapers (Gale)" for "Griffin" AND "Case" [hereinafter *Methodology*] show reports in most Southern states in 1869 when Justice Chase made the decision and

In the years after 1870, references disappear almost completely. I have found only eight articles that mention the decision in national news coverage between 1871 and 1899 despite extensive searching (and no shortage of other cases featuring parties named "Griffin").[44] Nor did Chase's decision become a common reference point in Congressional debate, though two Republicans did make passing reference to *Griffin's Case* during the proceedings of the Electoral Commission of 1877.[45] Initial historical considerations of the Reconstruction period focusing on constitutional and political history—even in Virginia—published in the last few decades of the nineteenth century and first decade of the twentieth century also do not include the case.[46] In sum, I do not see significant evidence that the case became part of a broader constitutional language during these years—let alone a popular one.

In addition to contemporary accounts, modern historical scholarship on the federal courts during Reconstruction has been mostly silent when it comes to *Griffin's Case*. With one crucial exception (which I return to below), most of the essential scholarship tackling the constitutional history of the era does not mention the case at all. Despite writing a new introduction to Bradley Johnson's *Reports* of Chase's Fourth Circuit cases, Harold Hyman does not include it in his constitutional evaluations of the period.[47] *Griffin's Case* plays no role in classic work by William Wiecek or

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in the year after, but far less attention outside the former Confederate states—and especially outside the former slaveholding states. Although there are a large number of hits for "Griffin" AND "case" in northern newspapers in 1869 and early 1870, a great number of the articles are about other cases involving a different Griffin. A majority of northern newspapers reporting on the case in 1869 feature the same Richmond news report of Chase's decision without additional commentary, as was often the practice in nineteenth-century publishing. On newspaper publishing during the Reconstruction era, see generally MARK WAHLGREN SUMMERS, THE PRESS GANG: NEWSPAPERS & POLITICS, 1863–1878 (1994).

[44] *See supra* note 43 (applying *Methodology*, *supra* note 43, to different time periods to chart coverage, or lack thereof, of *Griffin's Case*).

[45] UNITED STATES ELECTORAL COMMISSION, PROCEEDINGS OF THE ELECTORIAL COMMISSION AND THE TWO HOUSES OF CONGRESS IN JOINT MEETING RELATIVE TO THE COUNT OF ELECTORAL VOTES CAST DECEMBER 6, 1876 FOR THE PRESIDENTIAL TERM COMMENCING MARCH 4, 1877 (Wash., D.C., Gov't Prtg. Off. 1877). A search of the Congressional Record from its creation in 1873 to 1899 on the Record's host website, Congress.gov, produced no references to *Griffin's Case*.

[46] *See generally* WILLIAM ARCHIBALD DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION AND RELATED TOPICS (London, Macmillan & Co. 1898); 1 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES (1901); HAMILTON JAMES ECKENRODE, THE POLITICAL HISTORY OF VIRGINIA DURING THE RECONSTRUCTION (1904); JOHN WILLIAM BURGESS, RECONSTRUCTION AND THE CONSTITUTION, 1866–1876 (1905).

[47] *See generally* BRADLEY T. JOHNSON, REPORTS OF CASES DECIDED BY CHIEF JUSTICE CHASE IN THE CIRCUIT COURT OF THE UNITED STATES FOURTH CIRCUIT 1865–1869 (1876), *reprinted in* (Chief Justice Chase ed., Da Capo Press ed. 1972); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (1973); HAROLD M. HYMAN, THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE: *IN RE TURNER* AND *TEXAS V. WHITE* (1997).

Stanley Kutler.[48] Neither William Nelson's nor Earl Maltz's books on the Fourteenth Amendment make any mention of the decision.[49] The case fares no better in recent scholarship, where it does not appear or is relegated to a footnote in studies by Eric Foner, Cynthia Nicoletti, Gregory Downs, and Pamela Brandwein, among others.[50] Nor do we see reference to it in studies of the history of the lower federal courts in the nineteenth century.[51]

The lack of interest in the case among Reconstruction scholarship is also mirrored in the histories written of Salmon Chase's life. As was common among prominent men in the nineteenth century, friends quickly published memoirs and biographies

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[48] *See generally* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875 (1982); STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968). The case also does not appear in the controversial 3 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).

[49] *See generally* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION (2003).

[50] *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019); CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS (2017); GREGORY P. DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR (2015). The case appears in a footnote among many other circuit cases considering the Fourteenth Amendment in PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 46 n.76 (2011). Other important recent books covering the period that do not include the case include ORVILLE VERNON BURTON & ARMAND DERFNER, JUSTICE DEFERRED: RACE AND THE SUPREME COURT (2021); LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS (2015); TIMOTHY S. HUEBNER, LIBERTY AND UNION: THE CIVIL WAR ERA AND AMERICAN CONSTITUTIONALISM (2016); 2 G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM RECONSTRUCTION THROUGH THE 1920S (2016). Jonathan Lurie's overview of the Supreme Court during the Chase years includes many circuit cases but not *Griffin's Case*. *See generally* JONATHAN LURIE, THE CHASE COURT: JUSTICES, RULINGS, AND LEGACY (2004).

[51] Scholarship on the nineteenth-century federal courts and particularly circuit riding in 1860s is extremely limited. *But see generally* PETER CHARLES HOFFER ET AL., THE FEDERAL COURTS: AN ESSENTIAL HISTORY (2016) (analyzing 1860s circuit decisions); ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS (1987) (same). Despite several references to how the Fourteenth Amendment was considered in the federal courts, there is no reference to *Griffin's Case* in FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1927). In addition, while I have not completed an extensive review of casebooks, the case also does not appear in ERWIN CHEMERINSKY ET AL., FEDERAL COURTS IN CONTEXT (2023); JONATHAN R. SIEGEL, FEDERAL COURTS: CASES AND MATERIALS (3d ed. 2023); MICHAEL L. WELLS ET AL., CASES AND MATERIALS ON FEDERAL COURTS (1st ed. 2007); ARTHUR D. HELLMAN & LAUREN ROBEL, FEDERAL COURTS: CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS (2d ed. 2005); RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. 1996); DAVID P. CURRIE, FEDERAL COURTS: CASES AND MATERIALS (3d ed. 1982).

of Chase in the years immediately following the Chief Justice's death. Among these were an account of Chase's life by his private secretary, Jacob Schuckers, and another by Robert Bruce Warden, a former Democratic judge on the Ohio Supreme Court who moved to Washington to practice in front of the U.S. Supreme Court and was hired by the Chief Justice in 1873 to write a biography of him.[52] Neither man included anything about *Griffin's Case* in their accounts.[53]

Since then, the scholarly work on Chase's life has also largely ignored the case. Albert Bushnell Hart, who wrote the first academic biography of Chase in 1899 makes no mention of *Griffin's Case*.[54] There have been three major biographies of the Chief Justice published since then. In Frederick Blue's 1987 study, the case does not appear, and Walter Stahr's 2022 book notes the decision in a footnote.[55] John Niven, who is primarily responsible for collecting and publishing Chase's papers, makes one brief reference in his 1995 treatment, but does not accurately describe how the case unfolded.[56] Among scholarship on Chase's legal and judicial career, *Griffin's Case* is also almost entirely absent.[57] C. Ellen Connally references the case in her 2015 law review article on Chase's use of the Fourteenth Amendment in the Jefferson Davis treason prosecution, though as part of a string of Virginia circuit decisions (and conflicts between the Chief Justice and District Judge) in 1869.[58]

An important exception among all of these works is the 1971 volume of the *Oliver Wendell Holmes Devise* Series on the History of the Supreme Court written

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[52] *See generally* J.B. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE, UNITED STATES SENATOR AND GOVERNOR OF OHIO; SECRETARY OF THE TREASURY, AND CHIEF-JUSTICE OF THE UNITED STATES (N.Y., D. Appleton & Co. 1874); ROBERT B. WARDEN, AN ACCOUNT OF THE PRIVATE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE (Cincinnati, Ohio, Wilstach, Baldwin & Co. 1874). On Warden's history, see *Supplement: The Supreme Court of Ohio*, 19 MEDICO-LEGAL J. 1 (1901).

[53] *See generally* SCHUCKERS, *supra* note 52; WARDEN, *supra* note 52.

[54] *See generally* ALBERT BUSHNELL HART, SALMON PORTLAND CHASE (Bos.; N.Y., Houghton, Miflin & Co. 1899).

[55] WALTER STAHR, SALMON P. CHASE: LINCOLN'S VITAL RIVAL 787 n.26 (2021). *See generally* FREDERICK J. BLUE, SALMON P. CHASE: A LIFE IN POLITICS (1987).

[56] *See* JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 434 (1995) (describing Chase as having "managed to persuade Underwood to reverse his orders").

[57] The entire Fall 1993 issue of the *Northern Kentucky Law Review* was devoted to Salmon Chase, including several articles on his years as Chief Justice by G. Edward White, Herman Belz, Michael Les Benedict, Robert J. Kaczorowski, Harold M. Hyman, Lowell F. Schechter, and James A. Dietz. There is no mention of *Griffin's Case* in the majority of the issue's articles, though Benedict references the case once in the body of his comment and once in a footnote. *See* Michael Les Benedict, *Salmon P. Chase as Jurist and Politician: Comment on G. Edward White, Reconstructing Chase's Jurisprudence*, 21 N. KY. L. REV. 133, 147–48 n.54 (1993) (footnoting the case in reference to Chase's strongarming tactics with Underwood and later mentioning the case as a conduit for Southern Democrats' interest in restorative liberty). *See generally id.*

[58] *See* C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 AKRON L. REV. 1165, 1191 n.221 (2009).

by Charles Fairman.[59] The *Devise* series is notoriously detailed, but Fairman also appears to have had specific reasons for writing about *Griffin's Case.* The author sets out to tell a harrowing story of the Chief Justice defeating the corruption and radicalism of John Underwood, the "wayward" federal District Judge who "disturbed the commonwealth at a moment when repose was needed."[60] Fairman's point of view on the case is not hard to discern: as Magliocca notes in his work on *Griffin's Case*, the *Oliver Wendell Holmes Devise* author was "unfairly slanted against Judge Underwood and in favor of Chief Justice Chase."[61]

There are reasons why Fairman might have been interested in *Griffin's Case* based in both contemporary legal concerns and historiography. As Richard Aynes has written, Fairman had developed many of his views about Reconstruction and particularly the Fourteenth Amendment in the context of Dunning-era historiography that was particularly critical of federal power.[62] Fairman was not generally a proponent of Chase—his pre-war years proved too radical—but compared with Underwood, he practically viewed the Chief Justice as a saint.[63]

So, yes, Fairman's account does give *Griffin's Case* slightly more attention (6 pages in his 1,540-page *Reconstruction and Reunion, 1864–88*, containing more than 1,000 cases).[64] But consider the different ways that his—quite positive—account of Chase's decision in 1971 differs from the importance we have now placed on the case today. In his original published research, Magliocca argues that "*Griffin's Case* deserves close attention as the first major judicial opinion on the Fourteenth Amendment."[65] Magliocca is careful to note that he was unable to locate any prior cases, though does "hedge a bit" and say this was the first "major" opinion since there may

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[59] *See generally* FAIRMAN, *supra* note 18. I have been able to locate two other early references. One is in a footnote in a 1963 unattributed article. *See The 'De Facto' Officer Doctrine*, 63 COLUM. L. REV. 909, 917 n.57 (1963) (referencing Justice Chase's statements in the unanimous opinion). The second is in a 1965 article by David F. Hughes, then an assistant professor of Government at Centre College in Kentucky. The article is an assessment of Chase as Chief Justice, and Hughes cites *Griffin's Case* as an example of how he consulted with other justices while on circuit. *See* David F. Hughes, *Salmon P. Chase: Chief Justice*, 18 VAND. L. REV. 569, 609 n.158 (1965) ("[A]dding to his opinion that he was 'authorized to say' that the Justices of the Supreme Court 'unanimously concur in this opinion.'" (quoting Griffin's Case, 11 F. Cas. 7 (No. 5,815) (C.C.D. Va. 1869))). Hughes was in the midst of a full-length study of Chase when he died suddenly at the age of 38. Larry R. Matheny, *In Memoriam*, 36 J. POLITICS 1115, 1115–16 (1974).

[60] FAIRMAN, *supra* note 18, at 602.

[61] *Amnesty and Section Three*, *supra* note 18, at 103 n.81.

[62] *See* Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1204, 1204 n.42 (1995). *See generally* WILLIAM ARCHIBALD DUNNING, RECONSTRUCTION: POLITICAL AND ECONOMIC, 1865–1877 (1907).

[63] Aynes, *supra* note 62, at 1211.

[64] *See generally* FAIRMAN, *supra* note 18.

[65] *Amnesty and Section Three*, *supra* note 18, at 103.

have been unpublished cases.[66] Fairman, by contrast, never identifies Chase's decision as the first of anything. Instead, he loops *Griffin's Case* in with a series of other habeas cases in Virginia, each of which Fairman believes puts Judge Underwood in an unflattering light.[67] For Fairman, the case itself appears to be much less about Chase and the Fourteenth Amendment, and much more about Judge Underwood himself: the entire section of the book in which it falls is titled "District Judge Underwood."[68]

What does all of this tell us? The future of *Griffin's Case* in constitutional arguments may be unsure, but it seems to me that the last three years have actually been the peak of its power. And the reasons for this have everything to do with the real and important differences between legal advocacy and the academic work of historians.[69] By instinctively looking to decisions first, the legal advocate privileges their role in constitutional interpretation. Meanwhile, the historian, whose tendency is to look at broader cultural and political contexts, does not typically begin with citations indexes.[70] Both may consult cases, but the effect of beginning the inquiry in different places can be profound. These varied approaches are wholly reasonable given the very real disciplinary goals. But they play a big role in shaping how history appears in contemporary law.

The more we use history in constitutional arguments, the more these procedural differences matter not only in current constitutional debate but also in historical scholarship. For in reshaping contemporary conversation about Reconstruction-era law, *Griffin's Case* may also become more important to historians of the period than it might have been in different circumstances. Already, we have seen this in action: both amicus briefs filed in *Trump v. Anderson* by prominent historians of the Reconstruction era discuss *Griffin's Case*, although none have written about the case previously.[71] I point this out not to suggest historians do not have the expertise to explain or explore the case (they surely do); nor that good legal argument did not require such attention (given the stakes, it is hard to argue against the approach). At the same time, there is a degree to which engaging *Griffin's Case* at all assigns it an importance it did not previously hold in Reconstruction-era legal and political discourse.

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[66] *Id.* at 103 n.81.

[67] FAIRMAN, *supra* note 18, at 602 (listing "a series of habeas cases—on behalf of Sally Anderson, Caesar Griffin, Jeter Phillips, and Sam Baker").

[68] *Id.* at 601–07.

[69] In fairness, Fairman himself did not have a history degree but was trained as a political scientist at Harvard, later earning a law degree at Harvard under the mentorship of Felix Frankfurter. As Aynes argues, Fairman (like Frankfurter) was deeply influenced by James Bradley Thayer. Fairman's particular approach to historical questions may say something unique about him or something broader about legal training in the 1930s. On Fairman's background, see generally Aynes, *supra* note 62.

[70] *See, e.g.*, Edwards, *supra* note 22; Shelden, *supra* note 26.

[71] *See generally* Brief for Professors, *supra* note 7; Brief for American Historians, *supra* note 7.

Historians are certainly more comfortable these days with the idea that present concerns affect (and sometimes even motivate) historical inquiries and welcome the opportunities that new generations of scholars have to ask new questions inflected by their contemporary circumstances.[72] Modern events can even help shape entire historical fields.[73] One might expect January 6 to influence at least a portion of future scholarship on Civil War and Reconstruction-era politics and constitutionalism. Yet, a corresponding rise in historians' scholarship about *Griffin's Case* is not the same kind of natural outgrowth. Instead, it would mark increased interest in a historic case that became important to 1869 specifically because of its relevance in the 2020s. Might that seem a bit like the tail wagging the dog?

It is possible, of course, that historians have simply been mistaken in overlooking *Griffin's Case* to this point. But the likelier explanation is that there have been good reasons why Chase's circuit decision remained buried for so long. In the context of Reconstruction-era constitutional and political culture, it simply was *not* very important—or at least not in the ways that it appears to be in 2024.

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[72] Although some historians remain wedded to concerns about "presentism," such critiques almost always include an acknowledgement that present circumstances inform history. *See* SARAH MAZA, THINKING ABOUT HISTORY 6–7 (2017). For an accounting of past debates about presentism and objectivity, see generally PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION (1988); THOMAS L. HASKELL, OBJECTIVITY IS NOT NEUTRALITY: EXPLANATORY SCHEMES IN HISTORY (1998).

[73] For just one among a great many examples, the context of the "Global War on Terror" helped spur an explosion in work on guerilla warfare and its importance in the Civil War. *See, e.g.*, DANIEL E. SUTHERLAND, A SAVAGE CONFLICT: THE DECISIVE ROLE OF GUERRILLAS IN THE AMERICAN CIVIL WAR (2009); BARTON A. MYERS, EXECUTING DANIEL BRIGHT: RACE, LOYALTY, AND GUERILLA VIOLENCE IN A COASTAL CAROLINA COMMUNITY, 1861–1865 (2009); MATTHEW M. STITH, EXTREME CIVIL WAR: GUERRILLA WARFARE, ENVIRONMENT AND RACE ON THE TRANS-MISSISSIPPI FRONTIER (2016); MATTHEW CHRISTOPHER HULBERT, THE GHOSTS OF GUERRILLA MEMORY: HOW CIVIL WAR BUSHWHACKERS BECAME GUNSLINGERS IN THE AMERICAN WEST (2016); JOSEPH M. BEILEIN, JR., BUSHWHACKERS: GUERRILLA WARFARE, MANHOOD, AND THE HOUSEHOLD IN CIVIL WAR MISSOURI (2016).