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A BRIDGE TOO FAR:

SECTION 3 AFTER *TRUMP V. ANDERSON*

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I. Introduction

After the 2020 presidential election, then-President Donald Trump engaged in a monthslong legal and social media campaign to undermine the legitimacy of the election.[2] On January 6, 2021, thousands of armed rioters attacked the U.S. Capitol in a failed attempt to stop Congress's certification of the 2020 presidential election.[3] In the fallout of the attack, Donald Trump was impeached by the House of Representatives for incitement of insurrection.[4] At the same time, political and legal commentators began speculating whether the Disqualification Clause of Section 3 of the Fourteenth Amendment would bar Donald Trump from seeking office again.[5] Donald Trump was eventually acquitted by the Senate[6] but the cloud of disqualification under Section 3 of the Fourteenth Amendment lingered after he left office.[7]

This would have been historically unprecedented. Beyond the initial flurry of litigation in the wake of the Civil War, the Disqualification Clause in Section 3 had only been used once since the end of Reconstruction to remove someone from federal office.[8] Previously derided as a "forgotten"[9] and "vestigial"[10] part of the Constitution, Section 3 received new life in the aftermath

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[2] H.R. REP. NO. 117-663, at 210-14 (2022).
[3] *Id.* at 76-77.
[4] H.R. Res. 24, 117th Cong. (2021).
[5] See Deepak Gupta & Brian Beutler, Opinion, *Impeachment Isn't the Only Option Against Trump*, N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/2021/01/12/opinion/Trump-impeachment-disqualification.html; see also Noah Feldman, Opinion, *Trump's 2024 Hopes Just Crashed Into the 14th Amendment*, BLOOMBERG (Jan. 11, 2021, 3:06 PM), https://www.bloomberg.com/view/articles/2021-01-11/trump-2024-president-may-be-ineligible-after-u-s-capitol-riot; see also Lyle Denniston, *Is 14th Amendment Sec. 3 a Dead Letter?*, LYLE DENNISTON L. NEWS (Jan. 10, 2021), https://lyldenlawnews.com/2021/01/10/is-14th-amendment-sec-3-a-dead-letter/
[6] 167 CONG. REC. S733 (daily ed. Feb. 13, 2021).
[7] Roger Parloff, *After the Cawthorn Ruling, Can Trump Be Saved From Section 3 of the 14th Amendment?*, LAWFARE (June 7, 2022, 1:32 PM), https://www.lawfaremedia.org/article/after-cawthorn-ruling-can-trump-be-saved-section-3-14th-amendment.
[8] MARCY KAHN, ASS'N OF THE BAR OF THE CITY OF NEW YORK, REPORT BY THE TASK FORCE ON THE RULE OF LAW ON SECTION 3 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION – THE DISQUALIFICATION CLAUSE 3 (2022) [hereinafter NYC BAR REPORT].
[9] Mark A. Graber, *Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory*, 62 ST. LOUIS U. L.J. 639, 639-40 (2018).
[10] Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 87 (2021).

of January 6. Section 3 has been used as the foundation for lawsuits against officials in six states[11] and was explicitly cited by a court to justify removal from office of a county commissioner in New Mexico.[12] The clause's timeliness and relevance only grew since mid-2023 when two law professors, William Blaude and Michael Paulsen, alleged that the clause, by operation of law, automatically disqualified Donald Trump from seeking the presidency again.[13] Others disagree.[14]

In late 2023, the threat of disqualification was realized when Donald Trump was disqualified from the Colorado presidential primary under Section 3 of the Fourteenth Amendment by the Colorado Supreme Court, acting under a Colorado state law that allowed voters to petition the secretary of state to keep constitutionally ineligible candidates off of the ballot.[15] The Supreme Court reversed that decision on March 4, 2024, holding that the States could not exercise discretionary judgment on the constitutional qualifications of presidential candidates.[16] But the Court then went further, broadening their ruling and holding that Section 3 is inoperative against would-be federal officeholders unless specifically given life by Congress.[17] And while the Court was unanimous in its holding that the States are powerless to enforce Section 3, the Court's disembowelment of that Section, reasoning that Section 5 enforcement legislation was "critical" to Section 3's application, produced a much more controversial 5-4 result.[18]

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[11] NYC BAR REPORT, *supra* Note 8, at 4-13.
[12] *See* New Mexico *ex rel.* White v. Griffin, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1, *67-69 (N.M. Dist. Ct. Sept. 6, 2022).
[13] *See* Isaac Chotiner, *The Constitutional Case for Barring Trump from the Presidency*, NEW YORKER (Aug. 23, 2023), https://www.newyorker.com/news/q-and-a/the-constitutional-case-for-barring-trump-from-the-presidency; *see also* Matt Ford, *The Conservative Legal Roadmap to Disqualify Trump from Office*, NEW REPUBLIC (Aug. 13, 2023), https://newrepublic.com/article/174977/baude-paulsen-trump-14th-amendment.
[14] Josh Blackman & Seth B. Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. (2024).
[15] Anderson v. Griswold, 2023 CO 63, ¶ 257, 543 P.3d 283 (Colo. 2023), *rev'd sub nom* Trump v. Anderson, 601 U.S. 100 (2024) (per curiam).
[16] Trump v. Anderson, 601 U.S. 100, 114-15 (2024) (per curiam).
[17] *Id.* at 104-06.
[18] *Id.* at 117-18 (Barrett, J., concurring); *see also, id*. at 121 (Sotomayor, S., Kagan, E., and Jackson, JJ., concurring).

This note does not seek to answer the ultimate question of whether Donald Trump is or is not disqualified from seeking future office under Section 3.[19] Absent a formal proceeding of some kind, that question is unanswerable.[20] And without such a proceeding, with the trappings of evidence and rules of procedure followed by a judicial decision and enforcement, it is unlikely that Donald Trump falls within the scope of Section 3 whatsoever.[21] Rather, this note will assess the majority's opinion in *Trump v. Anderson* and expand on the structural deficiencies identified by the minority concurring justices. All can agree that the States may not unilaterally enforce Section 3 against candidates for federal office – a unanimous decision on that point sends a loud message. But the criticality of Section 5 to Section 3's enforcement renders that section non-self-executing, something which is at odds with the Court's general understanding of the Fourteenth Amendment.[22]

Specifically, this note will examine the framework of the Constitution's other "self-executing" clauses and transpose that framework to the Disqualification Clause to discern whether Section 5 enabling legislation is truly "critical" to Section 3's application or whether the Court may have to revisit the majority's slim decision on this point at some time in the future. This note builds on previous scholarship not by taking a granular look at the text itself, but by examining the specific boundary of self-execution. Finally, this paper assumes, without any analysis, that the president is an "officer of the United States" and that the presidential oath of office is an "oath to support the United States." Both points are prerequisites for the operation of the Disqualification

[19] This note was written and submitted for review prior to the outcome of the 2024 presidential election. I would like to take this footnote to thank the student staff at the Rutgers Law Record for their thorough and thoughtful input and assistance.
[20] *Id.* at 108.
[21] *Id.*
[22] *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883).

Clause[23] and were disputed before the Supreme Court,[24] although the Court made no disposition on those points.

Part II of this note will cover the current state of legal scholarship and court rulings on the self-executing nature of the Disqualification Clause and its context in broader Fourteenth Amendment discussions, at least as they existed before *Trump v. Anderson*. Part III will continue this discussion by stepping away from the Fourteenth Amendment and looking at other "self-executing" clauses in the original Constitution, particularly the provisions in Article IV. Part IV will conclude on the actual mechanism by which a candidate for office could be disqualified for "insurrection" or "rebellion" and whether that mechanism is in harmony with a "self-executing" Disqualification Clause or whether Section 5 enabling legislation truly is "critical" to the clause's application.

II. State of Scholarship Before *Trump v. Anderson*

Before looking at what courts and scholars have to say on whether the Disqualification Clause is self-executing, it would be helpful to have a definition of what "self-executing" means in a constitutional context. The Supreme Court answered this in *Davis v. Burke*, where the Court held that a constitutional provision is self-executing when it "asserts a certain right, or lays down a certain principle of law or procedure, it . . . is full authority for all that is done in pursuance of its provisions. In short, if complete in itself, it executes itself."[25] In contract, non-self-executing provisions "lay[] down certain general principles, as to enact laws upon a certain subject . . . it may need more specific legislation to make it operative . . . it is self-executing only so far as it is

[23] U.S. CONST. amend. XIV, § 3.
[24] Brief for Prof. Seth Barrett Tillman as Amici Curiae in Supporting Petitioner at 15-20, 31-33, Trump v. Anderson, 601 U.S. 100 (2024) (per curiam) (No. 23-719).
[25] Davis v. Burke, 179 U.S. 399, 403 (1900).

susceptible of execution."[26] Constitutional clauses are thus self-executing if they provide the "proper machinery" to enforce duties or protect rights and are not self-executing if they fail to provide a rule to give the provision the proper "force of law."[27]

Section 3 of the Fourteenth Amendment, the Disqualification Clause, says:

> 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.[28]

On December 19, 2023, the Colorado Supreme Court held that the Disqualification Clause does have this "proper machinery" for self-execution and does not require enabling legislation to attach against candidates for the presidency.[29] Relying on the dicta of the *Civil Rights Cases*, the use of the mandatory "shall" in the Disqualification Clause itself, and a litany of U.S. Supreme Court cases holding other sections of the Fourteenth Amendment to be self-executing, the Court found that Colorado was constitutionally enabled to create a disqualifying procedure for presidential candidates in the absence of federal legislation and that this state-based process is "sufficient to permit a judicial determination of whether . . . disqualification has attached to a particular individual."[30]

Despite the Colorado Supreme Court's ruling, the consensus prior to *Trump v. Anderson* was that "[i]t is unclear whether Section 3 is self-executing."[31] The Supreme Court stated in dicta

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[26] *Id.*
[27] *Id.*
[28] U.S. CONST. amend. XIV, § 3.
[29] Anderson v. Griswold, 2023 CO 63, ¶¶ 88-90, 106-07, 543 P.3d 283 (Colo. 2023), *rev'd sub nom.* Trump v. Anderson, 601 U.S. 100 (2024).
[30] *Id.* at ¶¶ 91-104.
[31] CONG. RSCH. SERV., THE INSURRECTION BAR TO OFFICE: SECTION 3 OF THE FOURTEENTH AMENDMENT 4 (2022) [hereinafter INSURRECTION BAR TO OFFICE].

that the Fourteenth Amendment *is* self-executing,[32] without distinguishing between sections of the amendment itself. But at least six federal courts have ruled otherwise in January 6-related cases alone.[33] The Colorado Supreme Court relied on the attachment of the Fourteenth Amendment to a state-based procedure to disqualify Donald Trump from the 2024 ballot.[34] The necessity of attachment to a state-based procedure for the successful application of what is otherwise a federal claim does not suggest that the Disqualification Clause is self-executing. In fact, this circumstance would suggest the opposite result: a self-executing constitutional provision would need no attachment to external procedure to give rise to its own application.

Nevertheless, the division in modern scholarship and jurisprudence over the self-execution of the Disqualification Clause stems from a pair of contradictory judicial opinions from the time period of the Fourteenth Amendment's adoption itself.[35] In *Griffin's Case*, Chief Justice Salmon Chase, in his capacity as Circuit Judge for Virginia, held that covered officials "are not removed [from office] by the direct and immediate effect of the prohibition to hold office contained in the third section; but that legislation by congress is necessary to give effect to the prohibition, by providing for such removal."[36] Although this decision is not precedential, this would plainly indicate that the Disqualification Clause is not self-executing. Yet merely one year earlier,[37] in *Case of Davis*, Chief Justice Chase himself had agreed that the "operation and effect" of the

[32] The Civil Rights Cases, 109 U.S. 3, 20 (1883).
[33] Perry-Bey v. Trump, No. 1:23-cv-1165 (LMB/IDD), 2023 U.S. Dist. LEXIS 231092, at *14-15 (E.D. Va. Dec. 29, 2023).
[34] Anderson v. Griswold, *supra* note 29, at ¶107.
[35] *Compare* Magliocca, *supra* note 10, at 100-108, *and* William Baude & Michael S. Paulsen, *The Sweep and Force of Section Three*, 172 U. PENN. L. REV. 644-50 (2024) *with* Blackman & Tillman, *supra* note 14, at 146-55.
[36] Griffin's Case, 11 F. Cas. 7, 26 (C.C.D. Va. 1869).
[37] Case of Davis, 7 F. Cas. 63, 102 (C.C.D. Va. 1867) (Though the official citation to *Case of Davis* is from 1867, final disposition of the case and the Court's opinion is dated Nov. 23, 1868).

Disqualification Clause "exempted from indictment or prosecution" a defendant for engaging in the Confederate rebellion.[38] So which is it?

It is possible that Chase's vote in *Davis* is consistent with his ruling in *Griffin's Case*. By bifurcating the Disqualification Clause by its usage, Section 3 would be self-executing as a defense against double jeopardy prosecution for the underlying crime and not self-executing as a cause of action against an incumbent or prospective officeholder.[39] Such a distinction is controversial.[40] The distinction also raises troubling questions on the separation of powers. The *Davis* case never went to the Supreme Court because President Andrew Johnson's general pardon of ex-Confederates rendered the case moot.[41] If the Disqualification Clause is a self-executing "punishment" that protects against double jeopardy, then the effect of Congress's ability to remove the bar from office would effectively serve the same function as a presidential pardon for the underlying offense. Congress cannot assume such a power onto itself.[42] While a bar from public office is certainly a "punishment" that is punitive in nature, [43] this reading of the Disqualification Clause cannot exist in a constitutional framework of separation of powers.

In lieu of reading the Disqualification Clause as a punishment *per se*, the separation of powers problem can be avoided by treating it as a modification of existing constitutional qualifications for office that is distinct from bans from public office that otherwise attend criminal

[38] *Id.* at 102.
[39] *See* Blackman & Tillman, *supra* note 14, at 448-49.
[40] *See* Ron Fein & Gerard Magliocca, *States Can Enforce Section Three of the Fourteenth Amendment Without Any New Federal Legislation*, FREE SPEECH FOR PEOPLE 1, 12 n.11 (2023), https://freespeechforpeople.org/wp-content/uploads/2023/03/14.3-fsfp-magliocca-report-mar-2023.pdf.
[41] *Case of Davis*, 7 F. Cas. at 102.
[42] *See* Seth B. Tillman & Josh Blackman, *Offices and Officers of the Constitution Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. Tex. L. Rev. 349, 386-87 (2023).
[43] *See*, *e.g.,* Cummings v. Missouri, 71 U.S. 277, 327 (1867).

convictions. This reading permits the Disqualification Clause to exist independently of its statutory counterpart, which also includes a ban on public office for rebellion and insurrection.[44]

Beyond the separation of powers problem inherent to the bifurcation theory, principles of federalism create a more compelling demand in determining the self-execution of the Disqualification Clause and its applicability to the presidency. United States presidential elections are not singular, national affairs, but consist of 51 separate state elections for the electors of that office.[45] And it is the States – not the federal government – that regulate the choosing of presidential electors, subject to constitutional protections on the franchise.[46] The majority itself in *Trump* admits that the Elections and Electors Clause provides an alternate avenue for enforcement action against federal candidates by the States but dismisses further discussion by invoking the Fourteenth Amendment's "rebalancing" of federal-state power.[47]

Assuming that the Disqualification Clause *is* self-executing, "the mere presence of a federal issue within a broader state-law claim" relating to a candidate's eligibility to run for office under Section 3 "does not automatically transform the claim into one arising under federal law" that is justiciable in federal court.[48] Further, any attempt to *enforce* the Disqualification Clause against a presidential candidate would require the same elements of standing as any other justiciable claim – something that simply cannot be met for a voter suing in an individual capacity.[49] The Disqualification Clause, if it is self-executing, would not allow for the conversion of a state-based procedure brought by individual parties to be adjudicated in the federal courts. But the States themselves would still retain their inherent standing to litigate their sovereign interests in the

[44] 18 U.S.C. § 2383 (2000).
[45] U.S. CONST. art. II, § 1; U.S. CONST. amend. XXIII, § 1.
[46] *See* Williams v. Rhodes, 393 U.S. 23, 29 (1968).
[47] Trump v. Anderson, 601 U.S. 100, 108 (2024).
[48] Stencil v. Johnson, 605 F. Supp. 3d 1109, 1120 (E.D. Wis. 2022).
[49] *See* Clark v. Weber, 699 F. Supp. 3d 879, 882 (C.D. Cal. 2023) (citing Berg v. Obama, 586 F.3d 234, 237 (3d Cir. 2009)).

application of the Constitution.[50] This would demand that, if the Disqualification Clause is self-executing, that the States be able to bar covered insurrectionists not just from state office, but from federal office as well, and litigate in federal court their sovereign interest in preventing insurrection would-be presidents from taking office. And all this without federal enabling legislation.

The Fourteenth Amendment's Enforcement Clause does provide that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[51] The majority in *Trump* finds this to be of "critical" importance to the application of Section 3, without which the Disqualification Clause would have no effect.[52] Unquestionably, Congress could enforce the Section 3 by statute. Indeed, the Ku Klux Klan Act of 1870 did just that, directing U.S. district attorneys to "proceed against such person[s], by writ of *quo warranto*."[53] Congress has since repealed the federal *quo warranto* right of action to enforce the Disqualification Clause and has not passed any further legislation to enforce Section 3, specifically.[54] Absent any statute to enforce its provisions, the Disqualification Clause must be self-executing in order to have any actual effect on would-be federal officeholders.[55] The lack of federal statutory authority to enforce Section 3 does not prevent the States from codifying enforcement mechanisms for disqualified state officials.[56]

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[50] *See* Va. House of Delegates v. Bethune-Hill, 587 U.S. 658, 662 (2019).
[51] U.S. CONST. amend. XIV, § 5.
[52] *Trump v. Anderson*, 601 U.S.100, 105.
[53] Ku Klux Klan Act, § 14, 16 Stat. 140, 143 (1870) (repealed 1872).
[54] INSURRECTION BAR TO OFFICE, *supra* note 31, at 5.
[55] A writ of *quo warranto* may be issued by the U.S. District Court for the District of Columbia "against a person who within the District…unlawfully holds or exercises…a public office of the United States" but only the U.S. Attorney General or U.S. Attorney for the District of Columbia may bring such an action. D.C. Code §§ 16-3501, 16-3502 (2013). As a practical matter, forcing the executive branch to seek a writ of *quo warranto* against itself is a dead letter.
[56] Liz Hempowicz et al., *The Constitution's Disqualification Clause Can Be Enforced Today,* PROJECT ON GOV'T OVERSIGHT, 1, 8-9 (2022).

Despite the Court already answering the fundamental question on Section 3's self-execution, assessing the borders of constitutional self-execution in the context of the Disqualification Clause is critical in this current time. Now more than ever, in fact. Section 3 of the Fourteenth Amendment languished in obscurity for over a century before it became front-page news across the United States and a determinant of whether a former president of the United States is eligible to return to office. It is not the only "forgotten" provision of the Constitution that carries immense and awesome weight if it were suddenly revived.[57] Delineating these boundaries and principles of self-execution now will only assist future scholarship if and when those other slumbering sections of the Constitution awaken. Looking now to Article IV, home of other sections of the Constitution which issue mandatory commands yet provide no specific mechanics for their application, the precedence and weight of history in these sections can act as guideposts to whether the majority in *Trump* got it right when it said that Section 5 is "critical" to Section 3's application or whether the Court needs to revisit the question at an indeterminate point in the future.

III. Where Have We Been?

Most provisions of the Constitution are presumed to be self-executing with the notable exception of those clauses in Article IV that restrict State autonomy.[58] The Extradition Clause, Privileges and Immunities Clause, and Fugitive Slave Clause all found their power through specific enabling legislation.[59] The three clauses serve as an important benchmark to measure the degree of self-execution within Section 3 because they use the same mandatory "shall" to direct State policy without elucidating a procedure for their enforcement.[60] It is precisely where the

[57] Greg Abbott, *The Myths and Realities of Article V*, 21 TEX. REV. L. & POL. 1, 29-35 (2016).
[58] *See* Dennis v. Higgins, 498 U.S. 439, 443 n.4 (1991) (quoting Rep. Shellabargar in Cong. Globe App., 42nd Cong. 1st Sess. 69-70 (1871)).
[59] *Id.*
[60] *See* U.S. CONST. art. IV, § 2, cl. 1-3

national Constitution proscribes State autonomy without prescribing specific remedies that self-execution becomes unclear. What *is* clear from history is that non-self-executing constitutional provisions such as these are exceptionally dangerous under the wrong conditions.[61] Given the events of January 6 and the charged emotions regarding the efforts to use the Disqualification Clause to preempt a second Donald Trump presidency, political conditions in the United States are ripe to see further incidents of political violence.[62] If Section 3 is to have any meaningful impact in such a volatile electoral environment, it must be self-executing rather than a mere declaration of principles.[63]

A. Privileges and Immunities Clause Analysis

Focusing first on comparing the Disqualification Clause to the Privileges and Immunities Clause, which reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[64] Both clauses are notable in touching upon the "structural balance essential to the concept of federalism."[65] By prohibiting State governments from using State citizenship as a basis for disparate treatment, and thereby preventing non-citizens of a State to redress their grievances except to seek retaliation in-kind from their own State government, the Privileges and Immunities Clause freezes the principal organs of the States from retaliating against each other.[66] It is an essential element in the formation and maintenance of a federal union versus a mere "league of States."[67] Likewise, the Disqualification Clause, passed in the aftermath of the

[61] Fresh Air, *How the Fugitive Slave Act Paved the Way for the Civil War*, NPR WHYY, at 19:28 (Nov. 8, 2019), https://www.npr.org/2019/11/08/777212545/how-the-fugitive-slave-act-paved-the-way-for-the-civil-war.
[62] *See* Gail Collins & Bret Stephens, Opinion, *The Election No One Seems to Want Is Coming Right at Us*, N.Y. TIMES (Jan. 8, 2024), https://www.nytimes.com/2024/01/08/opinion/trump-biden-claudine-gay.html.
[63] Alan B. Sternstein, *Revitalizing Executive Branch Disqualification: Heeding an Imperfectly Learned Watergate Lesson*, 100 DENV. L. REV. 885, 897-907 (2023).
[64] U.S. CONST. art. IV, § 2, cl. 1.
[65] Austin v. New Hampshire, 420 U.S. 656, 662 (1975).
[66] *Id.*
[67] Toomer v. Witsell, 334 U.S. 385, 395-96 (1948).

Civil War, was meant to ensure that "the loyal alone shall rule the country" and banish, at least politically, those who waged rebellion against the United States.[68] In a fractured nation, it was an essential reform to re-establish an "enduring Union."[69]

But the Privileges and Immunities Clause also lacks any enforcement mechanism. As a textual matter, the Privileges and Immunities Clause neither grants power to the federal government to enjoin prohibited conduct nor defines what the protected conduct is. A coherent body of law in the Privileges and Immunities Clause exists only to the extent that States are essentially prohibited from using state citizenship as a class to restrict access to the "domestic private economy."[70] If that sounds like the purpose of the Commerce Clause that's because it is.[71] The Privileges and Immunities Clause, as a practical matter, is a "fill-in-the-gap" provision designed to allow States to discriminate only when there is a "particular evil" needed to be addressed by the exclusion of out-of-state commerce.[72] Outside of a radical rethinking[73] of the Privileges and Immunities Clause, it is an insufficient vehicle to safeguard "privileges and immunities."[74] Returning to the core purpose of this sub-part's analysis: whether the Privileges and Immunities Clause is self-executing, it is incapable of self-execution both for want of an execution mechanism and for the overlap of its core function with other, more powerful clauses of the Constitution.

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[68] Anderson v. Griswold, 2023 CO 63, ¶139 (Colo. 2023) (quoting Cong. Globe, 39th Cong., 1st Sess. 2505 (1866)).
[69] Trump v. Anderson, 601 U.S. 100, 109 (2024).
[70] Bryan H. Wildenthal, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557, 1561 (1989).
[71] *See* Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 63-64 (1988).
[72] Toomer, 334 U.S. at 398.
[73] Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, n.429.
[74] *See privilege (n.)*, SAMUEL JOHNSON'S DICTIONARY, https://johnsonsdictionaryonline.com/views/search.php?term=privilege (defining "privilege" as a "right not universal"); *see also immunity*, SAMUEL JOHNSON'S DICTIONARY, https://johnsonsdictionaryonline.com/views/search.php?term=immunity (defining "immunity" as "freedom.") An editorial judgment was made to exclude the definitions of privilege and immunity that defined itself.

Much like the Privileges and Immunities Clause, the Disqualification Clause also lacks an enforcement mechanism, at least partially. There can be no doubt that the Disqualification Clause is quasi-self-executing in the case of Senators and Representatives. The Congress is "unique" in its ability to police the conduct and qualification of its own membership[75] and is fully empowered to judge the constitutional qualifications of its own Members.[76] Congress does not have "a discretionary power to deny membership by a majority vote."[77] But Congress, in assessing the constitutional qualifications of its Members, may determine that a Member or Member-elect is an insurrectionist covered by the Disqualification Clause. In this way, the Disqualification Clause imbues in Congress a new avenue of constitutional assessment of its membership and is quasi-self-executing to the extent that the power of constitutional qualification assessment was already vested in Congress. Likewise, the Disqualification Clause lacks any mention of enforcement at the state level, but such enforcement would already be actionable under state law.[78]

If the Disqualification Clause does not confer Congress the right to exclude membership to a would-be insurrectionist Member but merely provides Congress with a new constitutional "yardstick" to assess constitutional eligibility, then this analysis should pass through to would-be presidents. The Disqualification Clause is essentially a run-on sentence with a Congressional remedy attached.[79] Its proscriptions on officeholder eligibility are universal to all who fall under its umbrella. Presidential and vice-presidential candidates would thus be bound by this constitutional limitation but no more or less than they would be bound by the other constitutional requirements for the presidency.[80]

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[75] Trump v. Anderson, 601 U.S. 100, 110 (2024).
[76] *See* Powell v. McCormack, 395 U.S. 486, 548 (1969).
[77] *Id*.
[78] New Mexico *ex rel.* White v. Griffin, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1, *67-*69 (N.M. Dist. Ct. Sept. 6, 2022).
[79] U.S. CONST. amend. XIV, § 3.
[80] *See* Ray v. Blair, 343 U.S. 214, 227 (1952).

So far, the lack of an enforcement mechanism in the Privileges and Immunities Clause, except acting as a "fill-in-the-gap" measure empowering States to address a "particular evil", suggests that a constitutional mechanism, like Section 3, that also lacks an enforcement mechanism can only be applied in exceptional contexts. If Section 3 is not a *punishment* per se[81] but merely modifies the qualifications of who can be an officeholder, and Congress and the States assume the authority to police their own officers in this regard, then the question on self-execution becomes: who may police the qualifications of the President? Not the States, that much is clear.[82] But if Congress is empowered to police the qualifications of the President under Section 3, it must find that authority under Section 5 alone – Article I provides no such authority to Congress.

B. Extradition Clause Analysis

The next piece in the Article IV-Disqualification Clause analysis is the Extradition Clause:

> A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.[83]

The Extradition Clause was determined to be non-self-executing very early in the Republic's history.[84] At the request of Attorney General Edmund Randolph, the Second Congress passed the Fugitive Slave Act of 1793 to give force to the Extradition Clause to compel States to return "fugitives from justice" and to compel abolitionist States to return slaves to slaveholding states (or to use the act's imaginatively euphemistic language, "fugitives from labor").[85] Because of its dual purpose, the act can be used for both analyses when looking at the applicability of federal statutory procedure on what are essentially duties imposed upon the States.

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[81] *See* discussion on separation of powers *supra* p. 8.
[82] Trump, 601 U.S. at 112-113.
[83] U.S. CONST. art. IV, § 2.
[84] *See* AMERICAN STATE PAPERS. DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 41-43 (Walter Lowrie & Walter S. Franklin eds., 1834).
[85] Fugitive Slave Act, ch. 7, 1 Stat. 302 (1793) (repealed 1864).

Although the plain language of the Extradition Clause comports a mandatory duty on one State to comply with extradition requests with another, and Congress reaffirmed this duty in the language of the Fugitive Slave Act of 1793, implying "an absolute obligation which the State is bound to perform,"[86] the Supreme Court still held in *Kentucky v. Dennison* that there was no power – either in the Constitution or in the Fugitive Slave Act of 1793 – to coerce compliance with that duty.[87] While the *Dennison* decision was later overturned, the rationale for enforcing the Extradition Clause against the states did not hinge on the aspect of the duty itself so much as the rejection of the notion that the States and the federal government were co-equal sovereigns.[88] A duty imposed by the Constitution itself did not "need to weigh the performance of the federal obligation against the powers reserved to the States under the Tenth Amendment."[89] Constitutional supremacy reigns and the States can – and must be – compelled to fulfill whatever commandments the Constitution imposes.

There can be no doubt that the Disqualification Clause does impose a constitutional duty upon the States. By its plain text, States must ensure that certain[90] insurrections and rebels do not hold "any office" in the State.[91] Nor may they serve as presidential or vice-presidential electors,[92] a process entirely under State control.[93] The Fourteenth Amendment has imposed a "federal obligation" against the States which they, as subordinate sovereigns, are obligated to enforce. The precise mechanism for enforcement of this obligation differ between the States and how and when,

[86] Kentucky v. Dennison, 65 U.S. 66, 109 (1861).
[87] *Id.* at 109-10.
[88] Puerto Rico v. Branstad, 483 U.S. 219, 228 (1987).
[89] *Id.*
[90] Only those insurrectionists and rebels who previously took an oath as a member of Congress, officer of the United States, or State executive, legislative, or judicial officer are covered under the restriction.
[91] U.S. CONST. amend. XIV, § 3
[92] *Id.*
[93] U.S. CONST. art. II, § 1.

specifically, the enforcement action may occur (i.e., before election, after election but before inauguration, or after inauguration).[94]

What is clear from history, however, is that the disqualification of covered individuals from State offices under the auspices of the Disqualification Clause does not implicate any federal right to hold office.[95] The right to hold public office is bifurcated into State rights to hold State office and a federal right to hold federal office.[96] Because the Disqualification Clause is a constitutionally imposed obligation on the States, its enforcement by the States against covered individuals for State office and presidential and vice-presidential electors is self-executing as a federal constitutional mandate enforced via state law.[97]

But that obligation also passes through, like the proscription on seating covered insurrectionists in the Congress, to prospective executive and judicial officers of the United States. The Court made clear that this constitutional obligation to prevent insurrectionists from holding office was not a duty that the States could perform against would-be federal officers. And this creates a dilemma: if a covered insurrectionist *were* to hold federal executive or judicial office, then the official would have no constitutional mandate to command the States to obey any order, judgment, or statute issued in contravention of the Constitution. But the States, other than plain disobedience, would have no remedy to challenge the constitutional qualification of the covered official under *Trump v. Anderson*.

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[94] Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL OF RTS. J. 153, 184-89 (2021).
[95] Worthy v. Comm'rs, 76 U.S. 611, 613 (1869).
[96] *See* Caron v. United States, 524 U.S. 308, 316 (1998); *id.* at 318 (Thomas, J., dissenting); see also Stiner v. Musick, 571 S.W.2d 149, 150 (Tenn. 1978).
[97] Lynch, *supra* note 94, at 189.

C. Fugitive Slave Clause Analysis

The final part of the comparative analysis between the Disqualification Clause and Article IV is the Fugitive Slave Clause. This obsolete[98] remnant of America's slaveholder past offers a robust comparison to the Disqualification Clause. It states:

> No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.[99]

The Supreme Court held in *Prigg v. Pennsylvania* that the Fugitive Slave Clause conferred "a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or regulation whatsoever."[100] A federal constitutional right to repatriate enslaved persons existed in the Fugitive Slave Clause beyond the reach and scope of any state law to the contrary. But the clause also "does not point out any state functionaries, or any state action to carry its provisions into effect. The states cannot . . . be compelled to enforce them."[101] A constitutional mandate that the States were bound to obey but, for lack of an enforcement mechanism, could not. Does this sound familiar?

Certainly, the "right" to own another human being and the ability to hold federal public office do not exist in the same moral universe. But the establishment of such a right in the Constitution and the imposition of a duty against the States to enforce that right supersedes all plenary power of the States to act in the contrary.[102] To state otherwise would be to deny the universal application of the constitutional right:

> If . . . a concurrent power in the states to act upon the subject-matter in the absence of legislation by Congress . . . if Congress had never acted at all; or if the act of Congress should be repealed without providing a substitute, there would be a

[98] U.S. CONST. amend. XIII.
[99] U.S. CONST. art. IV, § 2.
[100] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 613 (1842) (enslaved person at issue).
[101] *Id.* at 615.
[102] *See id.* at 625.

> resulting authority in each of the states to regulate the whole subject at its pleasure; and to dole out its own remedial justice, or withhold it at its pleasure and according to its own views of policy and expediency. Surely such a state of things never could have been intended, under such a solemn guarantee of right and duty . . . [t]he right and the duty are then co-extensive and uniform in remedy and operation throughout the whole Union.[103]

Similar to the right of a slaveholder to retrieve enslaved people throughout the Union – even in abolitionist States – a presidential candidate cannot be simultaneously barred from the presidency under Section 3 in one state and qualified to hold office in another.[104] While the ability to run for public office is not a fundamental right guaranteed by the Constitution,[105] it cannot seriously be disputed that a former officeholder (such as Donald Trump) who has held office in the past would continue to maintain the ability to run for the same office in the future unless otherwise barred. In the case of a constitutional officer such as the President of the United States, that bar must come from the Constitution itself.

To clarify, the enforcement of general constitutional "duties" and the protection of rights and privileges of citizens of the United States, including a candidate's ability to run for office, does generally fall within the scope of a State's "residual sovereignty,"[106] and is not the exclusive domain of the federal government. But even when a State has exclusivity over a right, privilege, or immunity, Congress may – and indeed must act – whenever the existence of a "right or immunity" is "created by the Constitution or only guaranteed by it."[107] With Section 3, the only "right" that is "created" by the Constitution is that "the loyal alone shall rule the country."[108] It is a right granted to all Americans to be governed exclusively by those that have not sought to

[103] *Id.* at 624.
[104] *See* Trump v. Anderson, 601 U.S. 100, 114 (2024).
[105] *See* Clements v. Fashing, 457 U.S. 957, 963 (1982).
[106] *See* Logan v. United States, 144 U.S. 263, 288-89 (1892).
[107] *Id.*
[108] Anderson, *supra* note 68, at ¶139.

suspend or otherwise rebel against the Constitution. But because the Disqualification Clause does, in fact, confer such a "right" to the American people to only be governed by loyalists and, in its second sentence, explicitly empowers Congress to make a determination that an otherwise-disqualified candidate should not be disabled by operation of the Fourteenth Amendment, the operation of the Disqualification Clause against candidates for federal office cannot be "secured . . . under the protection of the States" as a function of their reserved powers.[109]

A uniform application of a candidate's ability to hold federal public office (and of the duty of States to keep disqualified insurrectionists off the ballot) means that covered insurrectionists running for president must either be eligible to run for office in all States in which they otherwise qualify for ballot access, or they must be eligible in none of them. This is the binary that the Court in *Prigg* flung into the future – the echo of a previous era of instability and crisis crashing into the doorstep of another. Having already held that the States cannot, by operation of state law alone, enforce Section 3 against federal officers, the Court limits the application of Section 3's application against candidates for federal office to federal law alone. But if Section 3 establishes a "right" to be governed by loyal Americans coupled with a State duty to ensure unqualified candidates are not on their ballots, then these are established by the Constitution itself and decoupled from any Section 5 enforcement legislation (or lack thereof). So, what are States to do?

IV. Where Are We Going?

By now, the Article IV-Disqualification Clause analysis has concluded that Section 3 of the Fourteenth Amendment is self-executing against the States vis-à-vis their own officials as the imposition of a federal constitutional duty against which the States have no recourse, but which the States may implement via their own enabling legislation. And the analysis has also shown that,

[109] *See* United States v. Cruikshank, 92 U.S. 542, 550-51 (1875).

at least for the Congress, it is quasi-self-executing in that the Disqualification Clause is merely one more constitutional qualification by which it is to assess its own membership.[110] This is in line with other, well-explored analyses of the mechanical application of Section 3.[111] But the fundamental question of this paper has not yet been answered: is Section 3 self-executing against the President of the United States, whether an incumbent or candidate?

What has been gleaned through the Article IV analysis is that the self-execution question must adhere to three general principles. First, Section 3 does not have its own independent application, but modifies extant constitutional qualifications for federal and state office. The insurrection bar to office is universal in its application against covered officials and affects both state and federal rights to hold public office. Second, Section 3 imposes a federal obligation upon the States that they are duty-bound to enforce. And third, Section 3 must be as universal in its geographic scope as it is in its political scope. It applies to all States at once. A covered official, once disqualified, may not seek any office in any State or in the federal government. With these three principles in mind, it is time to begin the final analysis.

There is a "unique nature" to presidential elections that alters the schema of election regulation.[112] While States have an obvious interest in regulating elections and ballot access, the Supreme Court in *Anderson v. Celebrezze* wrote that a "State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by the voters beyond the State's boundaries."[113] Extending the Court's reasoning in *Celebrezze*, a State's lesser *interest* in regulating presidential elections than

[110] *See supra* note 62; *see also* Mark A. Graber, *Their Fourteenth Amendment, Section 3 and Ours*, JUST SECURITY (Feb. 16, 2021), https://www.justsecurity.org/74739/their-fourteenth-amendment-section-3-and-ours/ ("[i]n regard to the election of members of [the House] here is the tribunal. In regard to the election of Senators, the Senate . . . is the tribunal").
[111] Lynch, *supra* note 94, at 184-89, 194-95.
[112] *See* Cowen v. Ga. Sec'y of State, 960 F.3d 1339, 1344 (11th Cir. 2020).
[113] Anderson v. Celebrezze, 460 U.S. 780, 795 (1983).

state and local elections also translates to a lesser *power* to regulate presidential elections than state or local elections. The duty imposed on the States by the Disqualification Clause to prevent insurrectionists from holding office may be properly effectuated against state and local officials by operation of state law carrying out the mandate of the Disqualification Clause. It cannot be effectuated in the first instance against the presidency by state law alone owing to the presidency's national character.

A state scheme could render a covered official ineligible for federal office under state law if the covered official had previously or concurrently sought *state office* and was barred by operation of state law. The disqualification would carry-through and affect both the right to hold federal office and the right to hold state office. Likewise, a would-be president barred from being seated in the House or Senate by a chamber's finding that the prospective Member is a covered insurrectionist would likewise be ineligible from seeking future office anywhere. What judicial remedies would be available to such a candidate would be unclear.[114] What is clear is that, once the disqualification has been imposed – in any capacity – it exists against the individual for all offices at all levels and only Congress may remove the disability.[115]

Before *Celebrezze*, the Court previously held in *Or v. Mitchell* that "it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections . . . [i] cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections."[116] While the *Or* case concerned a State's ability to regulate *voters* in a presidential election (as opposed to candidates) the Court wrote in that same opinion

[114] In the only instance of a covered insurrectionist being denied office by operation of the Disqualification Clause in the twentieth century, Rep. Victor Berger (Wis.) was eventually seated by the House of Representatives after the Supreme Court overturned his criminal conviction under the Espionage Act. The Court did not address any question of the Fourteenth Amendment and the House undertook no further proceedings against him after 1921. *See* Berger v. United States, 255 U.S. 22 (1921).
[115] Trump v. Anderson, 601 U.S. 100, 108 (2024).
[116] Or v. Mitchell*,* 400 U.S. 112, 124 (1970).

that "[i]t is the power of Congress which has been enlarged"[117] by the operation of Section 5 of the Fourteenth Amendment and not any other power of the federal government or the States. Even assuming, at this stage, that the Disqualification Clause's modification of presidential qualifications are self-executing, it is apparent that the mechanism for disqualification of a presidential candidate is beyond the scope of a State government's plenary powers to govern elections within its own borders. The Court's base dismissal, without further analysis, of the Elections and Electors Clause in *Trump v. Anderson* was a bullseye.

The "unique nature" of the office of the presidency also demands that there is a uniform application of Section 3 against would-be insurrectionist presidential candidates. Justices Kagan and Jackson raised this concern during oral arguments in *Trump v. Anderson*.[118] Respondents' counsel argued that state-based enforcement of the Disqualification Clause was necessary both for redundancy in ensuring that insurrectionists would not gain office and to prevent Congress from "rip[ping] the heart out of Section 3 by a simple majority just by failing to pass enforcement legislation,"[119] a concern shared by several concurring Justices in the final opinion.[120]

It would certainly be incongruous if the plain text of the Disqualification Clause mandated that the "disability" created by its application could only be removed by a two-thirds vote of Congress, but that disability could be entirely avoided by simply refusing to enforce the disqualification in the first place. This is a compelling argument that weighs heavily in favor of self-execution. But that incongruity is laid at the feet of Congress. It does not necessarily translate that congressional inaction on a matter mandated to the Congress by the Constitution should be remedied by the States.

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[117] *Id.* at 128 (quoting Ex parte Virginia, 100 U.S. 339, 345 (1880)).
[118] Transcript of Oral Argument at 94-96, 104-05, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719).
[119] *Id.* at 96.
[120] Trump v. Anderson, 601, 100, 118-23 (Sotomayor, Kagan, and Jackson, JJ., concurring).

Uniform application of federal law is certainly *possible* through a state-by-state implementation process. That is how the Bankruptcy Code is administered in this country.[121] But State implementation of a constitutional objective (in bankruptcy, the discharge of a debtor's estate; in the Disqualification Clause, the keeping of covered insurrectionists from returning to public office) can only be uniform, in a "constitutional sense," if the "general operation" and "outcome" of the State action would have been the same as if there had been no federal grant of power to the States at all.[122] That does not follow if, absent a federal statute saying otherwise, the States were able to interpret the Disqualification Clause as applying to candidates for federal office appearing on ballots in other States.[123]

But there is a way for States to force the national government's hand to seek a uniform determination on the qualifications of a candidate for national office and enforce Section 3's command. And that is to sue the United States. It is well-established that individual citizens lack judicial standing to challenge the qualifications of particular officers under Article III.[124] But because "no private party would otherwise be able to maintain" a lawsuit enforcing Section 3 and because the States are subordinate sovereigns to the United States, the States maintain a unique "federal interest" in the maintenance of constitutional order.[125] And because the States may not enforce Section 3 against federal officers under their own "sovereign lawmaking powers," they deserve a "special solicitude" to enforce via litigation Section 3's constitutional mandate, even in the absence of a statutory procedure prescribed by Congress.[126]

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[121] CONG. RSCH. SERV., R4137, BANKRUPTCY BASICS: A PRIMER 3-4 (2022).
[122] Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 190 (1902).
[123] *See* Peter M. Shane, *The Least Harmful Way to Leave Trump on the Ballot*, WASH. MONTHLY (Jan. 25, 2024), https://washingtonmonthly.com/2024/01/25/the-least-harmful-way-to-leave-trump-on-the-ballot/.
[124] *See* Berg v. Obama, 586 F.3d 234, 240 (3d Cir. 2009); Ex parte Levitt, 302 U.S. 633 (1937).
[125] Stephen I. Vladeck, *States' Rights and State Standing*, 46 U. RICH. L. REV. 845, 848-50 (2012).
[126] Massachusetts v. EPA, 549 U.S. 497, 519-20 (2007).

The Supreme Court originally recognized implied causes of action to enforce the Constitution in *Bivens v. Six Unknown Named Agents*.[127] While that case involved the recognition of an implied *private* right of action to seek damages for violation of the Fourth Amendment, Justice Harlan in his concurrence recognized crucially that the mere lack of "express authorization" for judicial remedy was unnecessary where judicial relief was necessary to "effectuate" congressional policy.[128] The congressional policy at issue in Section 3 is clear from the record of its adoption: that the loyal alone shall rule the country. The fact that Congress may remove a constitutional disability from an otherwise ineligible insurrectionist by two-thirds vote is not indicative that Congress may also abdicate its role in regulating presidential elections by simply refusing to pass Section 3 enabling legislation. Such a result would be incongruous to the plain text of the Fourteenth Amendment.[129] Certainly Congress may pass a statute giving process to bar insurrectionists from office under Section 3. But where Congress is the "body charged" with designing such an election regulation scheme and it fails to do so, it cannot seriously be alleged that it has "discharged that responsibility to the extent that it affects" a court's ability to address States' serious constitutional concerns regarding the governance of the nation.[130] Until Congress does so, the States maintain standing to challenge a candidate's Section 3 eligibility via litigation in federal court to protect their own interests and the interests of their citizens as *parens patriae*.

V. Conclusion

The Court in *Trump v. Anderson* approached the delicate issue of Donald Trump's eligibility to run for president about as carefully as one could ask for, given the current political climate. As a textual matter, all nine Justices agree, the States may not enforce Section 3 through

[127] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396-97 (1971).
[128] *See id.* at 402.
[129] *See* Trump v. Anderson, 601 U.S. 100, 118-23 (Sotomayor, Kagan, and Jackson, JJ., concurring).
[130] *See* Schweiker v. Chilicky, 487 U.S. 412, 429 (1988).

operation of state law. And even the Court's basic dismissal of state-based causes of action under the Elections and Electors Clause finds thorough support in case law, as the above analysis showed. But where the Court erred was in its more substantive and more controversial holding that Congress alone maintains the authority to execute Section 3. Section 3 is self-executing upon the States and is quasi-self-executing upon the Congress. Section 5 *empowers* Congress to enforce Section 3, but the lack of any enforcement statute does not necessarily *disempower* Section 3 from applicability against the presidency: after all, the above analysis also showed that a candidate disqualified from state office by operation of state law would further be disqualified from the presidency. The disqualification would carry over.

Rather, the States should be able to avail themselves of previous Court doctrines to affect a self-executing constitutional remedy to Section 3 in the absence of a congressionally sanctioned procedure. The "special solicitude" given to the States to advance their federal interests[131] in *Massachusetts v. EPA* should also extend to Section 3 litigation in federal court. And *Bivens*, which established an implied federal cause of action to enforce constitutional prescriptions in the absence of congressional action, should also apply to Section 3. To infer otherwise would be to effectuate Congress's explicit Section 3 rehabilitation power by mere majority inaction rather than supermajority restoration. The Fourteenth Amendment grants Congress no such power. In the aftermath of *Trump v. Anderson*, Section 3 can only remain operative against the president if the States are empowered to take a *Bivens* action against the electoral college or the Congress to enjoin votes, or certification of votes, against would-be federal officeholders barred from office by Section 3. The federal courts would have equitable jurisdiction over such a claim and could

[131] The most unambiguous federal interest of a State in ensuring that only a Section 3 qualified candidate be elected to the presidency involves the President's unique role as Commander-in-Chief of the armed forces. The President of the United States has the sole authority the "federalize" a State's National Guard and remove its military forces from a State governor's command. *See* 10 U.S.C. §§ 251, 252, 12301.

reasonably be expected to issue a judgment on the merits of whether a candidate for president is or is not disqualified by Section 3. And if Congress thinks otherwise, Section 3 also empowers it to remove such disability either before or at the time of the certification of the electoral vote.