

STATES CAN ENFORCE SECTION THREE OF THE FOURTEENTH AMENDMENT WITHOUT ANY NEW FEDERAL LEGISLATION

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INTRODUCTION

It is sometimes suggested that enforcing Section Three of the Fourteenth Amendment (the Insurrectionist Disqualification Clause) would require new federal legislation.¹ That is incorrect. This report explain why state courts can enforce Section Three without federal authorization.²

First, state courts do not need permission from Congress to enforce the U.S. Constitution. The Constitution imposes obligations that are either self-executing or can be enforced by state law. And state courts routinely apply these obligations without relying on a federal statute for authorization. To conclude otherwise would undermine states' rights and undercut the Constitution by leaving its enforcement to the discretion of Congress. Congressional silence cannot silence state efforts to make sure that officials obey the supreme law of the land.

Second, Section Three is consistent with the principle that state courts can interpret, apply, and enforce the Constitution. The text of Section Three makes clear that the only exclusive role for Congress is in *removing* disqualifications from officials who engage in insurrection against the United States. Congress was not given an exclusive role in enforcing disqualifications.

The history of Section Three's implementation during Reconstruction demonstrates this. Congress, state courts, and even ex-Confederate insurrectionists all understood Section Three to apply *without* a federal enforcement statute. The only case suggesting that Section Three enforcement requires federal legislation arose in a state with a provisional government under the supervision of the Union Army. Extending that unique decision to modern states would be contrary to the text of Section

¹ See, e.g., 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>. There is no current federal Section Three enforcement statute.

² This report should not be interpreted as opposing proposed congressional legislation. The point is not that congressional enforcement legislation would be improper or unwise, but only that its absence does not divest state courts of their existing authority to apply Section Three.

Three, common sense, and more persuasive (and recent) state and federal precedent.

Finally, state courts relying on state law have applied Section Three to the January 6, 2021 insurrection, without any special federal legislation.

I. State courts do not need congressional permission to enforce the federal Constitution against state officials.

- A. State courts are both obligated and competent to adjudicate federal constitutional questions.

The Supremacy Clause of the U.S. Constitution states, in part: “This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.” U.S. Const., art. VI, § 2.

Nothing here or anywhere else in the text supports the idea that state judges may apply the Constitution only if Congress says that they can. To the contrary, the Supreme Court established fifty years before the enactment of the Fourteenth Amendment that state courts are generally competent to adjudicate questions arising under the U.S. Constitution. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 339-42 (1816) (Story, J.); see also *Robb v. Connolly*, 111 U.S. 624, 637 (1884) (Harlan, J.) (emphasizing that obligation to enforce U.S. Constitution lies “[u]pon the state courts, equally with the courts of the Union”). To be sure, Congress might give federal courts exclusive jurisdiction over specific constitutional claims. But this option only confirms that, in the absence of legislation specifically establishing exclusive federal jurisdiction, state courts remain authorized and obligated to apply and enforce federal constitutional provisions. As the Supreme Court has explained, “[t]he general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication.” *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981).

- B. State courts routinely adjudicate federal constitutional claims without a federal statute granting them permission to do so.

When a plaintiff in a civil action in state court raises a federal constitutional claim, state courts do not first look to see whether a federal statute authorizes consideration of the claim. Instead, the state court reviews the constitutional claim consistent with the pertinent authorities on the merits.³ Indeed, state courts' competency to decide federal constitutional claims without any special permission from Congress is so well established that the U.S. Supreme Court has developed doctrines of *preference* for state court adjudication of federal constitutional questions. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 105 (1980) (prior state court judgment on a federal constitutional question binds federal courts by collateral estoppel); *Younger v. Harris*, 401 U.S. 37, 54 (1971) (federal court cannot enjoin state court criminal proceeding on the basis of federal constitutional claims).

- C. State courts are fully competent to adjudicate questions under the Fourteenth Amendment.

State courts began adjudicating Fourteenth Amendment claims almost immediately after the amendment's passage, including affirmative civil actions, without special authorization from Congress. *See, e.g., Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136 (Cal. 1872) (deciding claim under Section One's privileges and immunities clause); *Tredway v. Sioux City & St. P.R. Co.*, 43 Iowa 527 (Iowa 1876) (deciding claim under Section One's equal protection clause). Indeed, one of the nation's foremost constitutional decisions arose, in part, from a state court case deciding plaintiffs' Fourteenth Amendment claim. *See Brown v. Bd. of Ed.*, 347 U.S. 483, 486 n.1

³ *See, e.g., 1A Auto, Inc. v. Dir. of Office of Campaign & Polit. Fin.*, 105 N.E.3d 1175 (Mass. 2018) (deciding plaintiff's First Amendment claim); *Jankovich v. Ill. State Police*, 78 N.E.3d 548 (Ill. App. Ct. 2017) (deciding plaintiff's Second Amendment claim); *N.Y. Horse & Carriage Ass'n v City of New York*, 545 N.Y.S.2d 439 (N.Y. Sup. Ct. 1989) (deciding plaintiff's Fourth Amendment claim); *McCabe v. Dep't of Reg. & Educ.*, 413 N.E.2d 1353 (Ill. App. Ct. 1980) (deciding plaintiff's Fifth Amendment claim); *Reeves v. Cox*, 385 A.2d 847 (N.H. 1978) (deciding plaintiff's Sixth Amendment claim); *see generally* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 Wm. & Mary L. Rev. 605 (1981). There are, of course, many state court cases where a federal constitutional question arises as a defense in a civil or criminal case, but as these cases illustrate, state courts also routinely adjudicate federal constitutional claims raised by civil plaintiffs.

(1954) (noting that one of the four consolidated cases arose in Delaware state court).

Today, state courts routinely enforce provisions of the Fourteenth Amendment when plaintiffs raise them in civil actions, without citing any federal statute “authorizing” such enforcement.⁴ *See, e.g., Alliance for Retired Americans v. Sec’y of State*, 240 A.3d 45 (Me. 2020) (deciding plaintiff’s Due Fourteenth Amendment Process Clause claim); *Rhoden v. Athens-Clarke Cnty. Bd. of Elec.*, 850 S.E.2d 141 (Ga. 2020) (same); *Sands Bethworks Gaming, LLC v. Penn. Dep’t of Revenue*, 207 A.3d 315 (Pa. 2019) (deciding plaintiff’s Fourteenth Amendment Equal Protection Clause claim).

Every state court in the country uses the same method. The opposite conclusion would create by implication an unprecedented limit on state authority that would sharply curtail the remedies available against official misconduct in state court, and undercut the U.S. Constitution by leaving its enforcement entirely to the discretion of Congress.

II. Nothing in the Fourteenth Amendment suggests that federal legislation is required for enforcement of Section Three.

Section Three of the Fourteenth Amendment is no exception to the principle that state courts adjudicate claims under the Constitution (including the Fourteenth Amendment itself) without congressional permission. It states:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

⁴ State courts also decide Fourteenth Amendment claims under 42 U.S.C. § 1983, *e.g.*, *Ex parte King*, 50 So. 3d 1056, 1057 (Ala. 2010), or Fourteenth Amendment defenses, *e.g.*, *State v. Clegg*, 867 S.E.2d 885, 890 (N.C. 2022). But the examples cited above illustrate that state courts decide affirmative Fourteenth Amendment civil claims outside those particular contexts.

U.S. Const., amend XIV, § 3.

Two textual points deserve close attention. First, Section Three imposes a disqualification upon any officials who engage in insurrection against the United States and thereby break their constitutional oath of office. *Cf.* U.S. Const., art. VI, § 3 (stating that all state legislators and “executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution”). The enforcement of that obligation by states is not conditioned on congressional enforcement.

Second, Section Three gives Congress an exclusive role only for *waiving* disqualifications. In fact, this is the *only* specific role that Section Three confers upon Congress. This textual distinction reinforces the conclusion that Section Three does *not* give Congress an exclusive role for enforcing disqualifications.

Furthermore, Section Five’s authorization of congressional legislation to enforce the Fourteenth Amendment does not mean, as some have argued, that the amendment is unenforceable without such legislation. *See* U.S. Const. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); *Hansen v. Finchem*, No. CV 2022-004321 (Ariz. Sup. Ct., Maricopa Cty., Apr. 22, 2022), at *6, available at <https://freespeechforpeople.org/wpcontent/uploads/2022/05/az-order-dismissing.pdf>, *aff’d on other grounds*, No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz. May 9, 2022) (declining to decide this issue).

The mere fact that Congress has the power to enforce Section Three through legislation does not mean that without such legislation, states are *unable* to adjudicate questions arising under Section Three. In fact, the argument proves too much. Section Five applies to the *entire* Fourteenth Amendment, including Section One’s Due Process and Equal Protection Clauses. If Section Five meant that states could not adjudicate questions under Section Three without congressional legislation authorizing them to do so, then it would *also* mean that states could not adjudicate Due Process or Equal Protection Clause questions without congressional legislation authorizing them to do so. Yet, as noted above, courts in every state routinely adjudicate such questions without any specific congressional

legislation authorizing them to do so. Since Section Five applies the same to Section Three as it does to Section One, state court adjudication of federal due process and equal protection questions refutes any argument that Section Five somehow means specific legislation is needed before states can enforce the Fourteenth Amendment.⁵

III. Reconstruction-era history confirms that states may enforce Section Three without special federal legislation.

Nothing in the original public meaning of Section Three supports the argument that congressional action is required for enforcement, nor has anyone identified any contemporaneous evidence (e.g., from congressional debates, state ratification debates, or public discussion surrounding ratification) supporting such a claim. To the contrary, history—including the period between 1868, when the amendment was ratified, and 1870, when the first federal enforcement legislation was passed—confirms that virtually everyone involved understood that Section Three applied and was enforceable even without special federal legislation.

- A. The Reconstruction-era Congress’s amnesty practice confirmed its understanding that Section Three applies without any special federal legislation.

Congress began exercising its power to remove disqualifications *before* any applicable federal enforcement legislation was enacted. The Fourteenth Amendment was ratified in July 1868, but the first federal enforcement

⁵ This argument also may prove too much because it would apply equally to federal courts—they would be unable to enforce the Fourteenth Amendment without specific federal legislation. Perhaps one could argue that 42 U.S.C. § 1983 constitutes that federal legislation. But taking this argument seriously would mean that federal courts’ authority to enforce the Fourteenth Amendment is limited to Section 1983 actions, and that Congress could strip federal courts of such authority by repealing Section 1983. Cf. Mark Graber, *Legislative Primacy and the Fourteenth Amendment*, Balkinization, <https://balkin.blogspot.com/2022/04/legislative-primacy-and-fourteenth.html> (Apr. 22, 2022) (observing that logic of a “legislative primacy” theory under which Congress must implement Section Three by legislation would apply equally to Section One, such that “[j]udges who swear off implementing Section 3 are on principle obligated to swear off implementing Section 1,” and “the same courts that refuse to disqualify persons from public office who participated in the January 6, 2021 insurrection will on principle be obligated to reverse the Supreme Court’s decision in *Brown v. Board of Education* (1954), which was also based on the independent judicial authority to interpret the Fourteenth Amendment”).

statute for Section Three was not enacted until May 1870. See Act of May 31, 1870, ch. 114, § 14, 16 Stat. 140, 143 (repealed 1948).⁶

But private bills enacted by the required two-thirds majority in each House from 1868 to March 1870—i.e., *before* Congress had yet passed a federal statute to enforce Section Three in the first place—gave Section Three amnesty to individuals from jurisdictions such as the District of Columbia, Indiana, Kentucky, Maryland, Missouri, New Mexico, New York, Tennessee, and West Virginia.⁷

Those who claim that Section Three cannot be enforced without special federal enforcement legislation must strain to explain why Congress bothered granting amnesty long *before* passing any federal enforcement legislation. If federal authorization were required for Section Three enforcement, then no one would have required amnesty until at least May 1870. Under this view, two-thirds of both houses of Congress repeatedly passed amnesties for no purpose.

⁶ The Act of Congress that readmitted five ex-Confederate States in 1868 could also be described as a federal Section Three enforcement statute. See Act of June 25, 1868, ch. 70, § 3, 15 Stat. 73-74 (readmitting Alabama, Florida, Georgia, North Carolina and South Carolina to the Union, and still in effect today) (“[N]o person prohibited from holding office under the United States, or under any State, by section three of the proposed amendment to the Constitution of the United States, known as article fourteen, shall be deemed eligible to any office” in those five states unless Congress exercised its power to grant a waiver). But the existence of the 1868 Act does not make congressional legislation a prerequisite for Section Three enforcement by state courts. Any argument that such legislation is always required, but happens to exist for five states, would mean that only five of fifty states can enforce Section Three today. And there is no precedent for the proposition that some states must enforce a federal constitutional provision while others are barred from doing so. Furthermore, many of the disqualification removals by Congress before May 1870 occurred in states or jurisdictions that were not covered by the 1868 Act. Thus, the argument that an Act of Congress is required for Section Three enforcement still cannot offer a convincing explanation for these waivers.

⁷ See “An Act to relieve certain Persons therein from the legal and political disabilities imposed by the fourteenth amendment of the Constitution of the United States, and for other Purposes,” ch. 1, 16 Stat. 614-630 (1870); “An Act to relieve certain Persons therein from the legal and political disabilities imposed by the fourteenth amendment of the Constitution of the United States, and for other Purposes,” ch. 1, 16 Stat. 607-613 (1869); “An Act to relieve Certain Persons of All Political Disabilities imposed by the Fourteenth Article of the Amendments to the Constitution of the United States,” ch. 5, 15 Stat. 436 (1868) (removing Section Three disability of DeWitt C. Senter of Tennessee).

But Congress understood Section Three well. These acts removing the disqualification—passed by Congress months or years before any congressional statute authorizing federal Section Three enforcement—show that Congress understood that Section Three’s disqualification could be enforced by the *states*. In other words, Congress treated disqualification as something that might merit congressional amnesty, even without federal enforcement legislation, *precisely* because it could be enforced by states.

Moreover, Section Three amnesty was granted in private bills only upon request by the disqualified individuals. See James G. Blaine, *Twenty Years of Congress: From Lincoln to Garfield* (1886). That means that many individuals understood that they could be excluded from office by state law and state courts and needed amnesty even in the absence of federal enforcement legislation—and that, as early as 1868 (the year the Fourteenth Amendment was ratified, just two years after passage by Congress), two-thirds of both houses of Congress agreed. If these individuals could only be excluded through congressional legislation that did not yet exist, they would have nothing to gain—and much to lose—by putting their fate in the hands of a congressional vote they could only win by a two-thirds vote.

B. Reconstruction-era state constitutions confirm that Section Three does not require special federal legislation.

Congress and ex-Confederates alike correctly understood that (without amnesty) insurrectionists would be barred from office even without federal legislation. That is in part because state constitutions *specifically so provided*.

Three state constitutions that invoked Section Three and were ratified at about the same time as the Fourteenth Amendment confirm that disqualification is imposed by the Fourteenth Amendment itself and does not require new congressional legislation. The Florida Constitution of 1868 stated:

Any person debarred from holding office in the State of Florida by the third section of the proposed amendment to the Constitution of the United States, which is as follows: [quoting Section Three] is hereby debarred from holding office in this state; *Provided*, That whenever such disability from holding

office be removed from any person by the Congress of the United States, the removal of such disability shall also apply to this State.

Florida Const., art. XVI, § 1. Likewise, the South Carolina Constitution of 1868 stated: “[N]o person shall be allowed to vote or hold office who is now or hereafter may be disqualified therefor [sic] by the Constitution of the United States, until such disqualification shall be removed by the Congress of the United States.” S.C. Const. of 1868, art. VIII, § 2. The Texas Constitution of 1869 contained identical language to South Carolina’s. See Texas Const. of 1869, art. VI, § 1.

These states recognized that disqualification was imposed by the Constitution, not by the Constitution plus Congress. Congress’s only essential role was *removal* of the disqualification.

- C. Reconstruction-era state courts used state law in civil cases to enforce Section Three without any special federal legislation.

If there were any doubt remaining, the actual practice of multiple state courts—including during that 1868-70 window before any federal enforcement legislation—demonstrates that they enforced Section Three without reference to any supposed need for federal legislation. One example is *Worthy v. Barrett*, an 1869 North Carolina Supreme Court opinion holding that a sheriff-elect could not take office because he was a sheriff under the Confederacy. *Worthy v. Barrett*, 63 N.C. 199, 200 (1869). *Worthy* said nothing about relying on a federal statute to enforce Section Three. Instead, the court quoted from a *state* statute providing that “no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Article XIV, shall qualify under this act or hold office in this State.” See *id.* (quoting Acts of 1868 ch. 1, § 8). The North Carolina Supreme Court took a similar approach in another case holding that a former county attorney who served in the Confederate Army was ineligible under Section Three to return to state office. See *In re Tate*, 63 N.C. 308, 308-09 (1869) (citing *Worthy* as controlling authority).

Similarly, that same year the Louisiana Supreme Court adjudicated the Section Three eligibility of a state official. *See State ex rel. Downes v. Towne*, 21 La. Ann. 490, 492 (1869). While the court concluded that “[t]he evidence in this case fails to establish conclusively that Downes [a state judge] is disqualified under the fourteenth amendment of the constitution of the United States,” the important point here is that the court did not discuss or suggest the need for any federal statutory authorization in order for it to decide that question.

- D. The only case stating that federal legislation is required to enforce Section Three does not apply to functional state governments.

The only ostensible basis for the upside-down view of federalism that state courts are helpless to enforce the U.S. Constitution without specific congressional action is an 1869 lower court decision that applied Section Three of the Fourteenth Amendment to the then-unreconstructed state of Virginia. *See Griffin’s Case*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815). The plaintiff, Caesar Griffin, was convicted in state court of assault. *Id.* at 22. He brought a federal *habeas corpus* petition alleging that his conviction was unlawful because the Virginia judge who presided over his trial was ineligible to serve under Section Three. *Id.* at 22-23. *Griffin’s Case* was heard by a two-judge court presided over by Chief Justice Salmon P. Chase, acting in his capacity as a Circuit Justice. *See id.* at 22.

The petition was rejected on the ground that Section Three was not self-enforcing and that an Act of Congress was required for enforcement.⁸ *Id.* at 26. Since no relevant Act of Congress was in force when Griffin’s trial occurred, the federal court held that Griffin’s trial judge was not ineligible to

⁸ This report need not address whether Section Three can be enforced without any underlying cause of action, as state law supplies the necessary procedural framework and enforcement authorities for eligibility challenges to candidates for office. Rather, the present question is solely whether, even where state law supplies a cause of action by which Section Three can be enforced, some unwritten principle requires specific congressional action before the state may apply its laws.

preside. *Id.* at 27. For several reasons, this decision is wholly unpersuasive and cannot bear the weight that some assign to it.⁹

Griffin's Case is contradictory and supplies little analysis for its critical conclusion. It was recently described as “confused and confusing” by a federal circuit judge. See *Cawthorn v. Amalfi*, 35 F.4th 245, 278 n.16 (4th Cir. 2022) (Richardson, J., concurring in the judgment). And with good reason. In a different Virginia circuit case shortly before *Griffin's Case*, the same Chief Justice Chase concluded that Section Three was self-enforcing and that no Act of Congress was required for its implementation.¹⁰ See *In re Davis*, 7 F. Cas. 63, 90, 102 (C.C.D. Va. 1867) (No. 3,621a); *Cawthorn*, 35 F.4th at 278 n.16 (Richardson, J., concurring in the judgment) (“These contradictory holdings . . . draw both cases into question and make it hard to trust Chase’s interpretation.”); see also Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 100-108 (2021)

⁹ See, e.g., 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>.

¹⁰ *In re Davis* was the treason case against Jefferson Davis. Chief Justice Chase, who was the presiding judge, suggested to Davis’s lawyers that they could raise Section Three as a defense with the argument that disqualification from office was the exclusive sanction for ex-Confederate officials. See *Cawthorn*, 35 F.4th at 278 n.16 (Richardson, J., concurring in the judgment); C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 Akron. L. Rev. 1165, 1196 (2009). Many scholars believe that Chief Justice Chase’s highly questionable intervention stemmed from his personal and political qualms about the Davis case. See, e.g., Cynthia Nicoletti, *Secession On Trial: The Treason Prosecution of Jefferson Davis* 294-296 (2017); Carlton Larson, *On Treason: A Citizens Guide to the Law* 126-128 (2020).

Davis indeed moved to quash his indictment, claiming that Section Three operated as an exclusive punishment. However, since no federal legislation had yet been passed to implement Section Three, Davis necessarily also argued that Section Three was self-enforcing. See 7 F. Cas. at 90-91 (argument of Davis’s counsel, former Judge Ould, on both points). The two judges disagreed whether to grant the motion, and certified the question to the Supreme Court. See *id.* at 102. But soon afterward, a presidential general pardon relieved Davis of any criminal liability. See *id.* Nonetheless, Chief Justice Chase “instructed the reporter to record him as having been of opinion . . . that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States.” *Id.* Thus, Chief Justice Chase necessarily adopted Davis’s argument that Section Three is self-enforcing.

Just as Chief Justice Chase’s interpretation in *In re Davis* may have reflected his personal qualms about the Davis prosecution, his interpretation in *Griffin* may have reflected his personal opposition to Section Three as “too harsh on former Confederate officials.” See *Cawthorn*, 35 F.4th at 278 n.16 (Richardson, J., concurring in the judgment) (quoting Connally, *supra*, at 1196).

(providing a detailed analysis of *Davis* and *Griffin's Case*). *Griffin* did not attempt to reconcile these conflicting points of view.¹¹

Griffin also never plausibly explained why state law could not be the basis for Section Three enforcement against a state official. The court first noted that Section Five authorizes congressional legislation. See 7 F. Cas. at 26. But authorizing Congress to enact legislation does not deprive states of their inherent authority and obligation to enforce the U.S. Constitution. See *supra* Part II.

Second, the court stated that the exclusive role for Congress in removing disqualifications “gives to congress absolute control over the whole operation of the amendment.” *Griffin*, 7 F. Cas. at 26. But the conclusion simply does not follow from the premise. To the contrary, Section Three’s grant of exclusive authority to Congress to *remove* the disqualification, coupled with the absence of such language regarding the *disqualification itself*, reinforces the conclusion that Section Three’s disqualification requirement, like other requirements of the Fourteenth Amendment (and the Constitution generally) may (and must) be enforced by state courts with or without congressional action.

But *Griffin's Case* can be read in a manner that makes the result less confusing or confused. In 1869, Virginia was an unreconstructed state under military occupation, without a fully functional state government. This meant that Virginia was not allowed to have United States Senators or

¹¹ Some might argue that Chief Justice Chase’s positions in these two cases are consistent because *Davis* raised Section Three as a defense to a federal criminal prosecution, whereas *Griffin* raised Section Three as an affirmative argument in a federal habeas petition. The claim that would follow is that Section Three does not require congressional implementing legislation when raised as a defense to a criminal prosecution but does require such legislation for affirmative litigation. However clever this post hoc explanation (never suggested by Chief Justice Chase himself) for Chase’s divergent rulings may appear, the fact that it did not occur to any of the hundreds of ex-Confederates who petitioned Congress for amnesty before 1870 despite the lack of congressional enforcement legislation, nor the two-thirds of both chambers of Congress that repeatedly granted such amnesty, indicates that the rest of the country understood that Section Three was enforceable even without congressional implementing legislation. Nor can Chief Justice Chase’s position in *Griffin's Case* be rescued by a post hoc distinction between federal and state offices, suggesting that even if state procedures suffice for state officials, federal procedures are still needed for federal officials (or office-seekers). *Griffin's Case* itself involved a state official, and nothing in its thin rationale would apply more to federal office than to state office.

Representatives in Congress and was under the control of a Union Army General as part of “Military Reconstruction.” See, e.g., First Military Reconstruction Act, ch. 153, 14 Stat. 428-430 (1867). Indeed, *Griffin’s Case* quoted from a Joint Resolution of Congress that referred to “the provisional governments of Virginia and Texas.” See *Griffin*, 7 F. Cas. at 26-27; Res. No. 8, 40th Cong., 15 Stat. 144 (1869); see also Act of Jan. 26, 1870, ch. 10, 16 Stat. 62-63 (readmitting Virginia to the Union).

Given that Virginia had a provisional government under federal control when *Griffin’s Case* was decided, the Court’s conclusion that only federal law could enforce Section Three in that limited context made sense. Provisional state governments operating under federal military occupation lacked the powers of ordinary state governments. Put another way, Virginia was treated more like a federal territory, with only the limited autonomy accorded it by Congress.

Moreover, Virginia had not yet ratified the Fourteenth Amendment when *Griffin* was convicted in 1868. See, e.g., “Virginia: Ratification of the Fourteenth and Fifteenth Amendments to the Constitution,” N.Y. Times, Oct. 9, 1869, at 3. Thus, suggesting that Virginia law could enforce a constitutional amendment *that Virginia refused to recognize* would have made no sense in 1869.

Given the decision’s unique historical context and its fundamentally flawed reasoning, any invitation to extend *Griffin’s Case* beyond the exceptional circumstances of post-secession Virginia should be rejected. Such an extension would violate the Constitution’s structure, Section Three’s text, and every other judicial precedent applying that provision. State courts play a vital role in vindicating the Constitution’s limits on officials—especially when an official engages in an insurrection that seeks to overthrow the government duly elected under the Constitution.

IV. Contemporary judicial precedent applying Section Three to the January 2021 insurrection recognizes that states may enforce Section Three without special federal legislation.

In 2022 a New Mexico state court applied Section Three, pursuant to the state *quo warranto* statute, and removed Couy Griffin, a county commissioner, from office for engaging in the Capitol insurrection. See *New*

Mexico ex rel. White v. Griffin, 2022 WL 4295619 (N.M. 1st Jud. Dist., Sept. 6, 2022), *appeal dismissed*, No. S-1-SC-39571 (N.M. Nov. 15, 2022). No special federal legislation was needed.

Similarly, Georgia adopted *Worthy's* approach in addressing a Section Three ballot challenge against Representative Marjorie Taylor Greene. *See Rowan v. Raffensperger*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Ofc. of State Admin. Hrgs. May 6, 2022), *available at* <https://freespeechforpeople.org/wpcontent/uploads/2022/05/2222582.pdf>. While the administrative law judge overseeing the state proceeding (like the Louisiana Supreme Court in *Downes*) ultimately concluded that there was insufficient evidence to establish that Representative Greene engaged in insurrection on January 6th, 2021, he specifically followed *Worthy* and adjudicated the Section Three question on the merits. Neither the administrative law judge, nor the state courts on appellate review, nor the federal court that rejected Greene's efforts to enjoin the state proceeding, *see Greene v. Raffensperger*, 599 F. Supp. 3d 1283 (N.D. Ga. 2022), *remanded as moot*, 52 F.4th 907 (11th Cir. 2022), ever questioned the state's authority to enforce Section Three—let alone suggested that the challenge *could not even be adjudicated* absent a specific Act of Congress authorizing the challenge. *See, e.g., Greene*, 599 F. Supp. 3d at 1319 (“Plaintiff has pointed to no authority holding that a state is barred from evaluating whether a candidate meets the constitutional requirements for office or enforcing such requirements”).¹²

The actions of these courts comport with the holding of Judge (now Justice) Gorsuch that “a state’s legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office.” *Hassan v. Colorado*, 495 Fed. App’x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (rejecting challenge to state’s exclusion of a naturalized presidential

¹² It is likewise clear from Section Three’s text, history, and case law that no criminal conviction (or even criminal charge) is required to trigger ineligibility. The Reconstruction-era *Worthy* and *Tate* cases involved individuals who had not been charged (let alone convicted) of any crimes. The 2022 Georgia decision, drawing upon Reconstruction-era history, explicitly rejected a requirement of a prior criminal conviction. *See Rowan, supra*, at 13-14 (“Nor does ‘engagement’ require previous conviction of a criminal offense.”); *see also Griffin*, 2022 WL 4295619 at *24 (“[N]either the courts nor Congress have ever required a criminal conviction for a person to be disqualified under Section Three.”).

candidate from ballot).¹³ Nothing materially differentiates Section Three from other constitutional qualifications for office, or from other questions under the U.S. Constitution that state courts routinely adjudicate without a special act of Congress instructing them to do so when the question properly arises in a state law proceeding.

V. Conclusion

States can enforce the U.S. Constitution without special federal legislation authorizing them to do so. The text of Section Three of the Fourteenth Amendment confirms that it is no exception to this general rule. The Reconstruction-era historical record is nearly unanimous: virtually everyone—Congress, state courts, state constitutional drafters, and ex-Confederates seeking amnesty—understood that Section Three disqualification applied without any federal implementing legislation. The *only* authority indicating otherwise arose in a state with a provisional government under direct federal supervision, which does not apply to any U.S. state today. And the two judicial decisions interpreting Section Three as applied to the January 6, 2021 insurrection (in one case, to a federal officeholder) have recognized their authority to adjudicate such questions without special federal legislation.

The overwhelming weight of text, history, and judicial precedent is clear: states can enforce Section Three of the Fourteenth Amendment without the need for any new congressional legislation.

¹³ In one Arizona decision, the state supreme court noted that the county trial judge had dismissed a Section Three challenge on multiple grounds, one of which was an ostensible requirement for congressional action, but the supreme court affirmed on a different ground (a technical question of Arizona election law) and declined to endorse the county judge's theory. See *Hansen v. Finchem*, No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz. May 9, 2022); *see also* *Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1319 (N.D. Ga. 2022) (denying motion to enjoin Section Three proceeding, and finding that state's "legitimate interest includes enforcing existing constitutional requirements [including Section Three] to ensure that candidates meet the threshold requirements for office"), *remanded as moot*, 52 F.4th 907 (11th Cir. 2022).

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