THE TRUMPET THAT SHALL NEVER SOUND RETREAT: THE ENDURING RELEVANCE OF SECTION THREE OF THE FOURTEENTH AMENDMENT IN PRESERVING THE LEGACY OF RECONSTRUCTION POST-*TRUMP V. ANDERSON*[*]

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** ** J.D. Candidate, University of North Carolina School of Law, Class of 2025. The title of this piece is taken from the lines of "Battle Hymn of the Republic," a folk marching song popularized among Union troops during the Civil War. A fuller excerpt of a variation of the line reads: "He has sounded forth the trumpet that shall never call retreat / He is sifting through the hearts of men before his judgment seat." The author holds these particular words of special relevance in the contemporary moment. *Battle Hymn of the Republic: The Story Behind the Song*, THE KENNEDY CENTER, https://www.kennedy-center.org/education/resources-for-educators/classroom-resources/media-and-interactives/media/music/story-behind-the-song/the-story-behind-the-song/the-battle-hymn-of-the-republic/.

INTRODUCTION

Two days after the Confederate attack on Fort Sumter that marked the beginning of the American Civil War, North Carolina militiamen arrived to seize Fort Macon, a Union garrison at the eastern end of Bogue Banks constructed to guard Beaufort Inlet.[1] Barely a year later, Union forces surrounded and laid siege to the fort, offering the Confederate commander multiple opportunities to surrender, all of which were rebuffed.[2] Negotiations having failed, federal troops, encamped along the coast adjacent to Fort Macon, opened fire on its brick fortifications with a new variety of more accurate rifle-barreled artillery.[3] Subjected to precise cannon shots that devasted the brick masonry construction of the fort, the Confederate commander surrendered after less than twelve hours, ceding control of Fort Macon back to the Union Army and ending barely a year of its occupation by insurrectionary forces.[4]

Like this rifle-barreled artillery, Section 3 of the Fourteenth Amendment to the federal Constitution, which bars from office any person who has previously engaged in rebellion against the lawful government of the United States or of any State,[5] is a precise tool designed for the defense of our Republic. Though narrowed in scope following the Supreme Court's decision in *Trump v. Anderson*, this mechanism of constitutional disqualification remains a powerful tool for protecting the integrity of state and local elections and governments.

This Recent Development explores the history, operation, and contemporary utility of this disqualification provision in the wake of the

1. *History of the Fort,* FRIENDS OF FORT MACON, https://web.archive.org/web/20240419204428/https://friendsoffortmacon.org/what-do-the-friends-do/history/ (at Part VI. Confederate Occupation).
2. *Id.*
3. *Id.*
4. *Id.*
5. U.S. CONST. amend. XIV, § 3.

US Supreme Court's decision in *Trump v. Anderson*.[6] Part I briefly surveys the history and text of Section 3, especially within the context of its passage with other amendments to the Constitution following the Civil War. Part II explains the narrowed meaning of Section 3 following *Trump v. Anderson*, while Part III explores its continued viability using the Fourth Circuit's (largely undisturbed) framework set out in their 2022 decision *Cawthorn v. Amalfi*, particularly how Section 3 disqualification may still be pursued in the federal courts against state officers in the face of recalcitrant state electoral bodies or even state courts. Part IV elaborates on the vital function served by Section 3 in our democratic, constitutional system of self-government before turning, in Part V, to the particular relevance of Section 3 and this analysis to North Carolina.

I. THE RECONSTRUCTION AMENDMENTS AND SECTION 3

Following the Civil War, Congress undertook a sustained and far-reaching project of rebuilding both the defeated South, and the constitutional order which the conflict had torn asunder. The era of Reconstruction was one of profound legal, social, political, and economic change that was premised on the realization of the Union's motivations for victory, and the fundamental reordering of the power of the states within the federal structure of our government.

A. *The Reconstruction Amendments*

Following the end of the Civil War, Congress passed and the states ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the federal Constitution.[7] The Thirteenth Amendment outlaws slavery in the United States;[8] the Fourteenth Amendment protects American citizenship and ensures equal protection before the law;[9] and the

6. Trump v. Anderson, 142 S. Ct. 662 (2024).

7. Alexander Tsesis, *Enforcement of the Reconstruction Amendments,* 78 WASH. & LEE L. REV. 849, 851 (2021).

8. U.S. CONST. amend. XIII.

9. U.S. CONST. amend. XIV.

Fifteenth Amendment protects the right of suffrage.[10] Together, they responded to a need to reimagine constitutional protections as a "vehicle through which members of vulnerable minorities could stake a claim to substantive freedom and seek protection against misconduct by all levels of government."[11]

The Fourteenth Amendment, in which Section 3 appears, was specifically passed by Congress in order to enshrine the core principles of the Union's victory in the Civil War "beyond the reach of . . . shifting political majorities"[12] after certain political actors, including the President himself, acted to subvert the success of the Civil Rights Act, passed by Congress to enforce the guarantees of the Thirteenth Amendment.[13] Likewise, even the passage of the Fifteenth Amendment failed to curb state-level efforts to suppress the voting rights of Black people,[14] requiring additional federal supports to correct the states' failure in this regard.[15]

B. *Section 3 of the Fourteenth Amendment*

The Fourteenth Amendment reads as a somewhat dissonant collection of provisions that cover citizenship and equal protection,[16] congressional apportionment,[17] and the public debt,[18] but includes in relevant part:

> "[n]o person shall . . . 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

10. U.S. CONST. amend. XV.

11. Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L. J. 2003, 2006 (1999).

12. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 251 (2d ed. 2014).

13. *Id.* Said one Congressman in reference to President Andrew Johnson's persistent efforts to sink Black civil rights by vetoing Congress's bills providing for their enforcement by the federal government, "the President has gone over to the enemy." *Id*. at 251–53.

14. *Id.* at 423.

15. *Id.* at 454–55 (discussing the federal intervention embodied in the 1870 and 1871 Enforcement Acts).

16. U.S. CONST. amend. XIV, § 1.

17. U.S. CONST. amend. XIV, § 2.

18. U.S. CONST. amend. XIV, § 4.

> 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.[19]

That provision thus functions to disqualify–by an apparently automatic constitutional mechanism–any current or former public officeholder from continuing in or regaining their public position if they have previously engaged in insurrection against the United States. Indeed, its express purpose was to bar former Confederates from ever again holding public office,[20] prohibiting them from wielding the power of the government they had previously sought to overthrow–a purpose the post-Civil War populace evidently felt strongly enough about to permanently enshrine in the text of our Constitution.

C. *The Amnesty Act*

Congress would exercise its option under Section 3 to remove the disqualification of former Confederates in 1872 with the passage of the Amnesty Act.[21] Proponents of this forgiveness for those who had first prosecuted the Civil War argued that alienating them from government would "encourage them to make terrorist mischief"[22] since they could not reasonably be expected to "give wholehearted support to the public authority that labeled them political outlaws."[23] By bringing them back into the fold, supporters hoped that "harmony and stability" would result,[24] treating the Confederacy's rebellion as "an error rather than [] a crime."[25] In the background of their advocacy for their sanctioned comrades, though, was the desire of certain members of

19. U.S. CONST. amend. XIV, § 3.

20. JOANNA LAMPE, CONG. RSCH. SERV., LSB10750, THE INSURRECTION BAR TO HOLDING OFFICE: APPEALS COURT ISSUES DECISION ON SECTION 3 OF THE FOURTEENTH AMENDMENT 1 (2022).

21. FONER, *supra* note 12, at 504–05.

22. WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION: 1869–1879 60 (1979).

23. *Id.*

24. *Id.*

25. *Id.*

Congress to bolster their number in opposition to many of the key initiatives of Reconstruction, including Black suffrage.[26]

In opposition to such an amnesty, many Republicans recognized the naivete of such confidence in the good faith of former Confederates, and predicted that it would lead to Southern states again falling victim to reactionary white governments–a prospect that would render Reconstruction "a confessed failure."[27] Those fears were realized nearly immediately. Within a year, Reconstruction was "visibly unraveling,"[28] with Republican governments too weak in Southern states to effectively control racist mobs unleashing "spectacular atrocities" on Black voters and integrated communities.[29] By 1877 the victory of former Confederates was complete, with Rutherford B. Hayes concluding the "Corrupt Bargain" with Southern Democrats to seal his Presidential victory by withdrawing federal troops from the South, ending Reconstruction and representing the "culminating betrayal of civil rights."[30] The era of Redemption–the reassertion of a violent racialized government led by white men–was at hand.[31]

II. TRUMP V. ANDERSON

Section 3 has been deployed throughout its history,[32] but in general has been largely forgotten since the Amnesty Act, and as the events of the Civil War faded into the background of history. Following the insurrection at the Capitol on January 6th, 2021,[33] however, Section 3 has taken on a renewed legal relevance.

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26. *See id.* at 59–60.

27. *Id.* at 60–61.

28. MICHAEL W. FITZGERALD, SPLENDID FAILURE: POSTWAR RECONSTRUCTION IN THE AMERICAN SOUTH 179 (2007).

29. *Id.* at 178.

30. *Id.* at 206.

31. STEPHEN KANTROWITZ, BEN TILLMAN & THE RECONSTRUCTION OF WHITE SUPREMACY 2 (2000).

32. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENTARY 87, 110 (2021) (discussed at greater length *infra* Part V).

33. On January 6, 2021, a large mob of supporters of President Trump marched from a rally at which he spoke outside the White House to the United States Capitol building. There, they initiated a prolonged, violent assault on the building aimed at preventing Congress from certifying the results of the 2020 presidential election and declaring Joe Biden the President-Elect. Gaining access to the Capitol, the mob sought out various members of Congress and Vice President Mike Pence for violent reprisals in support of President Trump. The mob forced a six-hour delay in the certification of the presidential

A. *State Court Proceedings*

In the fall of 2023, a group of Republican voters in Colorado brought a challenge in state court to the legitimacy of Donald Trump's candidacy for President on the basis that his participation in the January 6th, 2021 Capitol riots disqualified him from holding public office under the terms of Section 3.[34] When Trump attempted to have the case removed to federal district court, the federal court remanded the case back to the state court nearly immediately, finding that the challengers lacked standing to sue to disqualify Trump.[35] The state trial court proceeded to find that Donald Trump did engage in insurrection as that term is used in Section 3, but nonetheless refused to bar him from the ballot on the notion that the President of the United States is not an "officer of the United States," and is therefore outside the scope of Section 3's disqualifying powers.[36]

On appeal, the Colorado Supreme Court disagreed with the trial court's disposition of the challengers' claims, holding in relevant part that (1) the state Election Code provided the challengers with the avenue for litigating their claims in state courts; (2) Donald Trump engaged in insurrection as that term is used in Section 3; and (3) Donald Trump is barred from the ballot in Colorado as a result.

Since the Election Code—a state law—makes it unlawful for the Colorado Secretary of State to list on the ballot anyone who is not a "qualified candidate," to include constitutional as well as statutory qualifications,[37] the state courts properly had jurisdiction over the matter as an action grounded in state law.[38] And because the Election Code is the method by which Colorado exercises its delegated authority from the federal government to administer elections for federal offices, it is likewise proper for the case to remain within the state's jurisdiction.[39]

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election as Senators and Representatives were evacuated to undisclosed locations for several hours. Jay Reeves, Lisa Mascaro, & Calvin Woodward. "Capitol assault a more sinister attack than first appeared," ASSOCIATED PRESS (Jan. 11, 2021), https://apnews.com/article/us-capitol-attack-14c73ee280c256ab4ec193ac0f49ad54.

34. *See* Anderson v. Griswold, 543 P.3d 283, 296 (Colo. 2023).

35. *See id.* at 298.

36. *Id.* at 296.

37. *Id.* at 300.

38. *See id.* at 304–05.

39. *Id.* at 305–06.

And while the Colorado Supreme Court declined to provide a precise definition of "insurrection," it concluded that that term would "encompass a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country,"[40] a bar cleared by the events of January 6th.[41] It further concluded that by continuing to spread election misinformation which Trump knew to engender threats of violence against state and federal officials by his supporters[42] and by statements on January 6th that "literally exhorted his supporters to fight at the Capitol,"[43] that he had "engaged in" insurrection for the purposes of Section 3.[44]

B. *Supreme Court Decision*

Having been barred from the Colorado ballot, Trump appealed the Colorado Supreme Court's determination of the meaning of Section 3 to the Supreme Court of the United States in *Trump v. Anderson.*[45] In its decision reversing the Colorado court's judgment, the United States Supreme Court radically narrowed the scope of Section 3's operation, holding that in order for Section 3 to be made useable against federal officeholders Congress must first pass an enabling statute that permits such an action to be brought.[46] Similarly, the Court held that the states may not independently design or administer statutory schemes that would operate to disqualify federal candidates under Section 3[47]—foreclosing the challengers' claims against Trump as a Presidential candidate.[48]

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40. *Id.* at 330.
41. *Id*.
42. *Id.* at 332–34
43. *Id.* at 334–35.
44. *Id.* at 336.
45. Trump v. Anderson, 601 U.S. 100, 106 (2024).
46. *Id.* at 110–11.
47. *Id.* at 115.
48. Implicit in this rationale is the conclusion that, absent an express statutory authorization by Congress, and absent the apparent power of the states to act in this capacity, Section 3 claims against federal officeholders cannot be heard by any court or tribunal of any kind, anywhere. The Court seems to have rendered the text of Section 3 utterly meaningless in that they have closed off all avenues of possible enforcement. While this is but one of the many glaring holes in the majority's rationale in *Anderson,* a full exploration of those inconsistencies is beyond the scope of this article.

The Court takes pains in *Anderson* to point out, however, that states may still enforce Section 3 with respect to state officeholders or candidates for state office.[49] Having thus disposed of the Colorado challengers' claims, the Court declined to address any additional points about the meaning of "insurrection" or the original concerns about challengers' standing first raised by the federal district court.

III. CAWTHORN V. AMALFI

Two years prior to the Supreme Court's decision in *Trump v. Anderson,* a group of North Carolina voters used Section 3 to assert that Madison Cawthorn, then a sitting member of the United States House of Representatives, was ineligible to seek reelection because of his role in the January 6th insurrection[50] in "advocating for political violence" to "intimidate" Congress and the Vice President into taking unlawful actions.[51] The challengers brought their claim before the North Carolina Board of Elections, and Representative Cawthorn sued in federal court to enjoin the Board from continuing its proceedings.[52] The challengers' motion to intervene as defendants alongside the Board was denied by the district court,[53] and the district court granted Representative Cawthorn's motion to enjoin the Board from continuing to assess his fitness for office.[54]

In its ruling, the district court emphasized that its holding was narrow, and rested not on the challengers' constitutional claims, but solely on its conclusions about the meaning and construction of the Amnesty Act, which Cawthorn had raised as protecting any insurrectionary acts he may have committed.[55] In its ruling, the district court read the Amnesty Act to not only remove constitutional ineligibilities from all persons who had engaged in insurrection against the United States by the time of the Act's passage, but also all person who would *ever* do so in the future.[56] The Board declined to appeal the

49. *Anderson,* 601 U.S. at 110.

50. Cawthorn v. Circosta, 590 F. Supp. 3d 873, 890–91 (E.D.N.C. 2022).

51. Complaint at 2–4, *In re* Challenge to the Constitutional qualifications of Rep. Madison Cawthorn (North Carolina State Board of Elections, Jan. 10, 2022).

52. *Circosta,* 590 F. Supp. at 878–79.

53. Cawthorn v. Amalfi, 35 F.4th 245, 249 (4th Cir. 2022).

54. *Id.* at 250.

55. *Id.*

56. *Circosta*, 590 F. Supp. at 890–92.

district court's ruling,[57] and the challengers again made a motion to intervene as defendants,[58] which the district court again denied.[59] The challengers appealed that ruling, as well as the court's underlying ruling on the merits, to the United States Court of Appeals for the Fourth Circuit, decided as *Cawthorn v. Amalfi*.[60]

A. *Interpreting the Amnesty Act*

Like the district court, the Fourth Circuit centered its analysis around the Amnesty Act, relying on its interpretation of the Act as the key dispositional element of the case. In its decision, the Fourth Circuit focused on the Act's use of the past tense to indicate that it was only meant to have retroactive effect, rather than an indefinite prospective impact as asserted by the district court.[61] The Fourth Circuit also found that to read the Act as having so broad a function as the district court's reading would be contrary to the purpose of Congress in granting the amnesty,[62] reasoning that "having specifically decided to withhold amnesty from the actual Jefferson Davis, the notion that the 1872 Congress simultaneously deemed any future Davis worthy of categorical advance forgiveness seems quite a stretch."[63]

However, by the time of the Fourth Circuit's decision, Representative Cawthorn had lost his primary for a second term in Congress, mooting the issue of his qualification for office.[64]

B. *Challengers' Standing to Appeal*

Considering that the voters who first brought the challenge against Cawthorn's candidacy were not party to the original lawsuit due to the district court's denial of their motion to intervene as defendants, a substantial portion of the Fourth Circuit's decision is dedicated to its

57. *Amalfi*, 35 F.4th at 250.
58. *Id.*
59. *Id.* at 251.
60. *Id.*
61. *Id.* at 258–59.
62. *Id.* at 259.
63. *Id.* at 260.
64. Gary D. Robertson, *After Cawthorn's loss, candidate challenge ruling reversed*, ASSOCIATED PRESS (May 24, 2022), https://apnews.com/article/2022-midterm-elections-congress-north-carolina-primary-126d31acbcae9c10357e27c968728083.

conclusion that the voters had standing to mount their appeal. The question of standing, broadly, inquires into whether the plaintiff has a "personal stake in the outcome of the controversy"[65] sufficient to assert that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[66]

In so finding, the Fourth Circuit determined that the challengers' claim was greater than a "generalized grievance shared by all voters in their district"[67] since they had a "personal stake" as litigants in the pendency of their complaint before the North Carolina Board of Elections.[68] And the harm with which the challengers were threatened by the district court's injunction of their proceedings before the Board were not simply procedural in nature in preventing them from making their case as they wished to, but substantive.[69] The substantive injury arises from the function of the denial of the motion to intervene to "[prevent] them, personally, from exercising their rights [under state law] to engage in discovery and participate in a hearing that would result in a binding adjudication of their claims" against Representative Cawthorn.[70]

IV. CONSTITUTIONAL DISQUALIFICATION IS A CRITICAL LEGAL RATHER THAN POLITICAL PROTECTION

Important to Section 3's continued relevance as a tool for upholding the constitutional system is its function not as a tool of politics, but a tool of law. That is, its sole use is for the enforcement of the constitutional text, rather than as a device for political distraction or policy disagreement. In its operation, it protects the integrity of the constitutional order of government and the civil rights of vulnerable voters, and remains a robust tool under the *Cawthorn v. Amalfi* appellate framework.

65. Baker v. Carr, 369 U.S. 186, 204 (1962).
66. *Flast v. Cohen,* 392 U.S. 83, 101 (1968).
67. *Amalfi*, 35 F.4th at 251.
68. *Id.* at 252.
69. *Id.* at 253.
70. *Id*.

A. *Disqualification Protects the Integrity of the Constitutional System*

That many opponents of amnesty saw it to "presage a complete abandonment of Reconstruction" is no hyperbole.[71] Reconstruction was not just a process of rebuilding the defeated South and the weakened North–it was a monumental effort to reorder the constitutional system of the United States. The Reconstruction Amendments presented a sweeping guarantee of rights for free Black people[72] and completely reconfigured the balance of power between the federal government and the states.[73] As such, Section 3 operates to protect that rebuilt nation and democratic order by barring from its leadership anyone who has previously taken up arms against it, or otherwise encouraged its overthrow.

The federal courts have said as much before. Prior to the Supreme Court's decision in *Trump v. Anderson*, barring state enforcement of Section 3 against federal candidates, and more or less in parallel with the North Carolina-based proceedings in *Cawthorn v. Amalfi,* Georgia voters brought a challenge to Representative Marjorie Taylor-Green's candidacy on a similar premise to the challenge in *Cawthorn*. In *Greene v. Raffensperger,*[74] the federal district court found that Section 3, rather than just being a mechanism for *dis*qualification, was itself a qualification for office under the Constitution.[75] That is, it isn't just a way to be taken off of the ballot, but is a minimum standard to hold office in the United States that candidates could be made to prove, similar to age or residency.[76]

Further, once Greene appealed the ruling of the trial court permitting the challenge to her candidacy to proceed, the appeal was dismissed as moot since the state elections board finished its review

71. FONER, *supra* note 12, at 504.

72. It goes without saying, of course, that many of these guarantees have yet to be fully realized. It is the author's hope that this article may one day be supportive of continuing to advance that work.

73. Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976).

74. Greene v. Raffensperger, 599 F. Supp. 3d 1283 (N.D. Ga. 2022).

75. *Id.* at 1315-16.

76. *Id.* at 1318 (referencing United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 787 n.2 (1995)).

(and ruled in her favor) in the interim.[77] There, the Eleventh Circuit noted that:

> "[T]he state proceedings under the Challenge Statute have concluded, and Rep. Greene has prevailed at each stage: the ALJ [Administrative Law Judge] ruled in Rep. Greene's favor, Secretary Raffensperger adopted the ALJ's conclusions, the Superior Court of Fulton County affirmed the Secretary's decision, and the Supreme Court of Georgia denied the Challengers' application for discretionary review."[78]

Thus, challengers had a state law right under Georgia's statutory candidate challenge procedures to argue their case to the limit of their procedural guarantees. The merit of those procedures, and plaintiffs' rights to engage them, remains undisturbed following the Eleventh Circuit's review of *Greene* similar to the process at issue in *Cawthorn.*

B. *Disqualification Protects the Civil Rights of Vulnerable Voters*

In addition to providing a mechanism that protects the Constitution and the democratic system that it defines, Section 3 is built around protecting the individual rights of voters themselves, especially those who are already electorally vulnerable.

The Constitution contains a number of counter-majoritarian protections, necessary to protect the civil rights of minority groups, and to prevent the retrenchment in power of certain majority groups.[79] These include, among others, the composition of the Senate, Presidential term limits, impeachment, and supermajority requirements for Constitutional amendments.[80] Section 3 is an oft-forgotten part of that list, presenting a check against a runaway majority that would grant the power of the state to someone who has previously sought its overthrow.

Certainly this is true in the context of Section 3's origin. The primary antagonists against Black equality and especially Black voting

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77. Greene v. Sec'y of State, 52 F.4th 907, 910 (11th Cir. 2022).

78. *Id.*

79. Steven Levitsky, *The Third Founding: The Rise of Multiracial Democracy and the Authoritarian Reaction Against It*, 110 CALIF. L. REV. 1991, 1998 (2022).

80. *Id.*

rights—the Ku Klux Klan, the Knights of the White Camellia, and the Red Shirt movement, which all used intense violence to haunt the Reconstruction South as a phantom of antebellum white dominion[81]—were often composed of many former Confederate officers and government officials.[82] If Reconstruction were ever to succeed in its attempt to build a multiracial democracy or in breaking the power of white supremacist violence in the South, it could not surrender itself to the mastery of those who first made it necessary.

That same kind of protection for vulnerable minority groups remains necessary, not least because of the context in which these Section 3 challenges have so far been deployed. The three challenged candidates surveyed so far in this article all espouse radically anti-minority views. Donald Trump, in announcing his first campaign for President, fueled racialized fears about immigration by famously denouncing Latin American immigrants as "rapists."[83] Representative Majorie Taylor Greene has posted to social media—and refused to disavow—antisemitic conspiracy theories about a worldwide Jewish cabal controlling major institutions and events.[84] Madison Cawthorn, in a speech on the floor of the House of Representatives, mocked the hardships of extraordinarily vulnerable transgender youth with crass remarks about trans children's genitalia.[85]

That is not to say, of course, that Section 3 operates with a partisan lens, only serving to disqualify candidates with reactionary views about minority communities. Rather, Section 3 was born in an era when the nation was reeling from the violent impacts of intense, minority-directed animus whipped up by powerful actors to consolidate

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81. KANTROWITZ, *supra* note 31, at 57-64.

82. FITZGERALD, *supra* note 28, at 92; 204.

83. Amber Phillips, *"They're rapists:" President Trump's campaign launch speech two years later; annotated,* WASH. POST: THE FIX (June 16, 2017) https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/.

84. Eric Hananoki, *Majorie Taylor Greene penned conspiracy theory that a laser beam from space started deadly 2018 wildfire,* MEDIAMATTERS (Jan. 28, 2021, 1:15 PM), https://www.mediamatters.org/facebook/marjorie-taylor-greene-penned-conspiracy-theory-laser-beam-space-started-deadly-2018.

85. John Bowden, *Madison Cawthorn mocked for defining a woman as someone with 'no tallywacker,'* INDEPENDENT (April 4, 2022, 2:32 PM), https://www.the-independent.com/news/world/americas/us-politics/madison-cawthorn-woman-tallywhacker-speech-b2050750.html.

their political and economic power—and remains just as relevant now as we face a new era of that familiar pattern of politics.[86]

C. *Navigating the Continued Relevance of* Cawthorn v. Amalfi's *Protection of Disqualification Challenges following* Trump v. Anderson

While the utility of *Cawthorn*'s analytical approach is certainly narrowed by *Anderson's* prohibition on state enforcement of Section 3 challenges against federal candidates, it remains a critical tool in upholding constitutional democracy in the states. Indeed, *Anderson* goes out of its way to declare that states maintain the power to remove state officers under state statutes in order to enforce Section 3.[87]

Undisturbed by *Anderson,* however, is *Cawthorn*'s holding that candidacy challenges brought under state laws give rise to a right to litigate those claims to their statutory limit. That is, these statutes do not simply confer process rights, but meaningful substantive rights, too. Likewise undisturbed by *Anderson* is *Cawthorn*'s assertion that that right confers standing upon challengers to litigate their federal constitution claims in federal courts when a violation of their ability to fully bring those claims in state courts or other proceedings is violated or imminently threatened.

In cases that may follow the *Cawthorn* pattern then, where a candidate sues to enjoin the disqualification proceeding against them and obtains a ruling that the state elections board declines to appeal, the challengers themselves are permitted to intervene and appeal that ruling. Not only does this provide an additional safeguard for challengers' claims in federal courts, but it also provides a framework that challengers might also cite to assert standing to intervene on appeal in state courts that have similar or even more permissive standing rules than the federal system. It might additionally be deployed to obtain a federal order mandating a state hearing of the challengers' claims in the face of a recalcitrant state elections authority. Each of these pathways is

86. The pattern of violence and discrimination in the antebellum and Reconstruction period was directed specifically against Black people, and Reconstruction responded to the specific problem of the centuries-long subjugation of Black people. The author wishes to draw attention to the increasingly intersectional nature of the continuing struggle for racial equality with that of other groups and includes the relevant examples to that effect.

87. Trump v. Anderson, 601 U.S. 100, 110–111 (2024).

supported by the supremacy of the constitutional text—including Section 3—on which our system of government rests, rather than submission to legislative or judicial mastery over our fundamental charter,[88] and the principle that public officers at every level of government are duty-bound to enforce that text, no matter how inconvenient.[89]

This mechanism will be especially useful to litigants seeking to disqualify state candidates before state elections boards that might summarily reject those challenges or otherwise fail to faithfully investigate challengers' claims. Even in North Carolina, the board that had scheduled the complaint against Madison Cawthorn for a hearing on the merits summarily dismissed a similar complaint against Donald Trump in late 2023, in the lead up to the North Carolina Republican primary for President.[90] While Trump is a federal candidate, and one now protected by the Supreme Court's ruling in *Trump v. Anderson,* the Board's decision to jettison the complaint without so much as any semblance of an independent hearing[91] (even before *Anderson* was decided) is indicative of the risk of allowing elections boards alone to hear these challenges, and a marker of the usefulness of the *Cawthorn* appellate mechanism to vindicate challengers' hearing rights.

V. BATTLEGROUND: NORTH CAROLINA

Like the artillery trained at Fort Mason that forced its surrender to the Union, the legislation of the post-Civil War Congress is "laser-

88. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three,* 605 U. PA. L. REV. 605, 623 (2024).

89. *Id*. at 628–29. This point might be all the truer for the way federal lawmakers have proved increasingly unable or unwilling to observe or enforce the constitutional safeguards we already have in place to prevent a tumble into tyranny. *See generally* Michael Gerhardt, *The Trump Impeachments: Lessons for the Constitution, Presidents, Congress, Justice, Lawyers, and the Public,* 64 WM. & MARY L. REV. 1309, 1309–26, 1329–30 (2023).

90. Will Doran, *Trump will be on NC ballots for 2024 primary after election officials dismiss complaint*, WRAL (Dec. 19, 2023, 4:03 PM), https://www.wral.com/story/trump-will-be-on-nc-ballots-for-2024-primary-after-elections-officials-dismiss-complaint/21202559/.

91. Press Release, North Carolina State Bd. of Elections, State Board Meeting (Dec. 18, 2023) https://www.ncsbe.gov/news/press-releases/2023/12/14/state-board-meeting-dec-19-2023 (meeting agenda noting that the Board heard this candidate challenge at a regularly scheduled board meeting and among routine Board business).

focused" in serving narrow, defined purposes.[92] Section 3 is no different. Indeed, after the Supreme Court's narrowing of States' ability to enforce its terms against state officers only, it has become an even more precise tool. But that narrowness does not subvert its utility.

Section 3 remains effective against state officers, and in North Carolina that remains a particularly relevant consideration. In 2024, elections in North Carolina included candidates for the state legislature who personally attended and took part in the January 6th insurrection,[93] and others who are members of the far-right anti-government militia group known as the Oath Keepers.[94] Statewide, voters had the option of electing a Superintendent of Public Instruction who was also at the January 6th insurrection,[95] has openly called for the public execution of Barack Obama, Joe Biden, and other Democratic officeholders,[96] and advocates for a "race[]-based discipline system" in public schools.[97] One of the major-party nominees for Governor had likewise spoken approvingly of violence directed against Nancy Pelosi, praised the philosophy of Adolph Hitler, including by calling himself a "black NAZI" [sic],[98] called the Holocaust "hogwash," gay people "maggots," and opined for days before women could vote.[99] Not only do these

92. Cawthorn v. Amalfi, 35 F.4th 245, 259 ("To the contrary, the available evidence suggests that the Congress that enacted the 1872 Amnesty Act was, understandably, laser-focused on the then-pressing problems posed by the hordes of former Confederates seeking forgiveness.") (citations omitted).

93. Travis Fain, *Incoming NC lawmaker was at Jan. 6 US Capitol protests, riot*, WRAL (Nov. 1, 2021, 5:45 PM), https://www.wral.com/story/incoming-nc-lawmaker-was-at-jan-6-us-capitol-protests-riot/19938994/.

94. Issac Arnsdorf, *Oath Keepers in the State House: How a militia movement took root in the Republican mainstream*, NC NEWSLINE (Oct. 21, 2021, 10:55 AM), https://ncnewsline.com/briefs/oath-keepers-in-the-state-house-how-a-militia-movement-took-root-in-the-republican-mainstream/.

95. T. Keung Hui, *Homeschooling, 'indoctrination,' Jan. 6: A look at NC's new GOP superintendent candidate*, NEWS & OBSERVER (March 30, 2024, 4:18 PM), https://www.newsobserver.com/news/politics-government/election/article286325695.html.

96. Martin Pengelly, *North Carolina schools candidate who called for Obama's death put on the spot*, GUARDIAN (March 21, 2024), https://www.theguardian.com/us-news/2024/mar/21/north-carolina-gop-michele-morrow.

97. Michele Morrow (@MicheleMorrowNC), X (March 16, 2024, 9:16AM), https://twitter.com/michelemorrownc/status/1768989610627965338?s=42&t=AWsTYM5kPCtkuvC3yofiGQ.

98. Andrew Kaczynski & Em Steck, *'I'm a black NAZI!': NC GOP nominee for governor made dozens of disturbing comments on porn forum,* CNN (Sept. 19, 2024, 3:21 PM), https://www.cnn.com/2024/09/19/politics/kfile-mark-robinson-black-nazi-pro-slavery-porn-forum/index.html.

99. Nikki McCann Ramirez & Ryan Bort, *N.C. GOP Nominee Mark Robinson's Most Reprehensible Comments*, ROLLING STONE (March 9, 2024),

comments and activities suggest a sympathy for (if not active engagement in) efforts to subvert the lawful constitutional order, they also betray a distinctly anti-civil rights animus that the Reconstruction Amendments in general and Section 3 in particularly were designed specifically to combat.[100] And while none of these is likely to directly lead to the overthrow of North Carolina's democratic system of government, together they contribute to a normalization of the same kind of "violence and political intimidation that help[] accomplish that end" that was the downfall of Reconstruction at the hands of unrepentant rebels-turned-rulers in the former Confederacy.[101]

One need only look at the Amnesty Act's aftermath in North Carolina to see the promise betrayed by abandoning Section 3—and the specter of its continued failure. Having been elected to but denied a seat in the United States Senate because of Section 3 ineligibility in 1871, Zebulon Vance, the Confederate Governor of North Carolina,[102] was later re-elected as Governor and took office in 1877,[103] after the Amnesty Act's passage. North Carolina was thus "redeemed" from its experiment with multiracial democracy.[104]

Emboldened by the victories of Redemption politics in the era of amnesty, white supremacist groups terrorized the 1898 elections with a pattern of intense and violent intimidation.[105] A brutal coup seized control of the port city of Wilmington and installed its leader—a former Confederate officer—as Mayor only days after voting had ended, declaring that the "grave crisis" of Black freedom was at an end.[106] The

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https://www.rollingstone.com/politics/politics-features/north-carolina-gop-mark-robinson-worst-comments-1234984155/.

100. The mechanism by which a Section 3 challenge might be filed and adjudicated will necessarily vary from state to state depending on the particularities of that state's election laws. See Myles S. Lynch, *Disloyalty and Disqualification: Reconstruction Section 3 of the Fourteenth Amendment,* 30 WM. & MARY BILL OF RTS. J. 153, 183–95 (2021) for an explanation of these various mechanisms.

101. DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 113 (2001).

102. Magliocca, *supra* note 32, at 100.

103. Micahel Kent Curtis, *Race as a Tool in the Struggle for Political Mastery: North Carolina's "Redemption" Revisted 1870-1905 and 2011-2013*, 33 LAW & INEQ. 53, 82 (2015).

104. *Id*. at 71.

105. DAVID ZUCCHINO, WILMINGTON'S LIE: THE MURDEROUS COUP OF 1898 AND THE RISE OF WHITE SUPREMACY 162-174 (2020).

106. *Id*. at 189, 226. *See id*. 140–41 (identifying coup leader as a former Colonel in cavalry forces of the Confederate Army).

Governor acquiesced to this overthrow of the democratically-elected local government since the coup leaders managed to seize power by forcing the resignation of the Mayor and the Board of Aldermen (albeit through the instigation of widespread and horrific racial violence in all quarters of the city),[107] even though only a few years previous these new masters of Wilmington would have been barred from office by the letter, and the power, of the federal constitution. As our present condition now well indicates, these efforts were successful at "[weaving] strong threads of Confederate tradition into the fabric of American life" long after the rebellion's end.[108]

And though the unpredictability of contemporary statewide primaries or the results of gerrymandered elections may suggest an acquiescence by North Carolinians to a renewal of the norms of Redemption by candidates, rather the opposite is true.[109] Voters continue to file challenges against candidates on the ballot in North Carolina under Section 3,[110] and another group of North Carolinians is litigating a claim that the state constitution encompasses a guarantee to "fair" elections.[111] That is, North Carolinians care deeply about upholding constitutional rules of fairness that protect our constitutional government and defend our constitutional rights, and North Carolina will continue to be a place where such battles are waged.

CONCLUSION

This article does not suggest that contemporary candidates, or their comments or activities, rise to the same level as the racial terror of the post-Reconstruction era, or to the same magnitude as the concerted efforts of the Confederate states. Nor does it advance a theory that Section 3 should be deployed as frequently as possible simply to target candidates whose policy positions on civil rights diverge from those we

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107. *Id.* at 223–24, 226–27.

108. WILLIAM B. HESSELTINE, CONFEDERATE LEADERS IN THE NEW SOUTH vii (1970).

109. See Gene Nichol, *The Impossibility of Separating Race and Politics in a White People's Party,* 1 N.C. C. R. L. REV. 69 (2021) for a survey of continuing civil rights struggles in North Carolina, and especially their persistent racialized dimensions.

110. Doran, *supra* note 90.

111. Mehr Sher, *Does election district plan violate NC voters' constitutional rights? Heavy hitters back lawsuit claiming it does*, WFAE (Feb. 6, 2024), https://www.wfae.org/politics/2024-02-06/does-election-district-plan-violate-nc-voters-constitutional-rights-heavy-hitters-back-lawsuit-claiming-it-does.

might prefer. Rather, it illustrates the enduring importance of Section 3 in combatting a second era of Redemption, especially where Reconstruction's first defeat was worked by a unique combination of violent anti-government sentiment and violent anti-civil rights agitation.

Further, it demonstrates that even in the face of a reticence by the federal courts to abide by the express terms of Section 3, their interpretation of its text still retains important meaning in the context of regulating the conduct of elections for state and local governments, where so much of the fundamental work of civil rights is won or lost. And in the battle to preserve those rights, as well as the constitutional order on which they depend, Section 3 will continue to be as important a tool as the Union's artillery at Fort Mason in the arsenal that defends our Republic.