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Tar Heel Constitutionalism: The New Judicial Federalism in North Carolina

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ABSTRACT. The North Carolina Supreme Court has a mixed record of sometimes interpreting state constitutional guarantees in lockstep with federal constitutional doctrine, other times extending greater protection to individual rights than has been recognized by the U.S. Supreme Court, and most recently holding that the state equal-protection guarantee is narrower and more limited than the federal doctrine on questions of intentional racial discrimination. There is clear precedent that individuals have a private right of action to sue for damages for the violation of state constitutional rights if no other adequate remedy is available, but the principle has only been applied in three cases since first recognized. State constitutions can be a rich source of doctrines to shape how the fundamental guarantees of civil and political rights, individual liberties, and the promises of democracy are applied, but only if all relevant stakeholders are committed to playing a role in developing that body of law. In a state like North Carolina, where judges are elected, ultimately it is in the hands of the voters to choose what they want from their judicial system.

INTRODUCTION

Among the various rationales advanced for the proposition that state constitutions are a rich and appropriate source of legal authority to define and guarantee individual rights is a pragmatic, expedient justification: that state constitutional guarantees may provide greater protection than is found in the Federal Constitution.[1] Judge Jeffrey Sutton makes this case by analogizing legal claims

1. The literature on state constitutionalism is extensive and so are the approaches taken to justify it. *See, e.g.*, Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1312-13 (2017) (arguing that the legitimacy of state constitutionalism rests on the structure of our federal system, not on questions of interpretative methodology); Grant E. Buckner, *North Carolina's Declaration of Rights: Fertile Ground in a Federal Climate*, 36 N.C. CENT. L. REV. 145, 156-64 (2014) (advancing ten arguments for looking to

to free throws in a basketball game.[2] He asks why lawyers regularly take only one shot to invalidate state or local laws or governmental action, by stating claims only under the Federal Constitution, when state constitutional claims are also within bounds.

Justice William J. Brennan, Jr. encouraged state courts to see their state constitutions as "a font of individual liberties" in his seminal 1977 Harvard Law Review article,[3] widely credited for launching a New Federalism movement.[4] One reason this pivot to state constitutions was crucial, in his view, was a recent series of "door-closing" decisions from his Court.[5] Similarly, my perception that federal courthouse doors were closing to the civil-rights claims of people of color and low-income families was a factor in my decision to seek election to the North Carolina Supreme Court in 2018.[6]

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the North Carolina Constitution's Declaration of Rights to protect individual rights); Louis D. Bilionis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1803-05 (1992) (distinguishing results-oriented and structural accounts of the rise of state constitutional adjudication).

2. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 7-10 (2018).

3. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491, 502 (1977).

4. *See, e.g.*, ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 137-64 (2d ed. 2023) (surveying the literature on the New Judicial Federalism).

5. Brennan, *supra* note 3, at 502. For critiques of this approach as programmatic, results-oriented, and lacking moral authority, see, for example, Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 94 (2000); and Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 423 (1996). *See also* Robert F. Williams, *Justice Brennan, the New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 767-71 (1998) (reviewing critiques). Chief Justice Shepard also argued that plenty of state constitutional interpretation was happening long before Justice Brennan's article was published. *See* Shepard, *supra*, at 423-24. Other studies point to an explosion of state supreme court decisions relying on independent state constitutional grounds to establish or protect individual rights in a wide range of areas after Justice Brennan's article and a paucity of such decisions beforehand. *See* James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 362 (2016).

6. To be sure, the entry points to federal court had been narrowing before 2018, for example, with U.S. Supreme Court opinions limiting the recovery of attorneys' fees in civil-rights cases, reinvigorating sovereign immunity doctrines, and pulling back on substantive guarantees. *See, e.g.*, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 610 (2001) (ruling that attorneys' fees are no longer available to plaintiffs where the lawsuit was the "catalyst" for a change in defendant's practices, a substantial change from existing practice); Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding that there is no private right of action for individuals to enforce disparate impact regulations under Title VI of the Civil Rights Act of 1964); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (holding that states have immunity from claims under the Age Discrimination in Employment Act). *See generally* AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE

At the start of my career as a civil-rights attorney in the South in 1988, I joined a nationally renowned private firm that litigated significant and precedent-setting civil-rights cases in federal courts.[7] It was the generally accepted wisdom that advocates turned to federal courts to vindicate individual rights because state courts, which were more engaged with local politics, were too much a part of the oppressive power structures that needed to change.[8] The conclusion was that whether by influence or inclination, state court judges would not be fair and independent, and their courts were not a promising avenue for justice.[9]

FOR EQUAL JUSTICE (Denise C. Morgan, Rachel D. Godsil & Joy Moses eds., 2006) (collecting essays on the rollback of civil rights in multiple areas of the law).

7. At the time I joined, the firm was Ferguson, Stein, Watt, Wallas & Adkins, in Charlotte, North Carolina. This was the firm established by Julius L. Chambers, who was at that point the Director-Counsel of the NAACP Legal Defense and Educational Fund. Although Mr. Chambers had left in 1986, the firm still had a robust federal civil-rights litigation docket including employment discrimination, voting rights, police misconduct, and school desegregation cases. *See* RICHARD A. ROSEN & JOSEPH MOSNIER, JULIUS CHAMBERS: A LIFE IN THE LEGAL STRUGGLE FOR CIVIL RIGHTS 285-93 (2016); *see, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Thornburg v. Gingles, 478 U.S. 30 (1986).

8. *See, e.g.*, Steven Andrew Smith & Adam Hansen, *Federalism's False Hope: How State Civil Rights Laws Are Systematically Under-Enforced in Federal Forums (And What Can Be Done About It)*, 26 HOFSTRA LAB. & EMP. L. J., 63, 63 (2008) (explaining the accepted narrative that "in the beginning, state governments were the obstacles to liberty and equality. Since the end of the Civil War, states—southern states especially—were haunted by the legacy of Jim Crow—passive enablers of private discrimination at best, active participants at worst"). Note that this is the inverse of one theory of why state constitutions should be a source of individual rights: state courts are closer to the people and can adapt their rulings to local conditions and "account for these differences in culture, geography, and history." Sutton, *supra* note 2, at 17. Empirical evidence suggests that "civil rights plaintiffs are making less use of federal courts over time. Nonprisoner civil rights cases are a declining fraction of federal civil cases." Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUDS. 4, 28 (2015).

9. A long experience with overt racism in Southern courtrooms lay behind this conclusion. *See, e.g.*, A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 127-51 (1996); SOUTHERN JUSTICE 9 (Leon Friedman ed., 1965) (exploring "the key reasons the state's legal machinery is used as a weapon to suppress the civil rights movement rather than as a neutral umpire maintaining the social peace" and making the case for federal protections, in an anthology of articles written by lawyers with first-hand experience in civil-rights cases in the South). Both Julius Chambers and my former law partner James Ferguson experienced Chief Justice R. Hunt Parker leaving the courtroom when they stood up to argue in the North Carolina Supreme Court in 1968 and 1969. *See* ROSEN & MOSNIER, *supra* note 7, at 156-57. However, the historical record is more complex than the received wisdom might imply. State courts did protect individual rights and applied state constitutional doctrines on occasion to do so. *See* JOHN W. WERTHEIMER, LAW AND SOCIETY IN THE SOUTH: A HISTORY OF NORTH CAROLINA COURT CASES, 9-10, 148 (2009) (observing that "[c]ivil rights litigators in the South during this period uniformly preferred federal to state courts," but nevertheless concluding that "the North Carolina courts became an important and often effective venue within which racial minorities in the twentieth century

Nevertheless, the firm litigated some important civil-rights cases in state courts. These suits established a direct cause of action for plaintiffs whose rights under the state constitution had been violated in *Corum v. University of North Carolina*,[10] and led to a holding that expanded reproductive rights in *Whittington v. North Carolina Department of Human Resources*.[11] From a plaintiff's perspective, the choice of whether to sue under the Federal Constitution or the state constitution — or in federal court or state court — was a complicated balancing of numerous factors unique to each case.

To be sure, the precept that the vindication of constitutional rights was more likely to come under federal law and in federal court was longstanding and widely followed. For example, in enacting the Voting Rights Act in 1965, Congress decided not only that state courts were not up to the task of protecting voting rights, but also that even federal district courts in the South could not be trusted to fairly determine whether a particular change affecting voting had the purpose or effect of discriminating against Black voters. Therefore, any jurisdiction seeking judicial preclearance of its voting laws, practices, and procedures had to file in the U.S. District Court for the District of Columbia, rather than with a local federal court.[12]

Just as in North Carolina, the national historical record reveals that state courts have been an important forum for the protection of individual rights, while at the same time, there is a strong basis in fact for the conclusion that state courts sometimes are reluctant to expand rights beyond those recognized by federal courts interpreting the Federal Constitution.[13] Unfortunately, much of the state court litigation impacting individual rights, whether expanding those

presented grievances in their own voices . . . . [T]he courts of North Carolina, and perhaps other southern states, played an underappreciated role in limiting the reach of white supremacy").

10. 413 S.E.2d 276, 293 (1992).

11. 398 S.E.2d 40, 47 (1990) (maintaining that, as a matter of law, the state social services commission was not authorized to "promulgate rules such as the fetal model and reporting rules pursuant to the State Abortion Fund").

12. 52 U.S.C. § 10304 (2018) ("Section 5"). In the years leading to the passage of the Voting Rights Act, federal judges in the South faced the same social pressures as state court judges. *See, e.g.*, RICHARD GERGEL, UNEXAMPLED COURAGE: THE BLINDING OF SGT. ISAAC WOODARD AND THE AWAKENING OF PRESIDENT HARRY S. TRUMAN AND JUDGE J. WATIES WARING 206-12 (2019). For a contemporaneous account, see generally SOUTHERN JUSTICE (Leon Friedman ed., 1965) (describing civil-rights litigation in furtherance of desegregation in the South).

13. *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 898 (1976) (offering an early description of the lockstepping approach); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 404 (1984) (arguing lockstep analysis "constitutes an unwarranted delegation of state power to the Supreme Court and a resultant abdication of state judicial responsibility").

rights or denying them protection, is ignored by scholars and unknown to the general public.[14] As just one example, law students are taught *Marbury v. Madison*[15] as the foundational case establishing the principle of judicial review, but not *Bayard v. Singleton*,[16] the North Carolina case that—fifteen years before *Marbury*—recognized the principle of judicial review under the state constitution.[17]

One of the downsides of this relative lack of attention to state constitutions is that it makes it more difficult to test the pragmatic hypothesis. That is, in Judge Sutton's terms, do individuals seeking to vindicate their rights actually have two free throws, one to a federal basket of constitutional rights and one to a state basket of constitutional rights? Or are they playing in a game where a foul grants them only one shot? If there are in fact two shots, are the baskets at the same height, presenting equal opportunities to score, or is one set at a higher bar than the other?

This Essay seeks to narrow this gap by considering the extent to which individual rights have been more fully protected under North Carolina's state constitution than under the Federal Constitution. Various state supreme courts have found expanded state constitutional rights in different areas of the law. The Washington State Supreme Court has issued multiple rulings on how to eliminate the effects of racial bias in the judicial system that go well beyond federal

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14. *See, e.g.*, G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 1-3 (1998) (examining why state constitutions have been neglected); Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions As Guardians of Civil Liberties*, 82 ALB. L. REV. 1353, 1354 (2018) ("Today, litigants still fail to bring or adequately argue state constitutional claims that offer potential relief. Courts accordingly decline to clarify the nature and extent of state constitutional protections. And law schools still exclude state constitutional law from the standard curriculum, offering few courses to equip new attorneys with the knowledge and knowhow to identify and argue state constitutional claims effectively."). A notable recent exception is JAMES L. GIBSON & MICHAEL J. NELSON, JUDGING INEQUALITY: STATE SUPREME COURTS AND THE INEQUALITY CRISIS (2021). This work draws on a database of 6,000 decisions from fifty state courts over twenty-five years to assess whether those decisions either reduce or exacerbate inequality, covering a wide range of issues including educational equity, LGBTQ+ rights, workers' rights, and access to justice. *Id.* at 28-35.

15. 5 U.S. (1 Cranch) 137 (1803).

16. 1 N.C. (Mart.) 5 (1787). Chief Justice Exum reviews the historical evidence that the *Marbury* Court may have been aware of *Bayard* in James G. Exum, Jr., *Rediscovering State Constitutions*, 70 N.C. L. REV. 1741, 1742-45 (1992). For an account of how Chief Justice Exum directed the jurisprudence of the state, see MARK A. DAVIS, A WARREN COURT OF OUR OWN: THE EXUM COURT AND THE EXPANSION OF INDIVIDUAL RIGHTS IN NORTH CAROLINA 47-52 (2020).

17. State constitutional claims include topics as diverse as school finance, police use of excessive force, rights of defendants, freedom of speech, voting rights, and the right to privacy. For a comprehensive overview, see generally JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (4th ed. 2006) (providing an overview of tools, drawn from state constitutions, that litigators can employ).

jurisprudence.[18] Connecticut's Supreme Court has held that the death penalty is cruel and unusual punishment under the state constitution.[19] Multiple state supreme courts ruled that their state constitutions protected same-sex marriage before the U.S. Supreme Court decided the issue under the Federal Constitution in *Obergefell v. Hodges*.[20] The post-*Dobbs v. Jackson Women's Health Organization*[21] record of state court constitutional decisions is unsettled, to say the least. South Carolina's high court, for example, first decided that the state's 2021 law banning abortions after six weeks was unconstitutional, but then, after a change of personnel on the court, upheld a 2023 law with the same language that was based on different legislative findings.[22] In this landscape of renewed attention to state constitutional law, North Carolina is notable for its state constitutional decisions addressing core democracy issues including partisan gerrymandering,[23] voter ID requirements,[24] and felony disenfranchisement.[25]

It is hardly a novel observation that historically and currently, federal courts and state courts operate in an interactive system, in which changes in federal constitutional doctrine lead to corresponding changes in state constitutional doctrine, and vice versa. Despite some bright spots and bursts of optimism,

18. *See* State v. Zamora, 512 P.3d 512, 519 (Wash. 2022) ("[W]hen a prosecutor 'flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence,' we will vacate the conviction unless the State proves beyond a reasonable doubt that the race-based misconduct did not affect the jury's verdict."); State v. Sum, 511 P.3d 92, 103 (Wash. 2022) ("Based on the constitutional text, recent developments in this court's historical treatment of the rights of BIPOC, and the current implications of our decision, we hold as a matter of independent state law that race and ethnicity are relevant to the question of whether a person was seized by law enforcement."); *see also* WASH. STATE CT. GEN. R. 37 (Apr. 24, 2018) (establishing new procedures for all jury trials to determine if a peremptory challenge is being used improperly to remove a prospective juror based on race or ethnicity); State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986) (en banc) (establishing six nonexclusive criteria for determining when the state constitution provides greater protection than the Federal Constitution).

19. State v. Santiago, 122 A.3d 1 (Conn. 2015).

20. 576 U.S. 644, 666 (2019) (noting that the landmark Massachusetts Supreme Court decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), influenced the Court's constitutional analysis).

21. 142 S. Ct. 2228 (2022).

22. *Compare* Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 785 (S.C. 2023), *reh'g denied*, 2023 S.C. LEXIS 35 (S.C. Feb. 8, 2023) (holding a state statute that severely limits abortion rights violates the state constitutional guarantee of a right to privacy), *with* Planned Parenthood S. Atl. v. State, 892 S.E.2d 121, 132 (S.C. 2023) (holding a state statute that severely limits abortion rights is constitutional because the state has a compelling interest in protecting the rights of unborn children).

23. Harper v. Hall, 868 S.E.2d 499 (N.C. 2022), *vacated*, 886 S.E.2d 393 (N.C. 2023).

24. Holmes v. Moore, 881 S.E.2d 486 (N.C. 2022).

25. Cmty. Success Initiative v. Moore, 886 S.E.2d 16 (N.C. 2023).

North Carolina's record of interpreting its own state constitution to provide greater protection of individual rights is mixed. At times, the North Carolina Supreme Court has been a favorable venue to expand the protection of individual rights beyond federal doctrine, and at other times the doors have been shut here too.

State and federal courts have articulated views of judicial review that align in some ways and depart in others by reflecting differing views of the role of judicial review and the proper approach to constitutional interpretation. Originalism and a fierce dedication to the principle that the judiciary should defer to the people's elected representatives in the legislature—operationalized by the proposition that the presumption of constitutionality means a court must be satisfied that a statute is unconstitutional "beyond a reasonable doubt"—underlies recent decisions from the North Carolina Supreme Court,[26] for example. Although the U.S. Supreme Court has also employed originalism, it has not used the "beyond a reasonable doubt" formulation since 1895.[27]

In short, while the two court systems do not operate in isolation, lockstepping,[28] generally understood as a state court deciding to apply the same analysis under its state constitution as that which applies under the Federal Constitution, may not be as uniform as some might assume. Therefore, the U.S. Supreme Court is not the only game in town when it comes to conceptualizing the proper role of the judiciary, methods of constitutional interpretation, or the protection of individual rights. Ultimately, cultivating dialogue among state and federal courts about the protection of individual rights requires a legal culture that recognizes state constitutions as relevant and state courts as competent to advance constitutional doctrine and fairly adjudicate constitutional claims.

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26. *Harper*, 868 S.E.2d at 399. Other state courts have clarified that "beyond a reasonable doubt" is not a proposition about the level of proof needed to make factual findings in cases raising constitutional claims but rather an expression of the need to defer to the legislature if there is any reasonable question about a statute's constitutionality. *See* Quinn v. State, 526 P.3d 1, 12 n.9 (Wash. 2023). Conversely, the North Carolina Supreme Court in other decisions has emphasized the judiciary's role in ensuring the legislature complies with the state constitution. *See, e.g.*, Hoke Cnty. Bd. of Educ. v. State, 382 N.C. 386, 472-73 (N.C. 2022).

27. Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 699 (1895) (Jackson, J., dissenting) ("No rule of construction is better settled than that this court will not declare invalid a statute passed by a co-ordinate branch of the government, in whose favor every presumption should be made, unless its repugnancy to the constitution is clear beyond a reasonable doubt.").

28. Some also refer to state courts as employing a "persuasive lockstep approach" that finds "federal jurisprudence highly persuasive but does not mechanically follow it." Molly S. Petrey & Christopher A. Brook, State v. Carter *and the North Carolina Exclusionary Rule*, 100 N.C. L. REV. F. 1 (2021). This is more flexible than the definition of the word lockstep would suggest. *See Lockstep*, MERRIAM-WEBSTER (2023), https://www.merriam-webster.com/dictionary/lockstep [https://perma.cc/A3PL-MXVS] (defining "lockstep" as "a standard method or procedure that is mindlessly adhered to or that minimizes individuality").

I. THE NEW JUDICIAL FEDERALISM IN NORTH CAROLINA

To start with, it is useful to consider why it might make sense to examine modern jurisprudential developments in North Carolina if the goal is to shine light on the potential for more fruitful interplay between state and federal courts on the nature of constitutional rights. North Carolina's state constitutional provisions protecting the right to vote lately have been front and center in the national debate over whether and how to protect voting rights in our modern democracy. Having laid a foundation, the stage is set to examine more closely how various state constitutional provisions have been interpreted in recent decades.

A. Why North Carolina?

This Essay takes North Carolina as a case study of the New Judicial Federalism. Some of the recent renewed attention across the country to the importance of state courts and state constitutional guarantees has arisen from two cases from North Carolina decided by the U.S. Supreme Court.[29] Raising issues relating to voting rights, redistricting, and the protection of democracy, both cases brought greater attention to the role of state constitutional doctrine in these areas of the law.[30]

With regard to partisan gerrymandering, litigants long focused their efforts on potential federal constitutional theories to address the problem.[31] More recently, advocates turned to state constitutions. The voters of Florida amended their state constitution with specific measures addressing partisan gerrymandering in 2010,[32] and the Florida Supreme Court held in 2015 that the state's twenty-seven congressional districts "were 'taint[ed]' by unconstitutional intent to favor the Republican Party and incumbents."[33] In 2018 the Pennsylvania Supreme Court held that partisan gerrymandering of that state's congressional districts violated the state constitution.[34] This advocacy at the state level became even more essential in 2019, when the U.S. Supreme Court held in *Rucho v. Common*

29. Moore v. Harper, 600 U.S. 1 (2023); Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

30. *See, e.g.*, Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 907-16 (2021); Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 208-10 (2019).

31. *See* Davis v. Bandemer, 478 U.S. 109 (1986); Vieth v. Jubelirer, 541 U.S. 267 (2004); League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006); Gill v. Whitford, 138 S. Ct. 1916 (2018).

32. FLA. CONST. art. III, § 20.

33. League of Women Voters v. Detzner, 172 So. 3d 363, 416 (Fla. 2015).

34. *See* League of Women Voters v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018).

Cause[35] that claims arising under partisan gerrymandering are not justiciable under the Federal Constitution. The case arrived at the Court after a federal three-judge panel unanimously concluded that North Carolina's 2016 congressional redistricting plan, drawn as a remedy for a successful racial gerrymandering challenge to the districts drawn in 2011, was an unconstitutional partisan gerrymander in violation of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. In *Rucho*, Chief Justice Roberts, writing for the majority and responding to the argument that courts must curb partisan gerrymandering because legislatures will not, explained:

> Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. The dissent wonders why we can't do the same. The answer is that there is no "Fair Districts Amendment" to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.[36]

In effect, the fact that state constitutional provisions might address the issue supported the Court's decision to close the door to any arguments that partisan gerrymandering violates the Equal Protection Clause of the Fourteenth Amendment or infringes the freedoms secured by the First Amendment.

Three years after *Rucho*, the North Carolina Supreme Court accepted the U.S. Supreme Court's invitation to evaluate partisan gerrymandering under the state constitution. In *Harper v. Hall*, it determined that the state's legislative and congressional districts, redrawn in 2021 following the 2020 census, were an extreme partisan gerrymander that violated the state's constitutional guarantees of equal protection, fair elections, and freedom of speech.[37] Yet on appeal, the U.S. Supreme Court entertained arguments that the state supreme court did not have the authority to impose state constitutional limits on the drawing of congressional districts because the U.S. Constitution specifies that "the times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof[.]"[38] The potential ramifications of

35. 139 S. Ct. 2484, 2506-07 (2019).

36. *Id.* at 2507 (citations omitted).

37. Harper v. Hall, 881 S.E.2d 156 (N.C. 2022).

38. U.S. CONST. art. I, § 4; *see* Moore v. Harper, 600 U.S. 1 (2023).

adopting this "independent state legislature theory" were debated far and wide.[39] The chief justices of every state supreme court in the country filed an amicus brief urging the court not to usurp their authority to interpret their own state constitutions and review the acts of their states' legislatures to determine conformity therewith.[40] In a 6-3 decision in *Moore v. Harper*, the Court put to rest the notion that the Federal Constitution divested state supreme courts of the power of judicial review in these circumstances, but left open the possibility that if a rogue state supreme court were to interpret its own constitution in a manner inconsistent with federal law, the U.S. Supreme Court may need to step in.[41]

That state constitutions must be interpreted consistent with federal law is a well-known proposition. In the area of redistricting, for example, the North Carolina Constitution's whole-county provision for state legislative districts has been subject to the one-person, one-vote requirement of the Federal Constitution since *Reynolds v. Sims* in 1964. Those same whole-county provisions of the state constitution were abandoned entirely in the face of the need to comply with Section 5 of the Voting Rights Act, and then "harmonized" in state court litigation in the 2000s.[42] A literacy requirement remains in the state constitution but has not been enforced since the mid-1970s due to contrary federal law.[43] Leaving federalism doctrine where it has been for a long time, the decision in *Moore v.*

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39. *See, e.g.*, Leah M. Litman & Katherine Shaw, *The "Bounds" of* Moore*: Pluralism and State Judicial Review*, 133 YALE L.J.F. 881 (2024); Dan T. Coenen, *Constitutional Text, Founding-Era History, and the Independent-State-Legislature Theory*, 57 GA. L. REV. 539 (2023); Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571; Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235.

40. Brief of Amicus Curiae Conference of Chief Justices In Support of Neither Party, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271).

41. *Moore*, 600 U.S. at 29-30.

42. Stephenson v. Bartlett, 562 S.E.2d 377 (N.C. 2002); Stephenson v. Bartlett, 582 S.E.2d 247 (N.C. 2003).

43. N.C. CONST. art. VI, § 4 ("Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language."). This provision was upheld as constitutional in *Lassiter v. Northampton Company Board of Elections*, 360 U.S. 45 (1959). Despite the fact that § 201 of the 1970 Voting Rights Act Amendments banned the use of literacy tests, *see* Oregon v. Mitchell, 400 U.S. 112, 131-34 (1970) (upholding § 201 against a constitutional challenge), a federal court later found that literacy tests continued to be in use in North Carolina, *see* Ward v. Columbus Cty., 782 F. Supp. 1097, 1103 (E.D.N.C. 1991) (finding as fact that "[t]he literacy test was used in Columbus County until 1972, and was not applied in an even-handed fashion. Blacks were required to pass a literacy test at times when whites were not. Knowledge that passing a literacy test would be required intimidated many black citizens and, no doubt, kept many from attempting to register to vote"). For a summary of modern efforts to remove the literacy test from the North Carolina Constitution, see *Repeal the Literacy Test—Pass HB 44*, DEMOCRACY NORTH CAROLINA, https://democracync.org/hb-44-repeal-literacy-test [https://perma.cc/QF52-HR5G].

Harper was widely seen as a victory by those seeking to curb partisan gerrymandering and left the door open for other state supreme courts to look to their state constitutional guarantees as a check on state legislative action,[44] even though it had no effect in North Carolina.[45]

Beyond recent legal developments that have garnered national attention, at times North Carolina justices have regarded the state as being at the vanguard of state constitutional interpretation. In 1992, then-retired North Carolina Supreme Court Justice Harry C. Martin offered a normative account for invigorating state constitutional law:

> When faced with an opportunity to provide its people with increased protection through expansive construction of state constitutional liberties, a state court should seize the chance. By doing so, the court develops a body of state constitutional law for the benefit of its people that is independent of federal control. This unique *corpus juris* may be better adapted to the particular needs and concerns of the state, and stands safe from the vicissitudes of the United States Supreme Court.[46]

He went on to assert that "North Carolina has been at the head of the movement to energize state constitutional law."[47] But has the state heeded his advice and continued to lead the movement? The record is mixed.

B. North Carolina's Mixed Record of Protecting Individual Rights

A series of state court decisions in the 1980s and early 1990s may have been what Justice Martin had in mind when he praised the high court's record,

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44. *See, e.g.*, Michael Sozan, *Supreme Court's Decision in* Moore v. Harper *Is a Win for Democracy But Some Questions Remain Unanswered*, CTR. FOR AM. PROGRESS (July 24, 2023), https://www.americanprogress.org/article/supreme-courts-decision-in-moore-v-harper-is-a-win-for-democracy-but-some-questions-remain-unanswered [https://perma.cc/4GX3-G5UK].

45. The decision did not impact North Carolina because in the interim, the North Carolina Supreme Court reversed itself and held that partisan gerrymandering is not justiciable under the state constitution. *See* Harper v. Hall, 886 S.E. 393, 416 (N.C. 2023). This led Justice Thomas to dissent in *Moore v. Harper*, as he would have held that the case was moot. *Moore*, 600 U.S. at 41 (Thomas, J., dissenting).

46. Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1751 (1992).

47. *Id.*; *see also* James G. Exum, Jr., *Rediscovering State Constitutions*, 70 N.C. L. REV. 1741, 1744 (1992) (describing that the North Carolina Court of Conference's decision in *Bayard v. Singleton*, along with *Marbury v. Madison*, "laid the foundation for the judiciary's claim to judicial review of all acts of the other branches of government").

beginning with *State v. Carter*.[48] *Carter* held that under the North Carolina Constitution's prohibition on unreasonable searches and seizures, the exclusionary rule—which prohibits the use of evidence obtained in violation of that provision—would not be subject to a good-faith exception, unlike the exception the U.S. Supreme Court found in *United States v. Leon*.[49] However, *Carter*'s continued vitality is questioned by some. Decades after *Carter*, the North Carolina legislature purported to establish a good-faith exception under the state constitution by enacting a statute in 2011 that codifies the exclusionary rule with a good-faith exception.[50] At least one unreported appellate opinion has noted that *Carter* was "superseded by" statute, although it expressly declined to decide whether a state statute can "supersede" the North Carolina Supreme Court's interpretation of the state constitution.[51]

More firmly recognized is the seminal case establishing that there is a direct cause of action for the violation of state constitutional rights if no other remedy exists. In *Corum v. University of North Carolina*, the North Carolina Supreme Court held that a plaintiff who has no other remedy is guaranteed by the common law a direct cause of action for alleged violations of state constitutional rights.[52] Relying on earlier precedents that found a direct cause of action against state officials for violation of other rights under the Declaration of Rights,[53] the court explained:

> It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State. Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were

48. 370 S.E.2d 553 (N.C. 1988).

49. *Carter*, 370 S.E.2d at 562; United States v. Leon, 468 U.S. 897 (1984).

50. N.C. GEN. STAT. § 15A-974(a) (2011).

51. State v. Foster, 823 S.E.2d 169, 170 n.2 (N.C. Ct. App. 2019); *see also* Molly S. Petrey & Christopher A. Brook, State v. Carter *and the North Carolina Exclusionary Rule*, 100 N.C. L. REV. F. 1, 1 (2021) (discussing the controversy around *State v. Carter* and the "persuasive lockstep" approach to state constitutional interpretation).

52. 413 S.E.2d 276, 289 (N.C. 1992).

53. North Carolina's Declaration of Rights is contained in Article I of the State Constitution and includes thirty-eight rights granted to the people of North Carolina. N.C. CONST. art I, §§ 1-38. While "a number of these rights have analogs in the Federal Constitution . . . [North Carolina's] constitutional protections are more numerous, more detailed, and often textually distinct from their federal counterparts." Buckner, *supra* note 1, at 145. These distinctions provide a strong basis for the expansion of constitutional protections under North Carolina constitution.

> designed to safeguard the liberty and security of the citizens in regard to both person and property.[54]

While North Carolina is not unique in finding a direct cause of action for violations of state constitutional rights, other states have declined to do so, or have yet to decide the issue.[55] When *Corum* was decided, there was optimism that it heralded a resurgence of state constitutionalism, distinct from federal constitutional doctrine when it comes to the protection of individual rights.[56]

Corum remains good law today, but there has not been a robust turn to state constitutional rights by litigants in North Carolina in the thirty years since it was decided.[57] A year after *Corum*, the North Carolina Supreme Court adopted and applied the U.S. Supreme Court's First Amendment jurisprudence to determine whether a state statute making it a crime to publish anonymous, derogatory statements about candidates for public office violated the state constitution's Free Speech Clause.[58] When considering a later civil action seeking damages against the City of Creedmoor for alleged violations of the plaintiffs' federal and state constitutional rights to freedom of speech, the North Carolina Supreme Court again examined and applied the U.S. Supreme Court's First Amendment precedents, without any separate analysis of the analogous state constitutional

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54. *Corum*, 413 S.E.2d at 290 (citations omitted).

55. *See* Sharon N. Humble, *Implied Cause of Action for Damages for Violation of Provisions of State Constitutions*, 75 A.L.R. 5TH 619 (2000) (collecting and categorizing cases that address implied causes of action for damages for violations of state constitutions); *see also* T. Hunter Jefferson, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions Against State Governments*, 50 VAND. L. REV. 1525, 1534-35 (1997) ("Currently, seven states have recognized some form of action under their state constitution, and another three have embraced the idea when certain conditions are met. Some nine state courts, although not finding a constitutional tort appropriate in the case before them, have hinted that a constitutional cause of action may be appropriate in certain circumstances. In contrast, only seven states have flatly rejected such a cause of action.").

56. *See, e.g.*, Lou Bilionis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1805 (1992) (arguing that "primary responsibility for defining and enforcing civil liberties is shifting from the federal courts and the Federal Constitution to the state judiciaries and their state constitutions").

57. For a review of post-*Corum* jurisprudence, see Matthew R. Gautheir, *Kicking and Screaming: Dragging North Carolina's Direct Constitutional Claims into the Twenty-First Century*, 95 N.C. L. REV. 1735 (2017).

58. State v. Petersilie, 432 S.E.2d 832, 841 (N.C. 1993) ("In this case, for the purpose of applying our State Constitution's Free Speech Clause we adopt the United State's [sic] Supreme Court's First Amendment jurisprudence."); *see also* Bacon v. Lee, 549 S.E.2d 840, 857 (2001) (evaluating the governor's clemency power under the North Carolina Constitution and concluding "that the framers of our State Constitution, in contemplating clemency, did not intend to impose additional constraints upon their executive's discharge of clemency power beyond those applicable to state clemency procedures under the United States Constitution").

provisions.[59] In implementing the U.S. Supreme Court's approach, there would be no North Carolina-specific rule for this doctrinal question. Where the state and federal constitutions provide exactly the same protections, from a doctrinal perspective there is only one shot to vindicate individual rights.

To date, the North Carolina Supreme Court has found a direct cause of action under the state constitution by relying on *Corum* on only three occasions, which averages to once a decade. Two of the cases arose in similar factual circumstances. In *Craig v. New Hanover County Board of Education*,[60] the court held that because the plaintiff's common-law negligence claim against the school board for failing to adequately protect him from a sexual assault by another student was barred by the doctrine of sovereign immunity, he could bring a claim for damages directly under the state constitution.[61] In *Tully v. City of Wilmington*,[62] the North Carolina Supreme Court concluded that Officer Tully could sue his employer, the City of Wilmington, under Article I, § 1 of the North Carolina Constitution, which provides that "the enjoyment of the fruits of their own labor," is an inalienable right, for failing to promote him to the rank of sergeant in alleged violation of the Wilmington Police Department's own written policies.[63] Most recently, the court followed *Craig* in *Deminski v. State Board of Education*,[64] holding that a student can bring a claim for damages for a school board's deliberate indifference to repeated bullying and sexual harassment by other students under Article I, § 15 and Article IX, § 2 of the North Carolina Constitution.[65]

This is hardly a record of robust protection of individual rights under the North Carolina Constitution, at least by the state supreme court.[66] On occasion,

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59. Moore v. City of Creedmoor, 481 S.E.2d 14, 22-23 (N.C. 1997).

60. 678 S.E.2d 351 (N.C. 2009).

61. *Id.* at 354. The plaintiff asserted violations of his individual rights under three provisions of the North Carolina Constitution: his right to an education under Article I, § 15; his right to due process under Article I, § 19; and the requirement that schools and means of education be encouraged found in Article IX, § 1. *Id.* at 352. The Court's analysis focused on whether the plaintiff's additional common-law negligence claim, which would be defeated by governmental immunity, provided an adequate remedy at state law. The court held that it did not, and that the plaintiff could therefore bring claims directly under the North Carolina Constitution. *Id.* at 352.

62. 810 S.E.2d 208 (N.C. 2018).

63. *Id.* at 213-15.

64. 858 S.E.2d 788 (N.C. 2021).

65. *Id.* at 795.

66. This discussion does not survey all litigation nor cases decided by the North Carolina Court of Appeals without further review by the Supreme Court. *Corum* claims have been brought in federal courts, for example, and have been decided by the North Carolina Court of Appeals. *See, e.g.*, Hunter v. Town of Mocksville, No. 12-CV-333, 2017 WL 680434, at *12-*13 (M.D.N.C. Feb. 21, 2017), *appeal docketed*, No. 17-1374 (4th Cir. Mar. 24, 2017); Davis v.

Corum's requirement that a plaintiff have no other remedy has been the reason that plaintiffs were deemed not entitled to bring a direct action for damages.[67] The justification for imposing such a requirement, which has not been a condition in other states,[68] flowed from a fundamentally conservative view of the role of the judiciary, a deep respect for the power of the other branches of state government, and the normative conclusion that fashioning a common-law remedy for the violation of a constitutional right is an "extraordinary exercise" of the court's "inherent constitutional power."[69] The court seemed to be saying, if you push our backs up against the wall and there is no one else who can protect an individual's constitutional rights, then we will do our duty, while kicking, screaming, and dragging our feet at every step along the way.

Contrast that with the North Carolina Supreme Court's full-throated endorsement of the judiciary's role in enforcing the fundamental right to property. In 2016 the Court held that "[t]hough our state constitution does not contain 'an express constitutional provision against the "taking" or "damaging" of private property for public use' without payment of just compensation, we have long recognized the existence of a constitutional protection against an uncompensated taking . . . ."[70] Despite the lack of a specific provision, the Court concluded that the state constitution's "law of the land" clause[71] encompassed "the fundamental right to just compensation as so grounded in natural law and justice" that it was self-evident.[72] Therefore, the North Carolina General Assembly's Map Act, which allowed the Department of Transportation to designate corridors for future road development, without providing for compensation of landowners whose property was affected, was an unconstitutional taking under the state constitution's law of the land clause.[73] The result was to provide over 500

Blanchard, 175 F. Supp. 3d 581, 588-92 (M.D.N.C. 2016); Wilkie v. City of Boiling Spring Lakes, 796 S.E.2d 57, 63-64 (N.C. Ct. App. 2016); Hubbard v. N.C. State Univ., 789 S.E.2d 915, 923 (N.C. Ct. App. 2016).

67. *See* Copper v. Denlinger, 688 S.E.2d 426, 428-29 (2010) (finding an adequate statutory remedy for plaintiff's claim that his state constitutional right to procedural due process is violated by the school board denying him a hearing before his long-term suspension from school).

68. *See, e.g.*, Gay L. Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592, 613 (1979) (finding a cause of action for a violation of the state constitution's equal-protection guarantee without regard to whether alternative remedies existed); *see also* Bauserman v. Unemployment Ins. Agency, 983 N.W.2d 855, 866-67 (2022) (collecting cases from numerous states considering a cause of action for the violation of state constitutional rights).

69. Corum v. Univ. of N.C., 413 S.E.2d 276, 291 (N.C. 1992).

70. Kirby v. N.C. Dep't of Transp., 786 S.E.2d 919, 924 (N.C. 2016).

71. N.C. CONST. art. I, § 19.

72. *Kirby*, 786 S.E.2d at 924 (quoting Long v. City of Charlotte, 293 S.E.2d 101, 107-08 (N.C. 1982)).

73. *Id.* at 925.

landowners with a right to seek compensation for the decrease in market value of their property that resulted from their physical location in a corridor designated for development, at a cost of hundreds of millions of dollars to the state. In 2020, estimates suggested that the North Carolina Department of Transportation had spent about $600 million settling Map Act lawsuits.[74] As of mid-July 2019, the state had reached settlements in approximately 360 Map Act cases, with another 260 cases pending, based upon reports by the Chief Operating Officer, Bobby Lewis, to the Board of Transportation.[75] Note that the Court enforced an individual right grounded in common law and not found in any specific constitutional text, overruling a choice the North Carolina General Assembly had made about how property owners could address a decline in property values. There is no principled reason why property rights should have greater protection than the First Amendment rights at stake in *Corum* or the right to an education at stake in *Copper v. Denlinger*.

II. THE NORTH CAROLINA SUPREME COURT'S DEPARTURE FROM FEDERAL DOCTRINE

The shifting sands of state constitutional analysis in North Carolina make it difficult to argue that state courts are a solid foundation upon which to build a jurisprudence that protects individual rights—at least when it comes to questions of race discrimination and equal protection.

A. Equal Protection: Upward and Downward Departures from Lockstepping

As the discussion above illustrates, although the North Carolina Supreme Court has engaged in lockstepping in some contexts, following federal doctrine to evaluate state constitutional guarantees, it has also departed from it in other instances. This Section will argue that the court's departure from lockstepping is especially notable in the equal-protection context, where the North Carolina Supreme Court has found greater protection of individual rights in the state constitution than currently recognized under the Federal Constitution in several noteworthy cases, while providing less protection in other cases (especially when related to intentional racial discrimination). The court has acknowledged its

74. *See* Richard Stradling, *Supreme Court: NCDOT Must Compensate Map Act Property Owners for Lost Market Value*, NEWS & OBSERVER (May 1, 2020, 3:57 PM), https://www.newsobserver.com/article242434086.html [https://perma.cc/EV2B-4VGB].

75. *See* Richard Stradling, *Cost to Settle Landowner Lawsuits Could Cost NCDOT More than $1 Billion*, NEWS & OBSERVER (July 20, 2019, 1:33 PM), https://www.newsobserver.com/news/local/article232877827.html [https://perma.cc/B9AJ-83SM].

authority to construe the North Carolina Constitution's equal-protection clause to grant greater protections than its federal counterpart,[76] but it most recently construed that same provision as granting less protection than the Federal Constitution.[77]

In *Stephenson v. Bartlett*,[78] the court held that "use of both single-member and multi-member districts within the same redistricting plan violates the Equal Protection Clause of the State Constitution unless it is established that inclusion of multi-member districts advances a compelling state interest."[79] Although the one-person, one-vote jurisprudence as a requirement of equal protection in the redistricting context began with the federal courts,[80] as the *Stephenson* court acknowledged, under federal constitutional doctrine it is permissible to include single-member and multi-member districts in the same redistricting plan so long as the relative sizes of the districts ultimately give equal weight to every vote.[81] Quoting *State v. Carter*,[82] the *Stephenson* court pointed out that "[i]t is beyond dispute that this Court 'has the authority to construe [the State Constitution] differently from the construction by the U.S. Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.'"[83] Thus, the court concluded that under the state constitution, equal protection principles required all districts in a redistricting plan to be single-member districts.

There followed several years later the decision in *Blankenship v. Bartlett*,[84] holding that the equal-protection clause of the North Carolina Constitution required that districts drawn for the election of judges be subjected to intermediate scrutiny.[85] Acknowledging that the U.S. Supreme Court had explicitly ruled that judicial districts are not subject to the one-person, one-vote requirement under the Federal Equal Protection Clause,[86] the North Carolina Supreme Court

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76. *See infra* note 89.

77. *See infra* note 93.

78. 562 S.E.2d 377 (N.C. 2002).

79. *Id.* at 395.

80. *See* Baker v. Carr, 369 U.S. 186, 209 (1962) (establishing that redistricting issues are justiciable); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (requiring apportionment on a one-person-one-vote basis): Karcher v. Daggett, 462 U.S. 725, 744 (1983) (requiring a good-faith effort at population equality in districting).

81. *Stephenson*, 562 S.E.2d at 393 ("[T]he United States Supreme Court has held that multi-member districts are not *per se* invalid under the federal Equal Protection Clause . . . .").

82. 370 S.E.2d 553, 555 (N.C. 1988).

83. *Stephenson*, 562 S.E.2d at 395 n.6.

84. 681 S.E.2d 759 (N.C. 2009).

85. *Id.* at 766.

86. *See* Chisom v. Roemer, 501 U.S. 380, 403-04 (1991).

nevertheless concluded that "[s]tated simply, once the legal right to vote has been established, equal protection requires that the right be administered equally."[87] *Blankenship* did not specify any bright-line standard for how much judicial districts could deviate in population size before intermediate scrutiny would be triggered.[88] While the North Carolina Supreme Court examined various state and federal constitutional precedents, the majority was clear in rejecting a lockstepping approach to state constitutional interpretation, stating instead:

> This Court's analysis of the State Constitution's Equal Protection Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause. "However, in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court."[89]

The dissenting opinion in *Blankenship* pointed out that the court's interpretation of the Equal Protection Clause to apply to judicial districts was contrary to every other jurisdiction to have considered the issue and stated that this rare unanimity among the numerous courts at every level to have addressed it should have been highly persuasive to the court.[90] Also missing from the majority opinion in *Blankenship* is any discussion of deference to the legislative branch.[91] There was no mention of the need to find a statute unconstitutional "beyond a

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87. *Blankenship*, 681 S.E.2d at 765.

88. *Id.* at 766.

89. *Id.* at 762 (quoting Bulova Watch Co. v. Brand Distribs., 206 S.E.2d 141, 146 (N.C. 1974) (citing State v. Barnes, 142 S.E.2d 344, 346 (N.C. 1965))). In later commentary, Chief Justice Mark Martin acknowledges that *Blankenship* was a departure from the Court's characteristic lockstepping approach and suggests that intermediate scrutiny is an "elegant solution" to the conflict between approaching judges as either representatives or not representatives, and then recharacterizes *Blankenship* as an "interstitial, or supplemental, analysis . . . ." Mark D. Martin & Daniel F.E. Smith, *Recent Experience with Intermediate Scrutiny Under the North Carolina Constitution:* Blankenship v. Bartlett *and* King *ex rel.* Harvey-Barrow v. Beaufort County Board of Education, 59 U. KAN. L. REV. 761, 782 (2011).

90. *Blankenship*, 681 S.E.2d at 770 (Timmons-Goodson, J., dissenting) ("The majority offers little persuasive authority to support or explain why this Court should deviate from the reasoning of every other court in the country, particularly in light of the express flexibility in fashioning judicial districts granted under our Constitution.").

91. *Id.* Likewise, the *Stephenson* opinion, finding the General Assembly's redistricting statutes to be unconstitutional, made no reference to the "beyond a reasonable doubt" standard of review. *See* Stephenson v. Bartlett, 562 S.E.2d 377, 383 (N.C. 2002) ("The primary question for our review is whether the General Assembly, in enacting the 2001 legislative redistricting plans, violated the [Whole-County Provisions] of the State Constitution.").

reasonable doubt," even though this formulation later appears in voting rights opinions of the court as the unquestioned standard of review.[92]

In 2023, the North Carolina Supreme Court decided again to abandon lockstepping, this time to make clear that the North Carolina Constitution's equal-protection clause provides *less* protection than the federal analogue when it comes to proving intentional racial discrimination on the part of governmental actors.[93] In a recent voting-rights case, where the trial court found intentional racial discrimination after a full trial on the merits, the court reversed and held that it would not adopt the *Arlington Heights*[94] standard for proving intentional racial discrimination on the grounds that it is "subjective" and therefore too low a bar for plaintiffs alleging racial discrimination.[95] Instead, the court applies what it asserts is a more objective, and presumably higher, standard, namely that a challenger "must prove beyond a reasonable doubt that: (1) the law was enacted with discriminatory intent on the part of the legislature, and (2) the law actually produces a meaningful disparate impact along racial lines."[96] Under this new standard, a racially gerrymandered legislative district may not violate the equal-protection clause of the state constitution because a district drawn on the basis of race does not necessarily have any disparate impact on the voting strength of any voters. In *Community Success Initiatives*, the court also refused to apply the intermediate-scrutiny standard it adopted in *Blankenship*, even though both cases involved the fundamental right to vote.[97]

It is usually assumed that federal constitutional doctrine is a floor, not a ceiling, for the protection of individual rights. However, where the U.S. Supreme Court appears ready to roll back rights, as in *Dobbs*[98] and *Students for Fair*

92. Harper v. Hall, 886 S.E.2d 393, 414-15 (N.C. 2023); Cmty. Success Initiative v. Moore, 886 S.E.2d 16, 32, 49-50 (N.C. 2023); *see also* Hugh Spitzer, *Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond a Reasonable Doubt,"* 74 RUTGERS U. L. REV. 1429, 1429 (2022) (critiquing judicial deference to legislative authority unless a statute is "unconstitutional beyond a reasonable doubt").

93. *See* Holmes v. Moore, 886 S.E.2d 120, 130 (N.C. 2023); *Cmty. Success Initiative*, 886 S.E.2d at 34 ("When resolving claims that a facially neutral law discriminates against persons of a particular race in violation of our state Equal Protection Clause, we are free to depart from the federal burden-shifting framework if we deem it incompatible with the principles that guide our review of state constitutional challenges to the validity of statutes.").

94. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

95. *See Holmes*, 886 S.E.2d at 131, 144.

96. *Id.* at 132.

97. Cmty. Success Initiative v. Moore, 886 S.E.2d 16, 43-45 (N.C. 2023).

98. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (holding that a right to abortion does not exist in the U.S. Constitution).

Admissions, Inc. v. President & Fellows of Harvard College,[99] or to fail to enforce its own precedents, as in *Clark v. Mississippi*,[100] it is especially important for state constitutional doctrines to play a role.

B. Raising the Floor for Other Constitutional Rights

In other contexts, the North Carolina Constitution has been a stronger source of individual rights than the Federal Constitution. North Carolina's Constitution, unlike the Federal Bill of Rights, has multiple references to the right to education, which led the state supreme court to articulate a student's right to a "sound basic education" over twenty-five years ago in *Leandro v. State*.[101] More recently, the court held that a trial court was within its remedial powers to order certain state officials to transfer funds necessary to comply with its orders implementing a comprehensive remedial plan.[102] Here, the court interpreted a state constitutional provision that has no federal counterpart.

The North Carolina Supreme Court has also made further doctrinal advancements on certain criminal justice issues than the U.S. Supreme Court. In *State v. Kelliher*, the state supreme court held that a sentence that required a juvenile to serve fifty years in prison before becoming eligible for parole was a de facto sentence of life without parole under the North Carolina Constitution's

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99. 600 U.S. 181 (2023) (holding that the use of race-based admissions in higher education violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964). I acknowledge the value judgment inherent in this observation. Some would characterize this opinion as providing greater protection for the rights of white and Asian students.

100. 143 S. Ct. 2406 (2023) (refusing to enforce its previous ruling, *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), involving racial discrimination in jury selection, by denying certiorari in a case in which the Mississippi Supreme Court found no constitutional violation).

101. 488 S.E.2d 249, 257 (N.C. 1997). *But see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."); Plyler v. Doe, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution.").

102. *See* Hoke Cnty. Bd. of Educ. v. State, 879 S.E.2d 193, 198 (N.C. 2022). The remand is still pending in the trial court, but there have been subsequent rulings by the supreme court, the meaning of which are contested. *See* Hoke Cnty. Board of Educ. v. State, 883 S.E.2d 480 (N.C. 2023).

prohibition of cruel or unusual punishment.[103] The U.S. Supreme Court has not directly addressed this issue.[104]

Finally, as a structural matter impacting the right to vote, the North Carolina Supreme Court decided *NAACP v. Moore*. [105] There, the court determined that a legislature elected from racially gerrymandered districts could not place a state constitutional amendment on the ballot for voters if the purpose of that amendment was either to discriminate against voters on the basis of race or to seek to illegitimately maintain their elected offices.[106] In doing so, the court concluded that allowing such actions would be inconsistent not only with precedent but also with the North Carolina State Constitution's fundamental guarantee of a government elected by the people.[107] This issue, too, is one without a federal analogue, touching on the uniquely state-law issue of how a state constitution establishes a state government.

C. The Impact of Partisan Politics on State Constitutional Interpretation

Several recent decisions of the North Carolina Supreme Court have included assertions that the constitutional analysis by the majority of the court is a result of partisan commitments rather than the sound application of legal reasoning.[108]

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103. 873 S.E.2d 366, 375 (N.C. 2022). Additionally, and also in the criminal law context, the North Carolina Supreme Court addressed life-long satellite-based monitoring of sex offenders in *State v. Grady*, 831 S.E. 2d 542, 546-47 (N.C. 2019). There the court determined that under the Fourth Amendment to the United States Constitution, this type of monitoring for low-risk offenders violated a person's right to be free from unreasonable searches and seizures. At the time of that decision, the U.S. Supreme Court had not directly ruled on this question. *Grady,* 831 S.E.2d at 554.

104. The seminal U.S. Supreme Court case addressing juvenile life without parole is *Miller v. Alabama*, 567 U.S. 460 (2012). However, this case only addressed whether mandatory sentences of life without parole for those who committed crimes while under the age of eighteen violated the U.S. Constitution's Eighth Amendment prohibition of cruel and unusual punishment. *Id.* at 465.

105. 876 S.E.2d 513, 540 (N.C. 2022).

106. *Id.*

107. *Id.*

108. *See* State v. Kelliher, 873 S.E.2d 366, 394 (N.C. 2022) (Newby, C.J., dissenting) (concluding that "[i]t is difficult to imagine a more appropriate description of the action that the majority takes today" than "judicial activism"); State v. Robinson, 846 S.E.2d 711, 726 (N.C. 2020) (Newby, J., dissenting) ("Instead of doing the legally correct thing, the majority opinion picks its preferred destination and reshapes the law to get there."); N.C. State Conf. of the NAACP v. Moore, 876 S.E.2d 513, 559 (Berger, J., dissenting) ("That the majority has injected chaos and confusion into our political structure is self-evident."); Harper v. Hall, 874 S.E.2d 902, 904-05 (N.C. 2022) (Barringer, J., dissenting) ("[T]he majority's decision today appears to reflect deeper partisan biases that have no place in a judiciary dedicated to the impartial administration of justice and the rule of law."); Harper v. Hall, 868 S.E.2d 499, 578 (N.C. 2022)

In *Harper v. Hall*, the Chief Justice, in dissent, asserted that the majority was "seeking to hide its partisan bias."[109] In a later opinion in that same litigation, another justice, also in dissent, wrote that "the majority's decision today appears to reflect deeper partisan biases that have no place in a judiciary dedicated to the impartial administration of justice and the rule of law."[110]

Litigation over the requirement that voters present photo identification in order to vote has also been politically charged. In 2022, the North Carolina Supreme Court issued its first opinion in *Holmes v. Moore*, which addressed a statute implementing the state's new constitutional amendment requiring a voter ID, Senate Bill 824.[111] The plaintiffs brought an equal-protection claim pursuant to Article I, Section 19 of the North Carolina Constitution alleging that the "law was enacted at least in part with the intent to discriminate against African-American voters."[112] After analyzing the law under the *Arlington Heights* factors, the trial court concluded based on the evidence presented in a weeklong trial that S.B. 824 violated the state constitution because it was enacted with discriminatory intent.[113] The North Carolina Supreme Court affirmed that ruling. However, in 2023, following the installment of a new majority of Republican appointees on the court, that new majority granted rehearing and issued a new opinion invalidating the use of the *Arlington Heights* factors under the state constitution. In doing so, the court ultimately concluded that plaintiffs had "failed to prove beyond a reasonable doubt that S.B. 824 was enacted with discriminatory intent or that [S.B. 824] actually produce[d] a meaningful disparate impact along racial lines."[114]

My views on the court's decision to reverse itself on the fundamental question of whether partisan gerrymandering is justiciable and violates the state constitution within a matter of weeks of an election, as well as its decision to rehear and reverse itself on the question of whether the voter ID law was intentionally racially discriminatory, are set out in my and my colleagues' dissenting opinions

(Newby, C.J., dissenting) ("[T]he majority today wholeheartedly ushers this Court into a new chapter of judicial activism."); Gene Nichol, *NC Can't Have Judicial Standards that Only Apply to Black Female Democrat Justices*, CHARLOTTE OBSERVER (Nov. 28, 2023, 12:04 PM), https://www.charlotteobserver.com/article282410773.html [https://perma.cc/G5P8-Q24T].

109. *Harper*, 868 S.E.2d at 560.

110. *Harper*, 874 S.E.2d at 904-05 (N.C. 2022) (Barringer, J., dissenting).

111. *See* Holmes v. Moore, 881 S.E.2d 486 (N.C. 2022), *reh'g granted*, 882 S.E.2d 552 (N.C. 2023), *and opinion withdrawn and superseded on reh'g*, 886 S.E.2d 120 (N.C. 2023).

112. Holmes v. Moore, 881 S.E.2d 486, 490 (N.C. 2022).

113. *Id.* at 510.

114. Holmes v. Moore, 886 S.E.2d 120, 144 (N.C. 2023).

to the court's orders allowing rehearing.[115] It could be asserted that both the 2022 and the 2023 rulings were outcome-driven to favor a particular political party. To ascribe a false equivalency between the opinions and actions of the 2022 court and the 2023 court would do a great disservice to the hundreds of pages of documented factual material and legal reasoning in the trial court's rulings and the 2022 appellate opinions. In finding that partisan gerrymandering is justiciable, and that extreme partisan gerrymandering violates the state constitution, the 2022 court sought to provide all voters of every political party an equal opportunity to participate in the electoral process. The 2023 court abdicated its responsibility to enforce the state constitution and the rule of law, in favor of one political party that now holds a veto-proof majority in the legislature in a state where the voters are nearly equally divided by any measure of partisan political preferences.[116] In the voter ID case, the 2023 court ignored factual findings by the trial court, and imposed a new constitutional standard without allowing the trial court to first apply that standard to the evidence.[117]

Are the voting rights cases mere aberrations? A review of all the court's opinions reveals that in recent years the court's Republican-affiliated justices are less likely to disagree with one another and are more inclined to vote together a majority of the time than Democratic-affiliated justices.[118] I was elected to a court that within three months of my joining was comprised of six Democrats and one Republican. Between January 1, 2019 and January 1, 2023, when the court became a court of five Republicans and two Democrats, the North Carolina Supreme

115. *Harper*, 886 S.E.2d at 449-78 (Earls, J., dissenting); Holmes v. Moore, 882 S.E.2d 552, 554 (2023) (Morgan, J., dissenting); *see also* Holmes v. Moore, 886 S.E.2d at 145 (Morgan J., dissenting) ("This majority's extraordinarily rare allowance of a petition for rehearing in this case, mere weeks after this newly minted majority was positioned on this Court and mere months after this case was already decided by a previous composition of members of this Court, spoke volumes. My consternation with the majority's abrupt departure from this Court's institutionalized stature—historically grounded in this forum's own reverence for its caselaw precedent, its deference to the rule of law, and its severance from partisan politics—is colossal.").

116. Michael Sozan, *Threats from Political Minority Rule in Wisconsin and North Carolina*, CTR. FOR AM. PROGRESS (Dec. 7, 2023), https://www.americanprogress.org/article/threats-from-political-minority-rule-in-wisconsin-and-north-carolina [https://perma.cc/85V3-LYWY].

117. *See Holmes*, 886 S.E. 2d at 149-50 (Morgan, J., dissenting) ("Throughout its opinion, the majority adopts an unprecedented burden of proof for claimants bringing equal protection claims arising under our state Constitution. Although the majority repeatedly characterizes its framework as traditional and consistent with the bulk of state authority, the depiction is, mildly put, a freewheeling exaggeration. In fact, the majority's new standard departs sharply from both federal *and* state precedent by abandoning the traditional equal protection framework and construing a provision of our state Constitution as providing lesser protection to citizens of our state than its federal analogue.").

118. The North Carolina General Assembly required that all elections of appellate judges and justices be partisan elections effective in 2018. *See* N.C. GEN. STAT. § 163-106.2 (2023).

Court issued two opinions finding greater protection of individual rights in the state constitution[119] and four other opinions grounded solely in state constitutional doctrine.[120] To put this in context, the court issued a total of 557 opinions during this period.[121]

When the court was four Democrats and three Republicans, from January 1, 2021 to December 31, 2022, the court issued opinions in 313 cases. In 213 of those cases, the court was unanimous.[122] In seven cases, the Republican members of the court disagreed with each other.[123] In forty-six cases, the Democratic members of the court disagreed.[124] The court was split along party lines only thirty-nine times, and there were eight cases where both the Democrats and Republicans disagreed with each other.[125] Republicans on the court voted together almost all the time, whereas Democrats did not.

It is important to know the court's record, but I ultimately agree with Judge Sutton that failing to raise state constitutional claims is like voluntarily giving up a free throw. If advocates choose not to bring state constitutional claims seeking to vindicate individual rights, those rights under the state constitution will have no meaning. Even if the claims are unsuccessful, a path is laid for future efforts. The failures of the law today can be corrected in the future. The basket may be higher, and one might miss the shot, but being in the game makes a difference.

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119. *See* State v. Kelliher, 873 S.E.2d 366 (N.C. 2022) (holding that requiring juvenile offenders to serve more than forty years before becoming parole-eligible violated state and federal constitutional protections against cruel or unusual punishment); Harper v. Hall, 881 S.E.2d 156 (N.C. 2022) (affirming the right to vote on equal terms without partisan gerrymandering), *opinion withdrawn and superseded on reh'g*, 886 S.E.2d 393 (2023).

120. *See Holmes*, 881 S.E.2d 486 (N.C. 2022) (finding that voter-identification laws violated the state constitution's equal-protection clause), *opinion withdrawn and superseded on reh'g*, 384 N.C. 426 (N.C. 2023); NAACP v. Moore, 876 S.E.2d 513 (N.C. 2022) (finding state constitutional limits on the ability of legislators to initiate processes to amend the state constitution); Deminski v. State Bd. of Educ., 858 S.E.2d 788 (affirming a right to education under the state constitution); Hoke Cnty. Bd. of Educ. v. State, 879 S.E.2d 193 (N.C. 2022) (same).

121. *Collegiality Report*, SUPREME COURT OF NORTH CAROLINA (Dec. 16, 2022). This number includes 222 opinions in termination of parental-rights (TPR) cases that were on direct appeal to the Supreme Court during this period. Some of those cases also raised constitutional issues, but if they are excluded from the total, the number of opinions in non-TPR cases was 335.

122. Anita Earls, Catalog of North Carolina Supreme Court Cases (Jan. 22, 2024) (on file with author).

123. *Id.*

124. *Id.*

125. *Id.*

III. ENSURING INCREASED PROTECTION OF INDIVIDUAL RIGHTS UNDER STATE CONSTITUTIONS

State courts and litigants need to consider state constitutional guarantees of individual and civil rights. Here I suggest two prescriptions. The first is for state courts to own the freedom they hold to decide state constitutional questions independently from how the U.S. Supreme Court interprets parallel provisions in the Federal Constitution. Put another way, while state courts must treat the Federal Constitution as a floor, they should not reflexively fall back on lockstepping or otherwise respond to changes in federal constitutional caselaw that restrict individual rights by making corresponding downward shifts in their own state constitutional jurisprudence. When state courts perceive the need to expand individual protections under their own state constitutions but fail to do so, they undermine a litigant's ability to have "two shots" at the free throw. In the end, this effectively removes the state constitutional basket from the equation, forcing litigants to argue and defend their claims under federal law.

Next, it is important to build a legal culture that values the role of state courts in interpreting their own constitutional doctrines. A widespread shift in attitudes among relevant stakeholders that seeks to support the expansion of individual rights under state constitutions could encourage litigants to take "two shots" at the free-throw line, one into the Federal Constitution basket, and another into the state constitution basket. Support for the role that state constitutions play in expanding individual rights could come from at least four sources: (1) legal opinions that acknowledge the role of state courts in protecting individual rights; (2) state courts' own acknowledgment of the responsibility they have to shape individual rights under their constitutions; (3) legal education that focuses on state constitutional protections; and (4) practicing attorneys who bring claims on behalf of their clients under their respective state constitutions.

Chief Justice Roberts's opinion in *Rucho* is an example of the first source. There, he concluded that state constitutions and state statutes have a role to play in curbing political gerrymandering; while the Federal Constitution may have limitations in this regard, state courts interpreting their own laws may not be restricted by these limitations.[126] An increased awareness of the role state constitutions can play in protecting individual rights might also come from state supreme courts themselves. Just as retired Justice Martin explained, state supreme courts must seize the opportunity to expand individual rights whenever the occasion is provided. In doing so, courts will develop a "unique corpus juris" that

126. Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019) ("The answer is that there is no 'Fair Districts Amendment' to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.").

is uniquely attuned to the "needs and concerns of the state, and stands safe from the vicissitudes of the United States Supreme Court."[127]

Furthermore, law schools could also take a more active role in teaching students about the importance of state constitutions, and what can be gained when claims involving individual rights are brought under state constitutional provisions. Constitutional law courses, which cover the Federal Constitution's Bill of Rights, may be particularly well suited to teach the parallel provisions of their state constitutions, while also pointing out the way in which their respective state constitution grants additional rights.

Lastly, practicing attorneys who seek to preserve or expand their client's individual rights play a significant role in supporting the two-basket approach. Courts are usually inclined to consider and issue opinions on the issues raised by the parties in a case. Thus, without clients who seek to vindicate those rights arising under their state constitutions, and attorneys who are prepared to bring these claims pursuant to state law, each state's respective constitutional legal doctrine cannot advance. Expanding the use of state courts to protect constitutional rights must be a joint effort between all relevant stakeholders: federal and state judges, academics, and practicing attorneys who shape the claims they bring on behalf of their clients.

CONCLUSION

Ultimately, state constitutions can be a powerful tool for protecting individual rights. Whether this notion can be realized is subject to a myriad of influences, ranging from the type of right implicated to the political composition of a court. However, with the participation of all relevant stakeholders, individual rights arising under state constitutions can be protected and broadened beyond what is currently understood to be encompassed by the U.S. Constitution. The experience in North Carolina suggests that state constitutional doctrine has left the door open, but much more needs to be done to realize the two-shot potential at the free-throw line.

Justice Anita Earls, Associate Justice, North Carolina Supreme Court.

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127. Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1751 (1992).