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ABSTRACT

This Article explores the development of the political question doctrine in North Carolina jurisprudence. The Article describes the federal origins of the doctrine and charts its adoption in North Carolina, first through the litigation of fundamental rights cases and later in separation of powers matters. The political question doctrine is a prudential doctrine exercised by courts that serves as a bar to relief on matters where the coordinate political branches of government—the executive and legislative—may have primacy. This Article concludes that the doctrine has been narrowed over time in North Carolina, though it may still be utilized in certain instances.

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INTRODUCTION

North Carolina courts have seen an abundance of litigation, both between branches of government and involving certain engagements by the executive and legislative branches, since 2016. The "somewhat droll curse, '[m]ay you live in interesting times'" is an apt phrase for lawyers, policymakers, scholars, journalists, and other court watchers in this context.[1]

The past five years have witnessed a significant number of lawsuits between state-elected officials, among branches of government, and by individuals challenging certain state actions.[2] In evaluating these claims, a common question raised before a court is whether the issue is a political question. Certainly, state and federal courts are called to resolve disputes that arise in the "political" space: be they election disputes,[3] challenges to legislation,[4] or a candidate suing an opponent for state action during the

1. Commonwealth v. Breighner, 22 Pa. D. & C.4th 493, 496 n.1 (C.P. Ct. Adams Cnty. 1994).

2. *See generally* State v. Berger, 781 S.E.2d 248, 248 (N.C. 2016) (discussing an action brought by the governor against state legislators claiming that certain statutes dealing with the appointment to and authority of certain commissions violated the appointments clause and separation of powers clause of the N.C. Constitution); Cooper v. Berger, 809 S.E.2d 98, 98 (N.C. 2018) (discussing an action brought by the governor against the General Assembly challenging the constitutionality of legislation consolidating functions of elections, campaign finance, lobbying, and ethics under the newly-created Bipartisan State Board of Elections and Ethics Enforcement); Cooper v. Berger, 852 S.E.2d 46, 46–47 (N.C. 2020) (discussing an action brought by the governor against President Pro Tempore of the State Senate and State House of Representatives challenging the constitutionality of a statute requiring senatorial confirmation of members of the Governor's Cabinet); Order on Motion for Preliminary Injunction at 1, Forest v. Cooper, No. 20 CVS 727 (N.C. Super. Ct. Aug. 11, 2020) (resolving a Motion by Lieutenant Governor Forest against Governor Roy Cooper concerning several of Cooper's executive orders relating to COVID-19); Talleywhacker, Inc. v. Cooper, 465 F. Supp. 3d 523, 523–24 (E.D.N.C. 2020) (discussing a § 1983 action by "operators of entertainment businesses" against the governor); Complaint at 1, Cooper v. Berger, No. 20 CVS 09542 (N.C. Super. Ct. Aug. 27, 2020) (bringing claims on behalf of Governor Cooper that certain state laws enacted by the General Assembly were unconstitutional); Common Cause v. Lewis, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *5 (N.C. Super. Ct. Sept. 3, 2019) (discussing the constitutionality of certain legislative districts enacted by the General Assembly in 2017).

3. *See generally* Response to Petition for Writ of Mandamus at 1–2, Harris v. N.C. Bipartisan Bd. of Elections and Ethics Enf't, No. 19 CVS 000025 (N.C. Super. Ct. Jan. 14, 2019) (describing Petitioner's request, during an on-going investigation into election irregularities, for an order deciding the election in Petitioner's favor as "legally impermissible").

4. *See generally* Cmty. Success Initiative v. Moore, No. 19 CVS 15941, 2020 NCBC LEXIS 113 (N.C. Super. Ct. Sept. 4, 2020) (resolving Plaintiifs' claim that certain statutes enacted by the General Assembly were in violation of the State Constitution).

course of their candidacy.[5] When these challenges implicate a violation of the state or federal constitution, courts may rely on a number of themes to evaluate the constitutional issue before them.

The political question doctrine is a prudential doctrine, consistent with the findings of constitutional scholar Philip Bobbitt's Constitutional Interpretation.[6] That is, the doctrine is a shield provided to defendants in which a judge may determine that it is not in the interest of justice to provide the requested relief, despite the claim being cognizable as a violation of the plaintiff's constitutional rights. As Bobbitt writes about modalities generally, "each of these forms of argument can be used to construct an ideology, a set of political and practical commitments . . . [that] can be distinguished, externally, from competing ideologies."[7] From this ideological framework, a prudential doctrine, when deployed, may preserve the flexibility of the courts in applying the law or in ordering a remedy while assessing the facts before it. The prudential modality "seek[s] to balance the costs and benefits of a particular rule."[8] That flexibility—or evolution—is evident in the political question doctrine's invocation in North Carolina courts.[9]

In North Carolina, the doctrine has narrowed significantly since its introduction in the early 2000s. Though practically, the doctrine is applied differently in separation of powers cases and individual liberty cases. In other words, the doctrine operates more narrowly on a structural level, resulting in an empowered executive branch; while on matters of fundamental

5. *See generally* Complaint and Motion for Temporary and Permanent Injunction; Request for Exceptional Case Designation Recommendation at 2–8, Forest v. Cooper, No. 20 CVS 07272 (July 1, 2020) (bringing a suit by Lieutenant Governor Forest against Governor Roy Cooper regarding Cooper's response to COVID-19).

6. *E.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–22 (1991). *But see* Ron Park, *Is the Political Question Doctrine Jurisdictional or Prudential?*, 6 U.C. IRVINE L. REV. 255, 255 (2016) (stating that some courts disagree whether a political question is jurisdictional or prudential). Because Bobbitt's modalities do not include a jurisdictional modality, it might be classified accordingly as doctrinal, as it is based on previous rulings by the courts and rules that require jurisdictional matters to be addressed *ab initio*.

7. BOBBITT, *supra* note 6, at 22.

8. *Id.* at 13.

9. *See, e.g.*, Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031, 1031 (1985) ("The [political question] doctrine has always proven to be an enigma to commentators. Not only have they disagreed about its wisdom and validity . . . but they also have differed significantly over the doctrine's scope and rationale."). Given the six-part test set forth in the foundational U.S. Supreme Court opinion on the federal political question doctrine, Baker v. Carr, 369 U.S. 186, 211–22 (1962), Erwin Chemerinsky writes, "it hardly is surprising that the doctrine is described as confusing and unsatisfactory." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 142 (6th ed. 2019).

liberties, a narrowly applied doctrine acts to limit retrenchment and preserve individual liberty.

This Article will examine the scope, evolution, and utilization of the political question doctrine in North Carolina courts. Part II will explore the origins of the political question doctrine at the federal and state level. Part III then turns to how the political question doctrine has been clarified through structural separation of powers matters and fundamental rights challenges in North Carolina courts. Next, Part IV examines the political question doctrine's application—or lack thereof—in the recent state trial court extreme partisan gerrymandering litigation; the U.S. Supreme Court held this same issue was nonjusticiable as a political question for federal courts. Finally, Part V examines the current proposed framework adopted by the courts for political questions and concludes that the doctrine's narrow application in state courts is tied to traditional prudential interests of preserving the courts' autonomy.

I. ORIGINS OF THE DOCTRINE

After remaining dormant during the Reconstruction Era, through the New Deal, and into the post-World War II era, the political question doctrine reemerged in 1962 in the context of redistricting and gerrymandering when the U.S. Supreme Court decided *Baker v. Carr*.[10] The case dealt with racial gerrymandering in the Tennessee legislature. The case's prominence is twofold: it found, for the first time, that the U.S. Supreme Court could address the constitutionality of state redistricting plans, and it also articulated the modern-day political question doctrine.[11] These tent poles have remained closely intertwined. Indeed, fifty-seven years later, in *Rucho v. Common Cause*, the U.S. Supreme Court held by a 5–4 majority that partisan gerrymandering claims—claims originating in North Carolina, as it were—were not subject to federal court review, though they were cognizable at the state level.[12]

In *Baker*, the Court provided a six-factor test which has remained at the center of political question analysis in state and federal courts ever since:

10. *Baker*, 369 U.S. at 186.

11. Some forty-seven years later, the U.S. Supreme Court held that state partisan gerrymandering and redistricting claims, as opposed to racial gerrymandering, were not subject to review by the federal courts. *See* Rucho v. Common Cause, 139 S. Ct 2484 (2019).

12. *Id.* at 2506–07.

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[13]

While the *Baker v. Carr* factors are overlapping, they provide an aggregate map detailing the contours of how a claim may be deemed nonjusticiable as a political question where the following are extant: (1) express constitutional commitment to the executive or legislative branch; (2) a manageable or discovered rule to apply; (3) non-discretionary policy determination; (4) an analysis that appears disrespectful to the other branches; (5) an unusual degree of unquestioned adherence to an already decided policy matter; and (6) the potential for the courts to be embarrassed by different pronouncements on the same question.

While these factors can overlap and may differ among the perspective of litigants before a court, the aggregated factors subject to consideration in analyzing the political question doctrine underscore the prudential nature of the courts when deploying the doctrine in demurring on providing relief that may be requested. However, the prudential nature of balancing the competing demands for justice, comity, and resolution point towards a pathway by which plaintiffs may elide the bar that the political question doctrine might otherwise present for relief.

North Carolina courts' engagement with the political question doctrine has been closely intertwined with separation of powers cases. North Carolina has an express separation of powers constitutional provision,[14] contrasted with the federal Constitution, where separation of powers has evolved as a doctrine. In North Carolina, the political question doctrine and separation of powers have been closely intertwined within the state's jurisprudence. In 2001, Justice Martin wrote about both principles in the context of a challenge to the governor's clemency authority.[15]

In *Bacon v. Lee*, an individual sentenced to death, and whose appeals were defended by Attorney General Easley, sought to have Governor Easley

13. *Baker*, 369 U.S. at 217.

14. N.C. CONST. art. I, § 6.

15. Bacon v. Lee, 549 S.E.2d 840, 853–854 (N.C. 2001).

divested from exercising the governor's constitutional clemency authority after he was elected governor.[16] In his opinion, Justice Martin provided extensive analysis of the separation of powers doctrine under North Carolina and federal law.[17] He also provided an articulation of principles around the traditional political question doctrine to explain why the courts were not providing relief to the individual awaiting execution and challenging the state clemency process which resides exclusively with the governor:

> [W]e note the basic premise of the political question doctrine to the extent it helps explain the traditional nonjusticiability of federal and state clemency procedures. The political question doctrine controls, essentially, when a question becomes "not justiciable . . . because of the separation of powers provided by the Constitution." "The . . . doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions[.]" "It is well established that the . . . courts will not adjudicate political questions." A question may be held nonjusticiable under this doctrine if it involves "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[18]

Thus, in regard to the prisoner challenging the clemency decision process, Justice Martin wrote that intervention by the courts would "unreasonably disrupt a core power of the executive" from judicial review.[19] Notably, the court's election to not weigh in on a clemency matter can be well understood on separation of powers principles. However, in providing both a separation of powers analysis and a political question doctrine basis to deny relief, the court set forth a more truncated political question doctrine than the traditional factors articulated in *Baker v. Carr*. Moreover, the *Bacon* court quotes *Baker* for the principle that "a textually demonstrable constitutional commitment of the issue to a coordinate political department" is

16. *Id.* at 844–45.

17. *Id.* at 853–54.

18. *Id*. at 854 (first quoting Powell v. McCormack, 395 U.S. 486, 517 (1969) (alteration in original); then quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (alteration in original); then quoting *Powell*, 395 U.S. at 518 (alteration in original); and then quoting *Baker*, 369 U.S. at 217).

19. *Id.*

grounds for application of the doctrine, but it did not include the remaining five elements in its discussion of the case or the doctrine.[20]

The *Bacon* court used the political question doctrine as a prudential matter to support demurring on intervening in Governor Easley's performance of his executive clemency authority. Notably, the other *Baker* factors, including "expressing lack of the respect due coordinate branches of government" in particular, militate for the political question doctrine remaining a shield to recovery in the *Bacon* case.[21] The relief sought in *Bacon*, removal of the clemency authority from the Governor based on his prior acts in furtherance of his official duties in previous

jobs—essentially finding a conflict of interest in the performance of his duties and not in his capacity as counsel—would have been tantamount to an expression of a lack of respect for the head of a coordinate branch of state government.[22]

The other formative political question case in North Carolina, *Hoke County Board of Education v. State* (*Leandro II*),[23] decided three years after *Bacon*, provides a similar assessment of the political question doctrine. *Leandro II* followed on the previous landmark school funding case, *Leandro v. State* (*Leandro I*),[24] which addressed the North Carolina Constitution's requirement that the State provide for public education for school age children.[25] Stepping back, the *Leandro* line of cases, which have been presented to the Supreme Court of North Carolina on four different occasions for arguments on the merits, center on the state constitution's guarantee that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[26] In 1997, Chief Justice Burley Mitchell authored the first opinion, *Leandro I*, which held that the State of North Carolina must provide public school children a "sound basic education."[27] At issue before the court in *Leandro I*, which was decided before *Bacon*, was whether the enumerated right to education set out a qualitative standard or was merely a right to access an education.[28]

The *Leandro I* court notably grounded its assessment in its own jurisprudence and the General Statutes to conclude the right was viable in North

20. *Id.* (quoting *Baker*, 369 U.S. at 217).
21. *Baker*, 369 U.S at 217.
22. *See Bacon*, 549 S.E.2d at 854.
23. Hoke Cnty. Bd. of Educ. v. State (*Leandro II*), 599 S.E.2d 365 (N.C. 2004).
24. Leandro v. State (*Leandro I*), 488 S.E.2d 249 (N.C. 1997).
25. *Id.* at 257.
26. N.C. CONST. art. I, § 15.
27. *Id.* at 254.
28. *Id.*

Carolina. Interestingly, the court gave some address to issues of justiciability but grounded its analysis in cases regarding judicial review and not the modern political question doctrine. *Leandro I* addressed the issue as a "threshold" matter.[29] Rather than citing to *Baker v. Carr*, the *Leandro I* court looked to the traditional judicial review cases of North Carolina law.[30] Thus, while the *Leandro I* court clearly holds that the matter is justiciable, and it identifies the textual commitments in the state constitution regarding public education and obligations reserved to the General Assembly and local governments,[31] it does not provide a traditional political question doctrine analysis in the same way that *Bacon v. Lee* or later cases do.

Alternatively, the *Leandro I* court cited back to the 1917 Supreme Court of North Carolina case of *Board of Education v. Board of Commissioners of Granville County*,[32] affirming that the state constitution's education provision must meet the adequate needs of the state's population. It also identified Chapter 115C of the General Statutes to confirm the qualitative requirements of education in the state constitution.[33] Notably, no discussion addressed the justiciability of the quantitative requirement under Article I. However, the court stated:

> We acknowledge that the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education. The members of the General Assembly are popularly elected to represent the public for the purpose of making just such decisions. The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants. The legislature can properly conduct public hearings and committee meetings at which it can hear and consider the views of the general public as well as educational experts and permit the full expression of all points of view as to what curricula will best ensure that every child of the state has the opportunity to receive a sound basic education.[34]

29. *Id.* at 253.

30. *Id.* (citing Mitchell v. N.C. Indus. Dev. Fin. Auth., 159 S.E.2d 745, 144 (N.C. 1968); *Ex parte* Schenck, 65 N.C. 353, 367 (1871); Bayard v. Singleton, 1 N.C. 5, 6–7, 1 Mart. 48, 49–50 (1787)).

31. *Id.*

32. Bd. of Educ. v. Bd. of Comm'rs Granville Cnty., 93 S.E. 1001 (N.C. 1917).

33. *Leandro I*, 488 S.E.2d at 254–55.

34. *Id.* at 259.

In *Leandro I*, the court looked to whether the State was providing school age children with an education in compliance with the Article I guarantee that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[35] In addition, the court weighed the provision that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students."[36] Thus, while the modern political question doctrine swirls through *Leandro I*, both in its threshold inquiry of justiciability as well as what the role of the coordinate branches are in remedying the found violation, it is not until *Leandro II* that the court picks up the doctrine in addressing the issues surrounding public education funding in North Carolina.

In *Leandro II*, the Hoke County Board of Education returned to the Supreme Court of North Carolina on the issue of North Carolina's ability to provide a "sound basic education" consistent with the constitutional public education requirement.[37] There, the Supreme Court of North Carolina generally affirmed the trial court's 400-page order regarding the State's continued noncompliance with the constitution. However, in addressing the trial court's remedies, the court found that judicially mandating a lower starting age for kindergarteners, which the trial court had ordered, violated the political question doctrine.[38]

In the *Leandro II* opinion, Justice Orr noted that *Baker v. Carr* crafted a political question doctrine finding that issues were nonjusticiable "(1) when the Constitution commits an issue . . . to one branch of government; *or* (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue."[39] Thus, the Supreme Court of North

35. N.C. CONST. art. I, § 15.

36. N.C. CONST. art. IX, § 2, cl. 1.

37. Hoke Cnty. Bd. Of Educ. v. State (*Leandro II*), 599 S.E.2d 365, 373 (N.C. 2004).

38. *Id.* at 391.

39. *Id.* (citing Baker v. Carr, 369 U.S. 186, 210 (1962)). Notably, in *Leandro II*, the court also does not expressly adopt the totality of the *Baker v. Carr* standards. It remains unclear if a claim that would be subject to one of the non-identified factors, such as causing embarrassment to the judiciary by multiple pronouncements on an issue, or reliance on a previously decided policy question, would be grounds in North Carolina courts for invocation of the political question doctrine. North Carolina courts have a lengthy tradition of generating their own jurisprudence that does not provide similar interpretations to state constitutional matters as the U.S. Supreme Court may have applied to federal constitutional matters. *See, e.g.*, Stephenson v. Bartlett, 562 S.E.2d 377, 393–96 (N.C. 2002) ("It is beyond dispute that [North Carolina courts] 'ha[ve] the authority to construe [the North Carolina Constitution] differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they

Carolina found that the trial court's remedy requiring compulsory attendance for children under seven years of age was unenforceable because it was nonjusticiable as a political question.[40]

In *Leandro II*, these themes of securing a guarantee of relief in enforcing an alleged violation of a state constitutional right and the involvement of the political branches are reinforced. There, the state supreme court cited to both the General Statutes and "constitutional provisions" in North Carolina, and no evidence was presented to the trial court to establish satisfactory or manageable criteria for judicial determination of the issue.[41] Yet, the reasoning behind this determination could have also militated for affirming the trial court order. North Carolina has a statutory requirement permitting optional school attendance for five-year-old children.[42] The "constitutional provisions" include a right bestowed upon the people of the state for the "privilege of education,"[43] and Article IX of the North Carolina Constitution further details the constitutional requirements around the provision of public education and the creation of a State Board of Education.[44] The state constitutional right to provide a "sound basic education" through state supported public schools is at the core of the *Leandro* litigation.[45] Yet, for the *Leandro II* court, these standards were not sufficient to move beyond the political question doctrine to shift the age of compulsory attendance to what had otherwise been recommended.

Further, *Leandro II* concluded with the curious exhortation that "[t]his Court now remands to the lower court and ultimately into the hands of the legislative and executive branches, one more installment in the 200-plus year effort to provide an education to the children of North Carolina."[46] Accordingly, the same case that confirmed that the issue of ensuring a "sound basic education" in state schools was justiciable also invoked the political question doctrine to reverse and remand a lower age of compulsory

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are guaranteed by the parallel federal provision.'" *Stephenson*, 562 S.E.2d 395 n.6 (quoting State v. Carter, 370 S.E.2d 553, 555 (N.C. 1988))). *See generally* MARK DAVIS, A WARREN COURT OF OUR OWN: THE EXUM COURT AND THE EXPANSION OF INDIVIDUAL RIGHTS IN NORTH CAROLINA (2020) (reviewing the history of North Carolina's Exum Court—one known for a strong departure from historical norms of the state).

40. *Leandro II*, 488 S.E.2d at 391.

41. *Id.*

42. N.C. GEN. STAT. ANN. § 115C-364 (West 2022).

43. N.C. CONST. art. I, § 15; *see Leandro II*, 599 S.E.2d at 380.

44. N.C. CONST. art. IX, § 2; *see Leandro II*, 599 S.E.2d at 380.

45. *See Leandro I*, 488 S.E.2d at 254; *Leandro II*, 599 S.E.2d at 391.

46. *Leandro II*, 599 S.E.2d at 397.

school-age attendance.[47] Moreover, the *Leandro II* court remanded the case to the trial court and *expressly* to the other political branches, which it deemed the ultimate authority to address deficiencies in the state's provision of educational instruction to its children. At the same time, the *Leandro* line of cases has been very clear that the state constitution's command that students receive an education is not subject to the political question doctrine, nor is the doctrine an apparent bar to remedies ordered by the courts in this context.

In conclusion, the state's highest court engaged with the political question doctrine at the turn of this century in a circumscribed manner that incorporated the federal principles articulated in *Baker*.[48] The factors articulated in *Baker* supported demurral in *Bacon* but could have permitted intervention in *Leandro II*. Both *Bacon* and *Leandro II* also dealt with remedies brought by individuals against state actions.[49] The *Bacon* court resolved whether the judicial branch should intervene regarding an individual's due process interests in an executive branch matter.[50] *Leandro II* addressed whether the judicial branch should further compel the legislative and executive branches to take additional steps to provide a "sound basic education."[51] While *Leandro II* addressed an individual right across a public school system, it did not necessarily implicate separation of powers or other doctrines that would have eluded justiciability. Although both of these cases laid the foundation for modern political question doctrine cases in North Carolina law, neither of them addressed the political question doctrine where the political branches were not aligned. However, beginning with the separation of powers challenges between the executive and legislative branches in 2016, the doctrine was again invoked and assessed.

II. EVOLUTION OF THE DOCTRINE

A. Separation of Powers/Intramural Challenges

In 2014, the General Assembly enacted a law providing for the creation of a series of new boards and commissions with a majority of members appointed by the General Assembly.[52] Governor McCrory challenged the law

47. *Id.* at 391.

48. *See* Bacon v. Lee, 549 S.E.2d 840, 854 (N.C. 2001).

49. *Id.* at 844; *Leandro II*, 599 S.E.2d at 374.

50. *See Bacon*, 549 S.E.2d at 854.

51. *See Leandro II*, 599 S.E.2d at 386.

52. State v. Berger, 781 S.E.2d 248, 250–51 (N.C. 2016) (citing N.C. GEN. STAT. §§ 143B-290 to -293.6 (2014); N.C. GEN. STAT. §§ 130A-200 to -309.231 (2014)).

as a violation of separation of powers and the Appointment Clause of the North Carolina Constitution.[53] The court unanimously held that the Appointment Clause was not violated, but a six-justice majority found that the enacted law violated the separation of powers.[54] Dissenting on the separation of powers issue, Justice Newby wrote that justiciability of this type of case was inappropriate when "any substantive review by the Court would interfere with the Governor's express constitutional authority. When one branch interferes with another branch's performance of its constitutional duties, it attempts to exercise a power reserved for the other branch."[55] Justice Newby thus argued that the legislature, by only appointing individuals to a commission, did not impermissibly interfere with the executive branch's performance of its duties.[56]

This reasoning was not dissimilar from Justice Martin's citing of the political question doctrine in *Bacon* or Justice Orr's demurral of applying a remedy in *Leandro II*. Moreover, this language in Justice Newby's dissent raises the question of when the judicial branch could *ever* intercede in judicial review of the actions of another branch. In other words, what judicial determination would *not* be an "impermissible interference" with the actions of a coordinate branch is unclear, as the very act of declaring what the law is requires an analysis of such actions.[57] The express authority of the legislature and executive branches would appear to create a standard of review that would augur towards determining more cases as nonjusticiable, so long as the other branch was performing its constitutional duties. Thus, per Justice Newby's dissent in *Berger*, judicial involvement in remedying the alleged separation of powers violation at issue in the case would itself be a political question and violate the separation of powers principle. Such an application of the political question doctrine would extend past the contours framed by *Baker v. Carr* and raise further uncertainty regarding the application of judicial review in fundamental matters where a case or controversy needs to be resolved.

In 2018, the Supreme Court of North Carolina was again faced with the issue of justiciability around separation of powers challenges in *Cooper v. Berger*.[58] There, the court was faced with determining whether the

53. *Id.* at 251.

54. *Id.* at 258.

55. *Id.* at 266 (Newby, J., dissenting) (citing *Bacon*, 549 S.E.2d at 854, 857) (explaining the *Bacon* decision and the Court's reasoning in the case).

56. *Id.*

57. *See* Cooper v. Berger, 809 S.E.2d 98, 113 (N.C. 2018).

58. *Id.* at 110–17.

General Assembly could constitutionally provide for the appointment of Board members to oversee state elections and ethics such that the governor did not retain a majority of appointments.[59] A closely divided court held that it could not.[60] Ultimately, the majority in *Cooper* found that the General Assembly violated the state constitution's separation of powers provision by interfering with the governor's authority, which is textually committed to the executive in the state constitution, "to take care that the laws are faithfully executed."[61]

The General Assembly argued in its briefing that the issue of Board appointment was not justiciable as essentially a political question. Notably, the *State v. Berger* court did not address the political question doctrine in Chief Justice Martin's 2016 majority opinion; though, as noted above, Justice Newby raised the matter in his dissent in *Cooper v. Berger*.[62] Rather, Justice Ervin, writing for the majority in *Cooper*, stated that issues before a court are nonjusticiable when cases are brought relating to "policy choices" and "value determinations" committed to the executive or legislative branch under the constitution.[63] Justice Ervin went on to state, "[t]he political question doctrine controls, essentially, when a question becomes 'not justiciable . . . because of the separation of powers provided by the Constitution.'"[64] In the case of the session law that provided for an evenly split Board overseeing elections and ethics, Justice Ervin found that the political question doctrine did not apply; the case was a violation of the separation

59. *Id.* at 116–17. By 2019, the General Assembly abandoned its attempts to combine the State Board of Elections and the Ethics Commission after subsequent litigation again challenging attempts by the General Assembly to limit the Governor's authority to oversee the boards. *See generally* Tae Aderman, *North Carolina Courts Again Strike Down Chair Selection Process for New State Ethics Board*, MULTISTATE (Nov. 26, 2018), https://www.multistate.us/insider/2018/11/26/north-carolina-courts-again-strike-down-chair-selection-process-for-new-state-ethics-board, [https://perma.cc/MGZ5-7DSP] (noting that, in October 2018, a three-judge panel ruled the General Assembly's third version of the statute was unconstitutional); Cole del Charco, *Bill Addressing State Elections Board Passes, Goes to Governor*, WFAE 90.7 (Dec. 12, 2018, 4:52 PM), https://www.wfae.org/politics/2018-12-12/bill-addressing-state-elections-board-passes-goes-to-governor, [https://perma.cc/96XW-MCHS] (stating that in December 2018, the General Assembly approved a bill to return the State Board of Elections and Ethics Enforcement to its former structure).

60. *Id.* at 116.

61. *Id.* at 110 (citing State v. Berger, 781 S.E.2d 248, 250 (N.C. 2016)).

62. *Id.* at 120. Notably, it was Justice Martin who authored *Bacon v. Lee* in the previous decade. Bacon v. Lee, 549 S.E.2d 840, 843 (N.C. 2001).

63. *Cooper*, 809 S.E.2d at 107 (quoting *Bacon*, 549 S.E.2d at 854).

64. *Id.* (alteration in original) (quoting Bacon v. Lee, 549 S.E.2d 840, 854 (N.C. 2001)).

of powers provision in the state constitution.[65] In other words, the session law's design to create an evenly-allocated Board between appointments from the governor and General Assembly violated the governor's Article III authority to "take care that the laws be faithfully executed."[66]

Justice Ervin contrasted the justiciability of the Board issue with *Bacon v. Lee*, where the political question doctrine supported a finding of nonjusticiability by the courts.[67] He also compared the Board composition issue to a court of appeals case, *News & Observer Publishing Co. v. Easley*, regarding public record requests against the governor.[68] At issue in *News & Observer* was the state's public records laws and their applicability to a constitutionally committed clemency authority that rests with the governor.[69] There, the court of appeals determined it had a duty "to identify where the line should be drawn . . . between the Executive Branch and the Legislature. . . ."[70] Justice Ervin further used *News & Observer* to assess the issue of justiciability in stating:

> [I]n order to resolve the justiciability issue, we must decide whether the Governor is seeking to have the judicial branch interfere with an issue committed to the sole discretion of the General Assembly or whether the Governor is seeking to have the Court undertake the usual role performed by a judicial body, which is to ascertain the meaning of an applicable legal principle, such as that embodied in N.C. Const. art. III, § 5(4).[71]

In deciding that the court was undertaking its "usual role," Justice Ervin highlighted the tension that exists between the separation of powers textual commitment in the state constitution and the political question doctrine of nonjusticiability.[72] In the earlier generation of political question doctrine cases, the court in *Bacon* and *Leandro II* was faced with determining whether the political question doctrine compelled it to intervene in a matter brought by an individual regarding a matter reserved to another branch. However, with the advent of recent separation of powers litigation

65. *Id.* at 109–11.

66. N.C. CONST. art. III, § 5, cl. 4.

67. *Cooper*, 809 S.E.2d at 107–08; *Bacon*, 549 S.E.2d. at 854.

68. *Cooper*, 809 S.E.2d at 108; News & Observer Publ'g Co. v. Easley, 641 S.E.2d 698, 698 (N.C. App. 2007).

69. *News & Observer*, 641 S.E.2d at 702.

70. *Id.* at 700.

71. *Cooper*, 809 S.E.2d 98, 108 (N.C. 2018).

72. *Id.* at 108–110.

between two branches, the assessment of whether a matter is a political question has to be evaluated differently. Justice Ervin found that the "manageable standard" that avoids the political question doctrine of nonjusticiability was articulated by Chief Justice Martin in *State v. Berger*: whether the legislative action "exercises power that the constitution vests exclusively in another branch" or "when the actions of one branch prevent another branch from performing its constitutional duties."[73]

Justice Newby's dissent in *Cooper* makes clear his belief that Justice Ervin's majority opinion "eliminates the political question doctrine" in North Carolina jurisprudence and "inserts the judiciary" between the political branches in all separation of powers disputes.[74] Justice Newby references the foundational political question doctrine case of *Baker v. Carr* and cites to four of the criteria articulated in that decision.[75] Moreover, Justice Newby asserts that the opinion created a constitutional authority for "the Governor to enforce personal policy preferences superior to the General Assembly's historic constitutional authority to make the laws."[76]

B. Individual Rights in Legislative Organization

Against the backdrop of what appears to be a narrower political question doctrine in North Carolina courts, two recent cases provided further context to the scope of the doctrine as it relates to individual challenges against state action. These challenges involved claims that originated the modern political question doctrine in North Carolina. One of these cases, *Common Cause v. Forest*, a court of appeals opinion regarding the right of North Carolinians to instruct their representatives, found that such a right's expression was subject to the political question doctrine.[77] Another case, *Common Cause v. Lewis*,[78] involved a three-judge panel's determination at the trial court that state courts were able to adjudicate extreme partisan gerrymandering cases after the U.S. Supreme Court found that such cases were subject to the federal political question doctrine. This section will briefly discuss both cases.

73. *Id.* at 111 (citing State v. Berger, 781 S.E.2d 248, 256 (N.C. 2016)).

74. *Id.* at 127 (Newby, J., dissenting).

75. *Id.* at 124 (Newby, J., dissenting) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

76. *Id.* at 128.

77. Common Cause v. Forest, 838 S.E.2d 668, 671 (N.C. App. 2020).

78. Common Cause v. Lewis, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56 (N.C. Super. Ct. Sept. 3, 2019).

1. Right to Instruct Legislators

In *Common Cause v. Forest*, members of the plaintiffs' organization and the group itself claimed that their right to instruct legislators in the political process was infringed when the General Assembly enacted a special session without providing notice and passed legislation limiting the power of the executive branch.[79] The plaintiffs' claim was based on Article I, Section 12 of the North Carolina Constitution which states, "The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated."[80]

When the General Assembly returned Gubernatorial Proclamation to appropriate disaster relief funds in December 2016 and after Governor-elect Cooper was declared the winner of the 2016 governor's race but before he was sworn in, the General Assembly entered into an additional special session. During that session, the General Assembly passed legislation that addressed certain bills that attempted to limit the authority of the governor.[81] On appeal, the court of appeals found that the individual's constitutional claims were nonjusticiable and were subject to a remedy through future elections but not in court. Judge Dietz, writing for the court, said "[t]he judicial branch has no constitutional authority to demand from the legislative branch an explanation of why a particular bill must move quickly to enactment, much less the authority to review whether that explanation is 'valid.'"[82]

In his reasoning, Judge Dietz articulated that the framers of the North Carolina Constitution were purposeful in demurring on exerting control over the manner and mechanism by which the legislature conducted its affairs.[83] He stated:

79. *Forest*, 838 S.E.2d at 670.

80. N.C. CONST. art. I, § 12.

81. *Forest*, 838 S.E.2d at 671 (noting that, of the 21 bills introduced during the fourth extra session, plaintiff specifically challenges House Bill Seventeen and Senate Bill Four). *See generally* H.B. 17, 2015–16 Gen. Assemb., 4th Spec. Sess. (N.C. 2016) (making various changes to laws regarding, *inter alia*, the appointments of heads of principal State departments); S.B. 4, 2015–16 Gen. Assemb., 4th Spec. Sess. (N.C. 2016) (creating the Bipartisan State Board of Elections and Ethics Enforcement; clarifying the General Assembly's authority in apportionment and redistricting matters; and restoring partisan elections for the North Carolina Supreme Court and Court of Appeals).

82. *Forest*, 838 S.E.2d at 675 (citing Cooper v. Berger, 809 S.E.2d 98, 107 (N.C. 2018)).

83. *Id.*

> Instead, the framers left to the judgment of the legislative branch how quickly to move a bill through the law-making process. The Right to Instruct . . . simply requires that the process, however quickly it moves, must be open to the public, and that the people must have ways to contact their representatives to convey their views during that process.[84]

Further, in his reasoning, Judge Dietz noted that the "political question doctrine . . . stems from our State's express guarantee of the separation of powers," and he cited to *Cooper v. Berger* for the principle that controversies over "policy choices" and "value determinations" are committed to separate constitutional branches.[85] Similarly, the opinion articulated that no right exists by the people to object to "abridged" law-making.[86]

As a result, and in part because application of the political question doctrine avoided determining that the bills at issue were unconstitutional, Judge Dietz also interpreted the right to instruct in the state constitution as being a right for the people to "'teach' or 'advise'" the elected officials.[87] The scope of the right to teach or advise is in "protect[ing] the ability of the people to contact their elected representatives and convey their views about the decisions those representatives are tasked with making on their behalf."[88]

Thus, the scope of the right to instruct the people's representatives and the political question doctrine are intertwined in *Forest*. Judge Dietz used the political question doctrine and the guarantee of separation of powers to avoid overturning bills that were passed by the General Assembly and signed by the governor in a session that was not noticed.[89] Because the courts cannot intervene, under the political question doctrine, the right at issue in *Forest* appears limited to the right to participate in the political process. With the scope of the right so broadly defined, it appears to be unavailable as a basis for a particular claim to be vindicated in state courts.

2. Extreme Partisan Gerrymandering

The second notable political question doctrine analysis came from a three-judge panel in *Common Cause v. Lewis*, an extremely partisan

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 673.
88. *Id.*
89. *Id.* at 675.

gerrymandering case.[90] Just three months after the U.S. Supreme Court held extreme partisan gerrymandering claims in federal court were subject to the federal political question doctrine,[91] a three-judge panel of North Carolina superior court judges unanimously held that the state's political question doctrine did not preclude such claims.[92]

In doing so, Judge Ridgeway, writing for the court, cited to *Leandro I* for the principle that courts must interpret the meaning of the constitution.[93] Similarly, the court has a duty to ascertain and declare the intent of the constitution's framers.[94] Courts, including the three-judge panel, have long held that redistricting questions generally are justiciable.[95] And in this instance, contrary to federal courts, the three-judge panel agreed that "state courts are particularly well-positioned to adjudicate redistricting disputes, as the public may 'more readily accept state court intervention . . . than . . . federal intervention in matters of state government.'"[96]

Turning to the issue of whether state courts had the authority to decide the issue, Judge Ridgeway noted that Common Cause's claims regarding the composition of the legislatively created districts, "fall within the broad, default category of constitutional cases the North Carolina courts are empowered and obliged to decide on the merits, and not within the narrow category of exceptional cases covered by the political question doctrine."[97] While the court of appeals in *Common Cause v. Forest* was clear that the political question doctrine and the separation of powers are intended to preserve the balance of power between branches of government, Judge Ridgeway was equally clear to "conclusively refute any notion that redistricting is 'committed to the *sole* discretion of the General Assembly' without judicial review by the courts."[98]

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90. Common Cause v. Lewis, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56 (N.C. Super. Ct. Sept. 3, 2019).

91. Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.").

92. *Lewis*, 2019 N.C. Super. LEXIS 56 at *385–89.

93. *Id.* at *381.

94. *Id.* (quoting Maready v. City of Winston-Salem, 467 S.E2d 615, 620 (N.C. 1996)).

95. *See, e.g.*, Stephenson v. Bartlett, 562 S.E.2d 377, 384–86 (N.C. 2002); Dickson v. Rucho, 781 S.E.2d 404, 415 (N.C. 2015), *vacated*, 137 S. Ct. 2186 (2017); Pender Cnty. v. Bartlett, 649 S.E.2d 364, 366 (N.C. 2007).

96. *Lewis*, 2019 N.C. Super. LEXIS 56 at *383 (alteration in original) (quoting Brooks v. Hobbie, 631 So. 2d 883, 890 (Ala. 1993)).

97. *Id.* at *385–86.

98. *Id.* at *386 (citing *Cooper*, 809 S.E.2d at 108).

In support of his position, Judge Ridgeway wrote that while the General Assembly is empowered under the state constitution to unilaterally draw and promulgate legislative districts, other constitutional provisions, like the Free Elections and Law of the Land Clauses,[99] operate to provide significant constraints against that power.[100] These individual rights—in contrast to the right to instruct in Judge Dietz's opinion—"must have a judicial 'remedy for the violation of plaintiff's constitutionally protected right of free speech.'"[101] Thus, for the three-judge panel in *Lewis*, rights were interpreted to apply to individuals and given proper scope to avoid application of the political question doctrine.[102]

In *Common Cause v. Lewis*, the court was clear that they were operating as something of a democratic backstop to a political branch. The *Lewis* court viewed the legislature as retrenching themselves into perpetual authority over the will of the people and the authority vested in other branches by enacting a redistricting plan that gave the party in power a considerable advantage in preserving, and even growing, their control of the legislative chambers:

> If unconstitutional partisan gerrymandering is not checked and balanced by judicial oversight, legislatures elected under one partisan gerrymander will enact new gerrymanders after decennial census, entrenching themselves in power anew decade after decade. When the North Carolina Supreme Court first recognized the power to declare state statutes unconstitutional, it presciently noted that absent judicial review, members of the General Assembly could 'render themselves the Legislators of the State for life, without any further election of the people.'[103]

III. ARTICULATED FRAMEWORK

With the frequency of litigation, both between the political branches and individual litigants seeking courts to vindicate a violation of their rights, state courts are likely to continue facing arguments on the applicability of the political question doctrine. As Justice Ervin noted in *Cooper v. Berger*, "[i]n determining whether a question falls within [the political question] category, the appropriateness under our system of government attributing

99. N.C. CONST. art. I, §§ 10, 19.

100. *Lewis*, 2019 N.C. Super. LEXIS 56, at *386–387.

101. *Id.* at *387 (quoting Corum v. Univ. of N.C., 413 S.E.2d 276, 290 (N.C. 1992)).

102. *Id.* at *381–84.

103. *Id*. at *383–84 (quoting Bayard v. Singleton, 1 N.C. 5, 7, 1 Mart. 48, 50 (1787)).

finality to the action of the political departments and also the *lack of satisfactory criteria* for a judicial determination are dominant considerations."[104]

Using the framework articulated in *Cooper*, a court should look at the issue to determine: (1) whether the action is performed by a political branch; (2) whether the action has been attributed some degree of finality; and (3) whether satisfactory criteria exist for the courts to evaluate the claim. Corresponding to the growth of litigation involving fundamental rights and the authority between branches, this three-prong test appears well-focused to assist in evaluating whether the doctrine should apply. As Judge Ridgeway noted in *Common Cause v. Lewis*, the doctrine is applied when other rights in the state constitution are not implicated; therefore, it is avoided more often than not. Notably, the partisan gerrymandering case was ultimately not appealed to the North Carolina Supreme Court, so there is not clear precedent to confirm that the three-judge panel was correct in finding that extreme partisan gerrymandering—like racial gerrymandering

claims—satisfied the state political question doctrine law case.[105]

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104. Cooper v. Berger, 809 S.E.2d 98, 107 (N.C. 2018) (alterations in original) (emphasis added) (quoting Baker v. Carr, 369 U.S. 186, 210 (1962)).

105. Subsequent to this Article's completion, the General Assembly passed a 2021 redistricting plan that three separate groups challenged in state court as an extreme partisan gerrymander. N.C. League of Conservation Voters, Inc. v. Hall, No. 21 CVS 015426, 2022 WL 124616 at *13–14 (N.C. Super. Ct. Jan 11, 2022). Chief Justice Newby appointed a three-judge panel to hear the claims, who granted judgment in the legislative defendants' favor. *Id.* at *2. Subsequently, the North Carolina Supreme Court granted the appellant's bypass petitions and petitions for discretionary review and remanded the case to the three-judge panel for a hearing on the merits. *Id.* After again determining that the partisan gerrymandering claim was not justiciable, the Supreme Court ordered expedited briefing and held oral arguments on the 2021 redistricting plan. *Id.* After oral argument in January 2022, the court issued a 4-3 order along partisan lines, with an opinion to follow, finding that the 2021 redistricting plan was unconstitutional under the Free Elections, Law of the Land, and Associational Rights provisions of the state constitution. Harper v. Hall, 867 S.E.2d 554, 557 (N.C. 2022). Thus, the court rejected the argument raised by the defendants that evaluating partisan gerrymandering claims was barred by the political question doctrine under state law. *See Id.* at 557–58. Chief Justice Newby published a dissent joined by two other Justices. *Id.* at 558–62 (Newby, J., dissenting). In the subsequent opinion, Justice Hudson, writing for a 4-3 majority, found that the issue of whether the General Assembly enacted a partisan gerrymander is justiciable because of its impact on the individual rights of North Carolinians and that the General Assembly is thus not shielded by the political question doctrine. Harper v. Hall, No. 413 PA 21, 2022 WL 496215, at *21–27 (N.C. Feb. 14, 2022). In issuing an opinion embracing similar reasoning as that by Judge Ridgeway in the 2019 *Common Cause* opinion in Wake County Superior Court, Justice Hudson is clear in framing the issue regarding justiciability as whether the General Assembly has violated citizens' rights identified in Article I of the N.C. Constitution: "[t]he question is whether the General Assembly complied with provisions of the Declaration of Rights in its exercise of the [Article

Likewise, through the COVID-19 pandemic, a number of parties, including other statewide elected officials and business groups, litigated the decisions promulgated by Governor Cooper through his Executive Orders under the State Emergency Management Act. The courts did not provide any appellate treatment as to whether the political question doctrine applies—neither when another executive branch official challenges the governor's authority nor when private individuals bring suit. Rather, the supreme court, after hearing oral arguments in a case brought by the North Carolina Bowling Proprietors Association against the governor, determined that the matter was moot and remanded the case to Wake County Superior Court.[106]

The effect of mooting the case accomplished an effect similar to application of the political question doctrine. Namely, the plaintiffs' rights, if violated, were not remedied. Rather, the court demurred on determining whether the governor acted within the authority delegated to him under the Emergency Management Act.[107] By dismissing the case as moot, future emergency actions are not constrained by a precedent issued by the courts. At the same time, though, parties lack certainty as to whether such actions are justiciable. The court, however, avoided expending capital on temporary state actions, such as the interventions ordered pursuant to the Emergency Management Act. Thus, it is reasonable to assume that state and local governments may attempt to utilize the political question doctrine in an effort to address future claims regarding alleged statutory or constitutional violations.

In striving for manageable criteria, both *Cooper v. Berger* and *Common Cause v. Lewis* show that such criteria can take the form of legal precedent or mathematical data. In the context of evaluating these claims, namely whether an executive official's authority is unconstitutionally limited or whether a legislatively drawn map may deprive individuals of a meaningful vote, such criteria appear manageable, even if potentially time-consuming. In other matters, like education-funding cases such as the *Leandro* cases where the issue concerns how much to spend to be constitutionally compliant, it remains to be seen whether the court will agree that

II] apportionment power." *Id.* at *26. Because that query is not one where the N.C. Constitution makes a demonstrable textual commitment to the General Assembly on the issue, the Court's majority found the matter, similar to other "modern redistricting precedents" to be justiciable." *Id.* at *25. The court remanded to the trial court for further proceedings and to permit the parties to submit maps that would provide for a constitutional redistricting plan. *Id.* at *50.

106. N.C. Bowling Proprietors Ass'n v. Cooper, 847 S.E.2d 745, 746 (N.C. 2020).

107. *See id. See generally* N.C. GEN. STAT. ANN. § 166A-19.10 (West 2012).

such criteria can be sufficiently discerned to avoid application of the political question doctrine.

CONCLUSION

While the state political question doctrine is often described by courts as preserving the authority of the political branches, it also effectively preserves the courts' authority. By demurring on remedying state actions from other branches where a matter is not final or where there are not manageable standards, the court has found ways to preserve its authority, its ability to exercise judicial review, and its emphatic duty "to say what the law is."[108] In this way, the political question doctrine serves as an avoidance mechanism to remove the court from cases that might raise questions about whether the court was acting politically or without reliance on the rule of law, while not waiving its authority to exercise judicial review and serve. Judge Ridgeway alluded to this as a backdrop, preserving the integrity of the democratic system in *Common Cause v. Lewis*.[109]

The potency of such an order preventing the "subordina[tion] and devalu[ation] for no legitimate governmental purpose, but rather the purposes of entrenching a political party in power," is, as Judge Ridgeway notes, "what the North Carolina Constitution forbids."[110] However, the potency of that language, and that context, necessitates a measured approach in its application to preserve the authority of the courts to do that very thing: determine and apply what is constitutionally permissible. By invoking the political question doctrine as a prudential standard, North Carolina courts preserve their discretion in serving this necessary purpose.

108. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

109. *See* Common Cause v. Lewis, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56, *389 (N.C. Super. Ct. Sept. 3, 2019).

110. *Id.* at *394.