Campbell Law Review

Volume 46
Issue 2 *Spring 2024*

Article 4

2024

Can the General Assembly Turn Back the Hands of Time? *McKinney v. Goins* and the Constitutionality of the "Revival Provision" in North Carolina's SAFE Child Act

Allison Heitchue

Can the General Assembly Turn Back the Hands of Time? *McKinney v. Goins* and the Constitutionality of the "Revival Provision" in North Carolina's SAFE Child Act

ABSTRACT

This Comment analyzes the current debate over the constitutionality of the SAFE Child Act's "Revival Provision" under the North Carolina Constitution through the case McKinney v. Goins *and argues why the North Carolina Supreme Court should find the "Revival Provision" constitutional.*

INTRODUCTION

In 2019, the North Carolina Legislature unanimously passed S.L. 2019-245, known as the SAFE Child Act. This legislation mirrors similar enactments by other state legislatures aiming to modernize sexual abuse laws. These widespread legislative initiatives reflect emerging research and evolving understandings regarding the prevalence of delayed reporting in child sexual abuse cases.

After its enactment, victims across North Carolina filed suit utilizing enhanced protections afforded by the SAFE Child Act. Specifically, section 4.2(b) of the SAFE Child Act, commonly known as the "Revival Window" or "Revival Provision" (hereinafter referred to as the "Revival Provision"), established a two-year timeframe during which victims of childhood sexual abuse could pursue civil claims otherwise time-barred under the relevant statute of limitation. Over 250 cases have been filed under the Revival Provision's two-year window.[1]

Cases filed under the Revival Provision, however, remain at a standstill as constitutional challenges to the Revival Provision have become a focal point of legal debate in North Carolina. Illustrative of this debate is *McKinney v. Goins*, a case currently pending in the North Carolina Supreme Court. The arguments presented in *McKinney v. Goins*, along with prior decisions rendered by a three-judge panel and the North Carolina Court of Appeals, highlight the divergent perspectives on the Revival Provision.

This Comment analyzes the factual background and procedural history of *McKinney v. Goins* to present the current constitutional debate surrounding the Revival Provision. This analysis examines the North Carolina Constitution's text and history, and precedent applicable to retrospective legislation and the vested right to a statute of limitations defense. Finally, this Comment argues that the North Carolina Supreme Court should hold the SAFE Child Act's Revival Provision constitutional.

I. THE SAFE CHILD ACT

A. Overview of the SAFE Child Act

On October 31, 2019, the North Carolina General Assembly unanimously passed Session Law 2019-245, titled "An Act to Protect

1. Brief for Defendant-Appellees at 3 n.2, McKinney v. Goins, 892 S.E.2d 460 (N.C. Ct. App. 2023) (No. COA22-261) ("The Board is aware of over 250 currently pending cases filed under the Revival Window . . . .").

Children from Sexual Abuse and to Strengthen and Modernize Sexual Assault Laws" (the "SAFE Child Act"). On November 7, 2019, Governor Roy Cooper signed the SAFE Child Act into law. Passage of this crucial legislation signaled the General Assembly's acknowledgement of emerging scientific insights and evolving societal understanding of the impact of childhood sexual abuse.[2]

Specifically, the SAFE Child Act expanded statutes of limitation for child abuse claims to address the prevalence of delayed disclosure and reporting of abuse.[3] The unique and profound harm inflicted by childhood sexual abuse[4] leads many victims to "suffer in silence for decades" before coping with and disclosing the abuse.[5] Some victims wait decades before

2. *See* Brief for CHILD USA as Amicus Curiae Supporting Plaintiffs-Appellants at 1–2, McKinney v. Goins, 892 S.E.2d 460 (N.C. Ct. App. 2023) (No. COA22-261); *see also* McKinney v. Goins, 892 S.E.2d 460, 465 (N.C. Ct. App. 2023) ("This change by the legislature mirrored scientific developments and greater understanding by lawmakers from 2000 to the present that child sex abuse victims frequently delayed disclosure of their traumas well into adulthood and suffer lifelong impacts to their physical, mental, and behavioral health." (citations omitted)); Brief for Plaintiffs-Appellants at 43, McKinney v. Goins, 892 S.E.2d 460 (N.C. Ct. App. 2023) (No. COA22-261) ("Studies suggest that the average age of disclosure in a majority of cases involving childhood sex abuse is age fifty-two (52)." (first citing Nina Spröber et al., *Child Sexual Abuse in Religiously Affiliated and Secular Institutions: A Retrospective Descriptive Analysis of Data Provided by Victims in a Government-Sponsored Reappraisal Program in Germany*, BMC PUB. HEALTH, Mar. 27, 2014, at 3; and then citing *Average Age of Disclosure of Child Sexual Abuse is 52 Years Old*, CHILD USA (2018), https://childusa.org/law/ [https://perma.cc/5N78-T97D])).

3. *See generally* SAFE Child Act, 2019 N.C. Sess. Laws 245.

4. *See* Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 43 ("The effects of child sexual abuse include lost earnings; increased healthcare costs; decreased productivity, happiness, and ability to care for children; disrupted or destroyed marriages; PTSD and addiction."); *see also* Brief for CHILD USA as Amicus Curiae Supporting Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 1 ("Child sexual abuse takes a significant, long-term toll on victims' overall health as well, increasing the risk not only for depression, anxiety, substance abuse, PTSD, and suicidal ideation, but also physical ailments such as high blood pressure and chronic illness." (first citing *Preventing Child Sexual Abuse and Neglect*, CDC.GOV (Feb. 14, 2024) https://www.cdc.gov/child-abuse-neglect/prevention/index.html#:~:text=Key%20points,preventing%20child%20abuse%20and%20neglect. [https://perma.cc/JZ3L-G6X6]; and then citing David Finkelhor et al., *Prevalence of Child Exposure to Violence, Crime, and Abuse: Results from the National Survey of Children's Exposure to Violence*, 169(8) JAMA PEDIATRICS 746 (2015))).

5. Brief for CHILD USA as Amicus Curiae Supporting Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 2 ("Many victims suffer in silence for decades before they talk to anyone about their traumatic experiences. In fact, research indicates that 44.9% of male victims and 25.4% of female victims delay disclosure by more than 20 years. In another study of victims of abuse in Boy Scouts of America, 51% of victims disclosed their abuse for the first time at age fifty or older." (citing Patrick J. O'Leary & James Barber, *Gender Differences in Silencing Following Childhood Sexual Abuse*, 17 J. CHILD SEX. ABUSE

they are ready to report, while many never report at all.[6] Delayed disclosure compounded with short statutes of limitations have effectively closed the door on victims seeking justice against their abusers and complicit institutions.[7] In passing the SAFE Child Act, North Carolina aligned with state legislative efforts nationwide taking proactive steps toward providing victims a path to justice.[8]

B. The Revival Provision

The SAFE Child Act made considerable modifications to sexual abuse laws in North Carolina, specifically the expansion of statutes of limitation for criminal and civil claims of child sex abuse.[9] Statutes of limitation establish timeframes within which criminal charges must be brought or civil suits filed.[10] Claims brought after the statute's established timeframe are barred.[11] Prior to the enactment of the SAFE Child Act, civil claims for tortious conduct associated with sexual abuse had a three-year statute of

133 (2008))); *see also Child Sex Abuse Statute of Limitations Reform*, CHILD USA, https://childusa.org/sol/#:~:text=Most%20victims%20miss%20the%20SOLs,at%20age%2050%20or%20older. [https://perma.cc/BB8P-ZLQP] (Apr. 15, 2024) ("Most victims miss the SOLs for obtaining justice because trauma affects them in a way that causes them to delay disclosure of their abuse until they are older. Studies show over half of CSA survivors first disclose they were abused at age 50 or older.").

6. *See* Brief for CHILD USA as Amicus Curiae Supporting Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 2; Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 43 ("At least thirty-three percent (33%) of such cases are never reported." (citing MARY-ELLEN PIPE ET AL., CHILD SEXUAL ABUSE: DISCLOSURE, DELAY, AND DENIAL 32 (2013))).

7. *See* Brief for CHILD USA as Amicus Curiae Supporting Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 2 ("Historically, a wall of ignorance and secrecy has been constructed around child sex abuse, which has been reinforced by short statutes of limitation ('SOLs') that kept victims out of court. Short SOLs for child sex abuse have played into the hands of the perpetrators and their enabling institutions.").

8. *See Child Sex Abuse Statute of Limitations Reform*, *supra* note 5; *2023 SOL Tracker*, CHILD USA, https://CHILDUSA.org/2023SOL/ [https://perma.cc/7Q5C-6YYS] (Dec. 4, 2023).

9. *See generally* SAFE Child Act, 2019 N.C. Sess. Laws 245.

10. *See Child Sex Abuse Statute of Limitations Reform*, *supra* note 5 ("Statutes of limitations (SOLs) set the deadline for pressing criminal charges or filing a civil lawsuit for child sex abuse . . . .").

11. *See* Charles E. Daye & Mark W. Morris, 1 North Carolina Law of Torts § 19.30 at 1 (Matthew Bender & Company, Inc. 2023); *see also* Morris v. Rodeberg, 895 S.E.2d 328, 331 (N.C. 2023) ("Statutes of limitations are blunt instruments. They bar claims filed outside their temporal boundaries regardless of whether the claims have merit.").

limitation that was tolled[12] until the potential plaintiff's eighteenth birthday.[13] After a victim's eighteenth birthday, the three-year clock begins to run, regardless of when the abuse occurred. Once the victim turns twenty-one, the doors to justice in the civil arena are closed forever.

The North Carolina General Assembly ("General Assembly") recognized that this short three-year window failed to provide victims of childhood abuse with an adequate timeframe to redress abuses. So, the General Assembly made a change. Following in the footsteps of twenty-six states and three territories, as of 2023,[14] the General Assembly crafted the Revival Provision. Found in section 4.2(b) of the SAFE Child Act, the Revival Provision provides: "Effective from January 1, 2020, until December 13, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under G.S. 1–52 as it existed immediately before the enactment of this act."[15] When the door to justice for many victims of childhood sexual abuse had long been closed, the North Carolina General Assembly opened a window.

Victims across North Carolina filed suit, taking advantage of the two-year window created by the Revival Provision and the second chance for justice it provided. Defendants sued by plaintiffs relying on the Revival Provision responded by contesting this retrospective legislation's constitutionality, halting litigation.[16] Illustrative of this controversy is the case *McKinney v. Goins*.

---

12. *See* State v. Stevens, 831 S.E.2d 364, 366 (N.C. Ct. App. 2019) ("To 'toll' the statute of limitations means to arrest or suspend the running of the time period in the statute of limitations. In other words, the statute of limitations ceases to run while it is tolled." (citations omitted)).

13. *See* N.C. GEN. STAT. § 1-52(5)(16) (2023) ("[P]ersonal injury claims become barred after three years from when the bodily injury ought to have reasonably become apparent, not to exceed ten years from the last act or omission of the defendant giving rise to the claim."); *id.* § 1-52(19) ("[C]laims for assault, battery, or false imprisonment are barred after three years from the date of the act."); *id.* § 1-17(a)(1) ("[T]he statute of limitations in North Carolina is tolled until a potential plaintiffs eighteenth birthday.").

14. *2023 SOL Tracker*, *supra* note 8.

15. SAFE Child Act, 2019 N.C. Sess. Laws 245, § 4.2(b).

16. *See, e.g.*, Taylor v. Piney Grove Volunteer Fire & Rescue Dep't, Inc., 891 S.E.2d 661 (N.C. Ct. App. 2023) (reversing the trial court's order dismissing the Plaintiff's suit filed under the Revival Provision of the SAFE Child Act based on the trial court's conclusion that the Revival Provision was unconstitutional and remanding for further proceedings consistent with the court's holding in McKinney v. Goins, 892 S.E.2d 460 (N.C. Ct. App. 2023)); Cohane v. Home Missioners of Am., 892 S.E.2d 229 (N.C. Ct. App. 2023) (reversing the trial court's order granting the defendants' motions to dismiss the Plaintiff's suit filed under the Revival Provision based on the trial court's narrow interpretation of the provision).

II. *MCKINNEY V. GOINS*

A. Factual History

Defendant Gary Goins was a wrestling coach at East Gaston High School from August 1993 until June 2013.[17] In June 2013, Defendant Goins was arrested and charged for sexual offenses that he committed against his wrestling students.[18] The Plaintiffs in *McKinney v. Goins* are three former wrestling students of Defendant Goins.[19] Plaintiffs met Defendant Gary Goins between the ages of eleven and fourteen, both before and during their time at East Gaston High School.[20] As Plaintiffs' wrestling coach, Defendant Goins used his position of authority to subject Plaintiffs to repeated sexual abuse, physical violence, and psychological torment during their adolescent years.[21] Defendant Goins abused his authority as a coach to obtain unrestricted access to Plaintiffs on school grounds and during school wrestling trips.[22] Beyond the abuse Plaintiffs endured, Defendant Goins cultivated a physically abusive culture of hazing and violence among the East Gaston High School wrestling team students.[23] As a result of Defendant Goins egregious abuse, Plaintiffs have suffered life-long struggles such as anxiety, depression, post-traumatic stress disorder, and/or substance abuse and sex addiction.[24] Like many victims of childhood sexual abuse, Plaintiffs delayed reporting their abuse for many years.[25]

At all times relevant to Defendant Goins's abuse of Plaintiffs, he remained employed by the Gaston County Board of Education.[26] Despite

17. State v. Goins, 781 S.E.2d 45, 48 (N.C. Ct. App. 2015).

18. *Id.*; *see also* WBTV Web Staff, *Former Coach Gary Goins Found Guilty on 17 Charges in Sex Abuse Case*, WBTV (Sept. 11, 2014, 8:22 PM), https://www.WBTV.com/story/26262455/Former-coach-Gary-Goins-found-guilty-on-17-charges-in-sex-abuse-case/ [https://perma.cc/T94M-85CD].

19. For clarity purposes, the Plaintiffs in *McKinney v. Goins* are Dustin McKinney, George McKinney, and James Tate. Complaint at 1, McKinney v. Goins, 892 S.E.2d 421 (N.C. Ct. App. 2023) (No. COA22-261). They will be referred to collectively throughout as Plaintiffs.

20. *Id.* at 2, 4–5.

21. *Id.* at 2–4.

22. *Id.* at 2–3.

23. *Goins*, 781 S.E.2d at 53.

24. Complaint, McKinney v. Goins, *supra* note 19, at 4–6.

25. *See Goins*, 781 S.E.2d at 49–51; Brief for CHILD USA as Amicus Curiae Supporting Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 2.

26. *See* Brief for Defendant-Appellees, McKinney v. Goins, *supra* note 1, at 5 ("Goins was employed by the Board from August 1993 to June 2013 (Goins' separation from employment coincided with the indictment).").

allegedly receiving numerous complaints regarding Defendant Goins's conduct, the Gaston County Board of Education took no action against Defendant Goins during his employment.[27]

On August 12, 2014, with the support of Plaintiffs' testimony, Defendant Goins was found guilty of two counts of statutory rape, six counts of indecent liberty with a child, five counts of indecent liberty with a student by a teacher, two counts sex act with the student by the teacher and two counts of crimes against nature.[28] Defendant Goins appealed his convictions and lost on December 16, 2015.[29] He is currently serving a minimum of thirty-four years in prison at the Marion Correctional Institution.[30]

Passage of the SAFE Child Act's Revival Provision in 2019 enabled the Plaintiffs to sue Defendant Goins and his employer, the Gaston County Board of Education ("Defendant Board"), for perpetrating and condoning the abuse of Plaintiffs. The statute of limitations in effect before the Revival Provision gave Plaintiffs only three years after turning eighteen to file suit.[31] None of the Plaintiffs filed within this period, and as of 2008, all three Plaintiffs' claims were barred.[32] Without the Revival Provisions' two-year window, the Plaintiffs had no civil redress against their abuser and his enablers.

B. Procedural History

On November 2, 2020, relying on the new Revival Provision of the SAFE Child Act, Plaintiffs filed their complaint against Defendant Goins and Defendant Board in Gaston County Superior Court.[33] In their

27. Complaint, McKinney v. Goins, *supra* note 19, at 3 ("The Board, Defendant Goins' employer, received numerous complaints concerning his physical abuse of wrestlers under his tutelage. The Board, however, made no corrective action in response to these reports, electing instead to dismiss them after minimal investigation. Nor did the Board properly supervise Defendant Goins' activities . . . .").

28. *Id.*

29. *Goins*, 781 S.E.2d at 45.

30. WBTV Web Staff, *supra* note 18.

31. *See* N.C. GEN. STAT. § 1-52(19) (2023) ("Claims for assault, battery, or false imprisonment are barred after three years from the date of the act."); *id.* § 1-17(a)(1) ("The statute of limitations in North Carolina is tolled until a potential plaintiffs eighteenth birthday.").

32. McKinney v. Goins, 892 S.E.2d 460, 464 (N.C. Ct. App. 2023) ("None of Plaintiffs brought civil suits against Defendants for these torts within three years of their eighteenth birthdays, with the latest of the claims expiring in 2008.").

33. *See generally* Complaint, McKinney v. Goins, *supra* note 19 (alleging claims against Defendant Goins and Defendant Board).

complaint, Plaintiffs alleged assault; battery; negligent hiring, retention, and supervision; negligent infliction of emotional distress; intentional infliction of emotional distress; constructive fraud; and false imprisonment.[34]

On January 27, 2021, Defendant Board filed an Answer, Counterclaim, and Motion to Dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.[35] In its Motion to Dismiss, Defendant Board contended that "Plaintiffs cannot rely on Section 4.2(b) of North Carolina Session Law 2019-245 to revive [Plaintiffs'] previously [time-]barred claims because [Session Law] 2019-245 is *facially unconstitutional*[36] and therefore void."[37] The following day, Defendant Board filed an Amended Motion to Dismiss and a Motion to Transfer the facial challenge raised in their answer to a three-judge panel.[38]

Considering the implication of this challenge to the case, Plaintiffs and Defendant Board filed a Joint Motion to Transfer the action to a three-judge panel in the Superior Court of Wake County to resolve the constitutionality

34. *Id.* at 6–14.

35. *See generally* Answer and Counterclaim of Def. Gaston Cnty. Bd. of Educ., McKinney v. Goins, 892 S.E.2d 421 (N.C. Ct. App. 2023) (No. COA22-261).

36. *McKinney*, 892 S.E.2d at 467 ("Constitutional challenges generally take two forms: (1) facial challenges, which 'maintain[ ] that no constitutional applications of [a] statute exist, prohibiting its enforcement in any context,' and (2) as-applied challenges, which ask if a statute 'can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable.'" (quoting State v. Packingham, 777 S.E.2d 738, 743 (N.C. 2015))).

37. Answer and Counterclaim, McKinney v. Goins, *supra* note 35, at 1 (emphasis added).

38. *See generally* Amended Answer and Counterclaim of Def. Gaston Cnty. Bd. of Educ., McKinney v. Goins, 892 S.E.2d 460 (N.C. Ct. App. 2023) (20-CVS-3893) (requesting dismissal of the complaint); Joint Motion to Transfer Portion of Action to Three-Judge Panel and Stay Remainder of Action, McKinney v. Goins, 892 S.E.2d 460 (N.C. Ct. App. 2023) (20-CVS-3893) (requesting a transfer of the facial challenge to a three-judge panel). Section 1-267.1(a1) of the North Carolina General Statutes provides that "any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to [section] 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County . . . ." North Carolina's Rule of Civil Procedure 42(b)(4) provides that if a claimant or defendant, in their complaint or answer, respectively, raises such a facial challenge, "the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel if . . . a determination as to the facial validity of [the] act . . . must be made in order to completely resolve any matters in the case." This three-judge panel is composed of Superior Court judges appointed by the Chief Justice of the North Carolina Supreme Court.

of the Revival Provision.[39] The Gaston County Superior Court granted this motion on February 17, 2021.[40]

1. Three-Judge Panel

On September 8, 2021, Chief Justice Paul Newby of the Supreme Court of North Carolina appointed a three-judge panel who then heard oral arguments on October 21, 2021.[41] The three-judge panel issued a 2-1 decision granting Defendant Board's Motion to Dismiss, holding that the challenged Revival Provision of the SAFE Child Act is unconstitutional.[42] The three-judge panel majority's holding is summarized as follows:

> Defendant Gaston Board has met its considerable burden of demonstrating beyond a reasonable doubt that Section 4.2(b) of S.L. 2019-245 is facially unconstitutional. The majority of this panel determines that Section 4.2(b) exclusively revives previously time-barred claims. Such time-barred claims have been consistently interpreted by our courts as a vested right under the North Carolina Constitution which is afforded absolute protection from acts of the legislature. The majority, therefore, concludes that Defendant Gaston Board is entitled to dismissal of Plaintiff's Amended Complaint on this ground.[43]

At the core of the panel majority's holding is its conclusion that Defendant Board possesses a vested right to a statute of limitations defense, which is constitutionally protected under the Law of the Land Clause of the North Carolina Constitution.[44]

This vested right is not found within the *text* of the North Carolina Constitution but rather within "long-standing" North Carolina Supreme Court and North Carolina Court of Appeals precedent. Specifically, the majority of the panel found that this right flows from the 1933 North

39. *See generally* Joint Motion to Transfer, McKinney v. Goins, *supra* note 38 (requesting a transfer of the facial challenge to a three-judge panel).

40. Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 2.

41. Order Designating Three-Judge Panel, McKinney v. Goins, 892 S.E.2d 460 (N.C. Ct. App. 2023) (No. COA22-261); Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 2. Shortly after appointment of the three-judge panel, the State of North Carolina filed a motion to intervene as of right in favor of Plaintiffs and in defense of the constitutionality of the Revival Provision. *Id*. The three-judge panel unanimously granted the State's motion to intervene on October 11, 2021. *Id*.

42. Order Granting Defendant's Motion to Dismiss at 5, McKinney v. Goins, 892 S.E.2d 460 (N.C. Ct. App. 2023) (No. COA22-261).

43. *Id.*

44. *Id.* at 4.

Carolina Supreme Court decision in *Wilkes County v. Forester* and subsequent application of this decision.[45] The Revival Provisions language and effect of "reviv[ing] any civil action . . . otherwise time-barred . . . before the enactment of this act" effectively eliminated Defendant Board's vested right to rely on a statute of limitation as a defense to Plaintiffs' claims.[46] Therefore, the majority found that this retroactive interference with such a vested right to a statute of limitations defense violates the due process protections guaranteed by the Law of the Land Clause of the North Carolina Constitution.[47] Thus, per the majority, the Revival Provision is *per se* unconstitutional.[48]

Judge McGee dissented from the majority's decision, stating that he could not find the Revival Provision "unconstitutional beyond a reasonable doubt after analyzing the text of the Constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provisions, and our court's unsettled law."[49]

First, Judge McGee concluded that the text of the Ex Post Facto Clause, which addresses retrospective legislation, prohibits only retrospective criminal laws and tax laws.[50] Additionally, he highlighted that nothing in the text of the North Carolina Constitution recognizes a statute of limitations defense as a vested right in property.[51] Second, historical context, specifically the amendment to the Ex Post Facto Clause after *State*

45. *Id.* at 3; Wilkes Cnty. v. Forester, 167 S.E. 691 (N.C. 1933). Subsequent application of *Wilkes County*'s purported holding establishing a defendant's vested right in a statute of limitations defense is seen in Waldrop v. Hodges, 53 S.E.2d 263, 265 (N.C. 1949), Colony Hill Condo. I Ass'n v. Colony Co., 320 S.E. 2d 273, 276 (N.C. Ct. App. 1984), and Troy's Stereo Ctr., Inc. v. Hodson, 251 S.E.2d 673, 675 (N.C. Ct. App. 1979).

46. Order Granting Defendant's Motion to Dismiss, McKinney v. Goins, *supra* note 42, at 3.

47. *Id.* at 4.

48. McKinney v. Goins, 892 S.E.2d 460, 466 (N.C. Ct. App. 2023) ("The majority further held that, because retroactive interference with a vested right is violative of the Law of the Land Clause's constitutional due process protections, the Revival Window's dissolution of the Board's statute of limitations defense was *per se* unconstitutional." (citation omitted)).

49. Order Granting Defendant's Motion to Dismiss, McKinney v. Goins, *supra* note 42, at 5 (McGee, J., dissenting).

50. *Id.*; *see also McKinney*, 892 S.E.2d at 466 ("Article I, Section 16 of the North Carolina Constitution only explicitly prohibits retrospective criminal laws and taxes, N.C. Const. art. I, § 16.").

51. Order Granting Defendant's Motion to Dismiss, McKinney v. Goins, *supra* note 42, at 5 (McGee, J., dissenting); *see also McKinney*, 892 S.E.2d at 466 ("[T]he North Carolina Constitution nowhere describes a statute of limitations defense as a vested property right . . . .").

v. Bell,[52] strongly supports the opinion that retrospective legislation like the Revival Provision "is not per se unconstitutional."[53] Finally, Judge McGee emphasized the "lack of clarity" in surrounding case law regarding retrospective legislation.[54] Conflicting precedent, coupled with the absence of any reference to the North Carolina Constitution in cases recognizing such a vested right, failed to establish that the Revival Provision violates the state constitution beyond a reasonable doubt.[55]

Based on his analysis of the constitution's text, history, and precedent, Judge McGee subjected the Revival Provision to rational basis review, and for arguments sake, strict scrutiny.[56] Judge McGee determined rational basis review to be the appropriate test as a fundamental right is not at issue and concluded that the Revival Provision "undoubtably would survive rational basis."[57] Assuming *arguendo* that a vested right to a statute of limitations defense is a fundamental right protected by the Law of the Land Clause, Judge McGee subjected the Revival Provision to strict scrutiny.[58] Even under heightened scrutiny, Judge McGee concluded the Revival Provision would pass constitutional muster, as the provision is narrowly tailored to advance a compelling government interest.[59]

In sum, the three-judge panel's decision introduces the conflicting arguments for and against the constitutionality of the Revival Provision. In granting Defendant Board's Motion to Dismiss, the majority felt bound by *Wilkes* to hold that the Revival Provision violated Defendant's vested right to a statute of limitations defense. Conversely, Judge McGee did not find the precedent clear-cut on the issue and would have, instead, denied Defendant's Motion to Dismiss. Plaintiffs subsequently appealed the three-judge panel's dismissal.[60]

---

52. 61 N.C. (Phil.) 76, 79 (1867).

53. Order Granting Defendant's Motion to Dismiss, McKinney v. Goins, *supra* note 42, at 5 (McGee, J., dissenting).

54. *Id.* at 6. *Compare* State v. _____, 2 N.C. (1 Hayw.) 28, 29 (N.C. Super. L. & E. 1794) (holding that a statute of limitations defense is not a vested right) *with* Wilkes Cnty. v. Forester, 167 S.E. 691 (N.C. 1933) (purporting to find a vested right to a statute of limitations defense).

55. Order Granting Defendant's Motion to Dismiss, McKinney v. Goins, *supra* note 42, at 6 (McGee, J., dissenting); *see also McKinney*, 892 S.E.2d at 466 ("[T]he cases relied upon by the majority did not anchor their vested rights and statute of limitations analyses to any constitutional provisions . . . .").

56. Order Granting Defendant's Motion to Dismiss, McKinney v. Goins, *supra* note 42, at 7–8 (McGee, J., dissenting).

57. *Id.* at 7.

58. *Id.*

59. *Id.*

60. Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 3.

2. North Carolina Court of Appeals

Plaintiffs sought and were initially granted discretionary review by the Supreme Court of North Carolina, but this grant was rescinded and the matter remanded to the North Carolina Court of Appeals.[61] In reviewing whether the panel's dismissal of Plaintiffs' claims was proper, the central constitutional issue before the North Carolina Court of Appeals was "whether a retroactive statute resuscitating a claim previously barred by a statute of limitations runs afoul of the North Carolina Constitution."[62] In a 2-1 decision, the Court of Appeals reversed the panel's order of dismissal, holding the North Carolina Constitution "does not *per se* prohibit such an act by [the] legislature and, regardless of the degree of scrutiny applicable, the Revival Window passes constitutional muster."[63]

Unlike the lower court panel's majority, the Court of Appeals declined to "elevate a purely procedural statute of limitations defense into an inviolable constitutional right" to be free from suit after a certain period has passed.[64] After examining the text of the Law of the Land Clause and the Ex Post Facto Clause of the North Carolina Constitution, its history, and North Carolina jurisprudence interpreting it, the Court of Appeals found that "retroactive civil laws, including ones reviving statutes of limitation, are not inherently unconstitutional."[65] Moreover, the court found that Defendant Board's reliance on *Wilkes County* and its progeny failed to satisfy its high burden of showing that the Revival Provision violates an *express* constitutional provision beyond a reasonable doubt.[66]

The Court of Appeals found Defendant Board and the lower court panel's reliance on *Wilkes County* to be misplaced for two important reasons. First, *Wilkes County*'s vested rights declaration is dicta.[67] Dicta is a legal statement in a court opinion that is not essential to resolution of the party's dispute, and thus, does not have the force of law.[68]

61. Order Rescinding Discretionary Rev., McKinney v. Goins, 109PA22 (N.C. Mar. 3, 2023).

62. McKinney v. Goins, 892 S.E.2d 460, 467 (N.C. Ct. App. 2023).

63. *Id.*

64. *Id.* at 464 ("Because adopting the Board's position would require us to strike down as unconstitutional a duly enacted statute of our General Assembly and disregard the narrowly crafted legislation designed to address a stunningly pressing problem affecting vulnerable children across the state, we decline to convert an affirmative defense into a free pass for those who engaged in and covered up atrocious child sexual abuse.").

65. *Id.* at 471.

66. *Id.* at 478.

67. *Id.* at 474.

68. *See* Orin S. Kerr, *How to Read a Legal Opinion: A Guide for New Law Students*, 11 GREEN BAG 2D 51, 60 (2007) ("Dicta refers to legal statements in the opinion not needed to

The Court of Appeals explained that because dicta is without legal effect, subsequent parroting of *Wilkes County*'s dicta by its progeny does not elevate this dicta to law:

> In an attempt to read *Wilkes County* more broadly, the [Defendant] Board cites to numerous cases repeating *Wilkes County*'s vested rights commentary in subsequent *dicta*. But *dicta* upon *dicta* does not the law make. Nor can *dicta* in subsequent decisions serve to expand or modify earlier holdings, as *dicta* is itself without legal effect.[69]

Second, the Court of Appeals clarified that even if *Wilkes County*'s dicta is not classified as such, it is still of no application because it only addresses "cases in which expired statutes of limitation affect vested *property* rights, not a procedural defense."[70] Defendant Board's reliance on dicta simply failed to make "plain and clear" that revival of Plaintiffs' time-barred claims directly conflicts with an express provision of the North Carolina Constitution.[71] Without *Wilkes County*, Defendant Board's vested right to a statute of limitation defense lacks support in both the text of the North Carolina Constitution and binding precedent.[72]

For arguments sake, the Court of Appeals followed in Judge McGee's steps and subjected the Revival Provision to a strict scrutiny two-part review, which requires a challenged statute be narrowly drawn to serve a compelling state interest.[73] First, the Revival Provision serves numerous state interests of the highest order:

> (1) "Vindicat[ing] . . . the rights of child victims of sexual abuse—and ensuring abusers and their enablers are justly held to account to their victims for the trauma inflicted";
>
> (2) "[E]ncouraging entities—trusted by parents to care and protect their children—to guard against abusive employees or agents through civil penalties"; and

---

resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase 'obiter dictum,' which means 'a remark by the way.").

69. *McKinney*, 892 S.E.2d at 475–76 (citations omitted).

70. *Id.* at 475.

71. *Id.* at 476, 478 ("[W]hile *Wilkes County*'s discussion of the question, ancillary to its ultimate holding, is relevant, it does not establish a 'plain and clear' constitutional violation . . . ." (citation omitted)).

72. *See id.* at 464.

73. *See id.* at 479.

(3) "[E]nsuring that the law—when premised on an outdated and inaccurate understanding of child sexual abuse—does not frustrate the ability of child victims to pursue their common law remedies."[74]

Second, the Revival Provision is narrowly tailored serve these interests: its operation is limited to a two-year window, which has already closed; it only applies to civil claims for child sexual abuse and only affects matters of procedure.[75] The court held that, under heightened strict scrutiny review, the Revival Provision survives.[76]

Judge Carpenter dissented from the Majority's opinion and concluded that *Wilkes County* controls and settles the constitutionality of the Revival Provision.[77] Judge Carpenter disagreed with the majority's holding that *Wilkes County*'s vested rights discussion is dicta and confined to only revival statutes affecting property rights.[78] Conversely, Judge Carpenter asserted that, despite failing to make *any* reference to the North Carolina Constitution, "deductive reasoning" illustrates that *Wilkes County* was an interpretation of the Law of the Land Clause.[79] Deductive reasoning, however, is not the standard. As the North Carolina Supreme Court has made clear, "any challenge alleging that an act of the General Assembly is unconstitutional *must identify an express provision of the constitution* and demonstrate that the General Assembly violated the provision *beyond a reasonable doubt*."[80] Judge Carpenter's conclusion that Defendant Board satisfied this immense burden is not grounded in the explicit commands of the North Carolina Constitution but rather "deductive reasoning" and adherence to *stare decisis*, i.e., *Wilkes County* and its progeny: "Stare decisis binds us beyond a reasonable doubt."[81] The problems with Judge Carpenter's argument are illustrated below.

74. *Id.* at 479–80 (citations omitted).

75. *Id.* at 480.

76. *Id.*

77. *Id.* at 481 (Carpenter, J., dissenting).

78. *See id.* at 482–84.

79. *Id.* at 483 ("The *Wilkes* Court was necessarily interpreting the Law of the Land Clause because the Court expressly stated it was *not* interpreting federal cases or the Due Process Clause." (citation omitted)).

80. Harper v. Hall, 886 S.E.2d 393, 399 (N.C. 2023) (emphasis added).

81. *See McKinney*, 892 S.E.2d at 481, 483 (Carpenter, J., dissenting) (citation omitted).

3. North Carolina Supreme Court

On September 20, 2023, Defendant Board filed its Notice of Appeal from the North Carolina Court of Appeals 2-1 decision, based upon Judge Carpenter's dissent and the involvement of a substantial constitutional question, to the North Carolina Supreme Court.[82] The issue which Defendant Board will present for review to the North Carolina Supreme Court is as follows: "Did the Court of Appeals err by overruling binding precedent in order to resurrect Plaintiff's time-barred claims, when legislation retroactively reviving such claims 'is inoperative and of no avail' because it 'takes away vested rights of defendants, and therefore is unconstitutional.'"[83]

III. CONSTITUTIONAL ANALYSIS OF THE REVIVAL PROVISION

McKinney v. Goins centers on the constitutionality of an act of the North Carolina General Assembly, i.e., the Revival Provision of the SAFE Child Act; specifically, whether the North Carolina Constitution prohibits the General Assembly from passing legislation reviving time-barred civil claims.[84] In resolving this question, it is essential first to understand the North Carolina Constitution's significant and unique features, the core methods governing its interpretation, and the presumptions that attach when courts review an act of the General Assembly.

A. Interpreting the North Carolina Constitution

North Carolina's Constitution differs from the Federal Constitution in an important respect: "[T]he Federal Constitution is a *limited grant of power* while the state constitution is a *limitation on power*."[85] In essence, all power not expressly limited in North Carolina's Constitution remains

82. *See* Defendant-Appellant Gaston Cnty. Bd. of Educ. Notice of Appeal at 1–3, McKinney v. Goins, 892 S.E.2d 460 (N.C. Ct. App. 2023) (No. COA22-261); *see also* N.C. GEN. STAT. § 7A-30 (2023), *amended by* 2023 N.C. Sess. Laws 134.

83. Notice of Appeal, McKinney v. Goins, *supra* note 82, at 2 (quoting Wilkes Cnty. v. Forester, 167 S.E. 691, 695 (N.C. 1933)).

84. *See McKinney*, 892 S.E.2d at 463, 467.

85. *Harper*, 886 S.E.2d at 398 (emphasis added); *see also McKinney*, 892 S.E.2d at 468 ("We are obliged to recognize that 'the North Carolina Constitution is not a grant of power, but a limit on the otherwise plenary police power of the State. We therefore presume that a statute is constitutional, and we will not declare it invalid unless its unconstitutionality is demonstrated beyond reasonable doubt.'" (quoting Hart v. State, 774 S.E.2d 281, 287 (N.C. 2015))).

with the people of North Carolina.[86] This essential principle of popular sovereignty[87] is found in Article I, Section 2 of the North Carolina Constitution, which declares that "[a]ll political power is vested in and derived from the *people*; all government of right originates from the *people*, is founded upon their will *only*, and is instituted *solely* for the good of the whole."[88] The political power vested in the people of North Carolina is exercised through their chosen representatives in the General Assembly.[89] The General Assembly's broad legislative power is limited only as the explicit text of our state constitution commands.[90] Thus, an act of the people of North Carolina through their representatives in the General Assembly is valid unless *expressly* prohibited by a *specific* constitutional provision.[91]

The natural corollary to popular sovereignty is separation of powers.[92] This essential principle is articulated in Article I, Section 6 of the North Carolina Constitution, declaring that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever *separate* and *distinct* from each other."[93] In essence, separation of powers ensures the protection of individual freedoms by "direct[ing] [each branch] to perform its assigned duties and avoid encroaching on the duties of another branch."[94] Within this divided system, the judicial branch keeps the legislative and executive branches in check through the exercise of judicial review.[95] Though significant, this power is not unlimited.[96] The General Assembly acts as the agent of the people, and courts exercise judicial review with great deference to the peoples chosen legislative enactments.[97]

---

86. *See* McIntyre v. Clarkson, 119 S.E.2d 888, 891–92 (N.C. 1961).

87. *See* JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 47–48 (G. Alan Tarr ed., 2d ed. 2013).

88. N.C. CONST. art. I, § 2 (emphasis added); *see Harper*, 886 S.E.2d at 398 ("The state constitution declares that all political power resides in the people." (citing N.C. CONST. art. I, § 2)).

89. *Harper*, 886 S.E.2d at 398 (citing N.C. CONST. art. I, § 9).

90. *See id.* at 449 ("We have recognized that our constitution allows the General Assembly to enact laws unless expressly prohibited by the constitutional text."); *see also McKinney*, 892 S.E.2d at 469 ("Specific provisions of the North Carolina Constitution impose express limitations on the General Assembly's ability to pass legislation of retroactive effect.").

91. Baker v. Martin, 410 S.E.2d 887, 891–92 (N.C. 1991).

92. ORTH & NEWBY, *supra* note 87, at 50.

93. N.C. CONST. art. I, § 6 (emphasis added); *see also Harper*, 886 S.E.2d at 297.

94. *Harper*, 886 S.E.2d at 297.

95. *Id.* at 298.

96. *Id.*

97. *See* Baker v. Martin, 410 S.E.2d 887, 890 (N.C. 1991) ("Since our earliest cases applying the powers of judicial review under the Constitution of North Carolina . . . we have

Adhering to these principles, the Supreme Court of North Carolina reviews constitutional challenges to acts of the General Assembly *de novo*.[98] In exercising *de novo* review, laws are presumed constitutional and will not be struck down unless they are found unconstitutional beyond a reasonable doubt.[99] In sum, these standards and their interplay with our core democratic principles are as follows:

> Historically, North Carolina courts have respected their significant but restrained role of judicial review by adhering to a standard of review that sets the most demanding requirements for reviewing legislative action: courts presume that an act of the General Assembly is *constitutional*, and any challenge alleging that an act of the General Assembly is unconstitutional must identify an *express provision* of the constitution and demonstrate that the General Assembly violated the provision *beyond a reasonable doubt*.[100]

Thus, for Defendant Board to prevail, it must demonstrate that the Revival Provision violates an *express* provision of the North Carolina Constitution "*plain* and *clear*."[101]

B. Constitutional Provisions at Issue in McKinney v. Goins

The arguments highlighted above differ as to which provision of the North Carolina Constitution controls: the Ex Post Facto Clause or the Law of the Land Clause.[102] To determine whether the Revival Provision violates either of these provisions, the following analysis will highlight the text of

---

indicated that great deference will be paid to acts of the legislature—the agent of the people for enacting laws. This Court has always indicated that it will not lightly assume that an act of the legislature violates the will of the people of North Carolina as expressed by them in their Constitution and that we will find acts of the legislature repugnant to the Constitution only 'if the repugnance do really exist and is plain.'" (quoting State *ex rel.* Martin v. Preston, 385 S.E.2d 473, 478 (N.C. 1989))).

98. *See* State *ex rel.* McCrory v. Berger, 781 S.E.2d 248, 252 (N.C. 2016); *see also* McKinney v. Goins, 892 S.E.2d 460, 467 (N.C. Ct. App. 2023) (citing State v. Romano, 800 S.E.2d 644, 649 (N.C. 2017)).

99. *See Berger*, 781 S.E.2d at 252 ("In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt."); *see also Baker*, 410 S.E.2d at 889.

100. *Harper*, 886 S.E.2d at 298 (emphasis added).

101. *See Berger*, 781 S.E.2d at 252 ("In other words, the constitutional violation must be plain and clear." (citation omitted)).

102. *See* N.C. CONST. art. I, § 16; N.C. CONST. art. I, § 19.

the clauses, "the historical context in which the people of North Carolina adopted" them, and the North Carolina precedent on point.[103] Guiding this inquiry is the compass that the explicit and unambiguous language of our state constitution reflects the will of the people who adopted it.[104] Thus, interpretation of the North Carolina Constitution must be rooted in its *plain meaning*.[105] The North Carolina Constitution's fixed meaning is expressed explicitly and clearly through the specific language reflecting the will of the people:[106]

> The constitution is interpreted based on its plain language. The people used that plain language to express their intended meaning of the text when they adopted it. The historical context of our constitution confirms this plain meaning. As the courts apply the constitutional text, judicial interpretations of that text should consistently reflect what the people agreed the text meant when they adopted it.[107]

1. Ex Post Facto Clause

i. North Carolina's Constitution of 1776

In 1776, the people of North Carolina adopted their first state constitution.[108] Because the language of North Carolina's first Constitution was simple and explicit, few opportunities for judicial interpretation arose.[109] Originally found in Section 24 of the Declaration of Rights, the Ex Post Facto Clause governing retrospective laws stated as follows:[110] "That retrospective laws, punishing acts committed before the existence of such laws, and by them *only declared criminal*, are oppressive,

103. *See Berger*, 781 S.E.2d at 252.

104. *See Harper*, 886 S.E.2d at 399.

105. *See id.*

106. *Id.* at 398 ("In the constitutional text, the people have assigned specific tasks to, and expressly limited the powers of, each branch of government. The state constitution is detailed and specific. The people speak through the express language of their constitution, and only the people can amend it." (citing N.C. CONST. art. XIII)).

107. *Id.*

108. ORTH & NEWBY, *supra* note 87, at 3 ("The Independence Constitution of 1776 [was] adopted by a provincial congress rather than by direct vote of the electorate . . . .").

109. *Id.* at 11.

110. *See* Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 8 n.2. Subsequently, this clause moved to Article I, Section 32 when the second North Carolina Constitution was adopted in 1868. *Id.* Finally, in 1971, the third and final North Carolina Constitution was adopted, and the clause was moved to where it remains today in Article I, Section 16. *Id.*

unjust, and incompatible with liberty; wherefore *no ex post facto law ought to be made*."[111]

Ex post facto laws change the legal consequences of acts done before the law's passage.[112] The explicit text of the original North Carolina constitution prohibited only retrospective *criminal* laws: "retrospective laws . . . *only declared criminal* . . . ."[113] Comparatively, the text of the United States Constitution is not as limited, declaring "[n]o . . . ex post facto Law shall be passed."[114] In *Calder v. Bull*, the United States Supreme Court defined this language to prohibit only retrospective *criminal* laws.[115] In reaching this decision, the Court relied in part on the explicit and narrow language utilized in several state constitutions, including North Carolina.[116]

Whether the prohibition on ex post facto laws in North Carolina's first state constitution extended beyond those deemed criminal was first considered in *State v.* _____.[117] In *State v.* _____, the court considered the constitutionality of a retrospective law authorizing the State to pursue judgments against receivers of public money.[118] North Carolina's then-Attorney General argued for the legislature's ability to pass such retrospective law, contending:

> Does any part of our Constitution prohibit the passing of a retrospective law? It certainly does not. The objection is grounded upon the 24th section of our Bill of Rights, which prohibits the passing of an *ex post facto law* . . . ; and this clause, I admit, is in restraint of legislative power in this

111. N.C. CONST. OF 1776, Declaration of Rights, § 24 (emphasis added).

112. *Ex Post Facto Law*, BLACK'S LAW DICTIONARY (6th ed. 1990).

113. ORTH & NEWBY, *supra* note 87, at 63 (quoting N.C. CONST. art.1, § 16).

114. U.S. CONST. art. I, § 9, cl. 3.

115. *See generally* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); *see also* ORTH & NEWBY, *supra* note 87, at 64 ("[T]he U.S. Supreme Court confined the prohibition to retrospective penal laws . . . .").

116. *Bull*, 3 U.S. at 391 ("I also rely greatly on the definition, or explanation of EX POST FACTO LAWS, as given by the Conventions of Massachusetts, Maryland, and North Carolina; in their several Constitutions, or forms of Government."); *see also* ORTH & NEWBY, *supra* note 87, at 64.

117. 2 N.C. (1 Hayw.) 28 (N.C. Super. L. & E. 1794). The predecessor to the North Carolina Supreme Court, known as the North Carolina Superior Courts of Law and Equity, rendered the decision in this case. Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 12 n.3 ("The North Carolina 'Supreme Court' was not established until 1818. From the adoption of the Constitution until the Supreme Court was established, trial judges served on a 'Court of Conference' and reviewed decisions made by other trial judges and laws passed by the General Assembly. *State v.* __ was decided by a Court of Conference.").

118. *State* v. ___, 2 N.C. (1 Hayw.) at 28–29.

> particular[.] [T]his indeed prohibits the passing of a retrospective law so far as it magnifies the *criminality* of a former action, *but leaves the Legislature free to pass all others*, and without such a power no Government could exist for any considerable length of time without experiencing great mischiefs. The exercise of such a power has been found frequently necessary here since the Revolution, and divers retrospective acts, which the Legislature have passed, have been carried into execution and sanctioned by the judiciary.[119]

The court agreed with the Attorney General's argument that the express prohibition of a specific category of retrospective laws leaves the legislature free to pass all others.[120] A fundamental principle guiding construction of North Carolina's constitution is to give effect to the intent of the framers and people who adopted it.[121] *State v.* _____, specifically the arguments by North Carolina's fourth Attorney General,[122] illustrate the early understanding of the state constitution less than twenty years after its adoption.[123] Moreover, *State v.* _____ reiterated an important principle discussed in *Calder v. Bull*:[124] the necessity of the legislature to adopt retrospective laws when the circumstances call for such legislative action.[125]

---

119. *Id.* at 39 (emphasis added). Initially, the Attorney General presented this argument in response to the trial judge's initial ruling against his ability to pursue these judgments under the retrospective law. *Id.* at 29–30. The Attorney General subsequently presented this same argument to a two-judge panel, which sided with him in overruling the trial judge. *Id.* at 40.

120. *Id.*; *see also* Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2 at 13 ("The *State v.* ____ court agreed with the North Carolina Attorney General's argument that by prohibiting this specific category of retrospective legislation, the Constitution permits all other retrospective legislation.").

121. *See* Perry v. Stancil, 75 S.E.2d 512, 514 (N.C. 1953); *see also* N.C. State Bd. of Educ. v. State, 814 S.E.2d 54, 62 (N.C. 2018) ("[I]n interpreting our state's constitution, we are bound to 'give effect to the intent of the framers of the organic law and of the people adopting it.'" (quoting Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs, 681 S.E.2d 278, 282 (N.C. 2009))).

122. *State v.* _____ was decided in 1794 during the term of North Carolina's fourth Attorney General John Haywood which spanned from 1792 to 1795. *North Carolina Former Attorneys General*, NAT'L ASS'N OF ATTORNEYS GEN., https://www.NAAG.org/attorneys-general/past-attorneys-general/North-Carolina-Former-Attorneys-General/ [https://perma.cc/87DL-4RCY].

123. *See* McKinney v. Goins, 892 S.E.2d 460, 469 (N.C. Ct. App. 2023) ("Although the Court resolved *State v.* _____, without issuance of a formal opinion, it is both illuminating of and relevant to a historical understanding of the Law of the Land Clause as originally ratified and enforced in connection with retroactive claims for monetary relief.").

124. 3 U.S. (3 Dall.) 386 (1798).

125. *State v.* _____, 2 N.C. (1 Hayw.) at 39 ("But [it] leaves the Legislature free to pass all others, *and without such a power no government could exist for any considerable length*

When time and circumstances demand, the legislatures power to act as an agent for the people must not be restricted unless the text declares such restriction.[126] The people of North Carolina "speak through the express language of their constitution" which details explicitly their chosen limitations on the governments powers.[127] This early decision recognizes the will of the people of North Carolina to leave the General Assembly's ability to enact retrospective *civil* legislation untethered.

In 1856, in *Phillips v. Cameron*, the Supreme Court of North Carolina explained the legislature may permissibly revive time-barred claims so long as this intent to do so is made clear in the legislation's language.[128]

In *State v. Bell*, the North Carolina Supreme Court upheld a retrospective tax as constitutional.[129] The court held that the North Carolina Constitution's prohibition on ex post facto laws applied only to criminal matters, adhering to the "universally accepted" categorical definition of "ex post facto law" set out in *Calder v. Bull*.[130] Echoing the arguments in *State*

---

of time without experiencing great mischiefs. The exercise of such a power hath been found *frequently necessary here since the Revolution*, and divers retrospective acts, which the Legislature have passed, have been carried into execution and sanctioned by the Judiciary." (emphasis added)); *Calder*, 3 U.S. (3 Dall.) at 391 ("[T]here are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement . . . such [retrospective] laws may be *proper or necessary*, as the case may be." (emphasis added)).

126. *See* State *ex. rel.* Martin v. Preston, 385 S.E.2d 473, 478 (N.C. 1989) ("All power which is not *expressly limited* by the people in our State Constitution *remains with the people*, and an act of the people through their representatives in the legislature is *valid unless prohibited* by that Constitution." (emphasis added) (citing McIntyre v. Clarkson, 119 S.E.2d 888, 891 (N.C. 1961))).

127. Harper v. Hall, 886 S.E.2d 393, 398 (N.C. 2023) ("The state constitution is detailed and specific. The people speak through the express language of their constitution . . . .").

128. Phillips v. Cameron, 48 N.C. (3 Jones) 390, 393 (1856).

129. State v. Bell, 61 N.C. (Phil.) 76, 79 (1867).

130. *Id.* at 81 ("Because it is an '*ex post facto* law,' and therefore prohibited by the Constitution of the United States. Art. I, sec. 10, ch. 1. It becomes necessary, then, to inquire what is such a law? That question was answered and settled by the Supreme Court of the United States in the case of *Calder v. Bull*, 3 Dallas 386, in which it was defined to be as follows: '(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates a crime or makes it greater than it was before it was committed. (3) Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when it was committed. (4) Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.' This definition, thus given by Judge Chase in pronouncing the opinion of the Court, has been universally accepted and approved, and it shows that an *ex post facto* law, in the sense in which it is used in the Constitution, applies to matters of a

v. _____, the court referenced the maxim *expressio unius est exclusio alterius*[131] to illustrate that the lack of any *general* prohibition on retrospective laws, in light of the *express* ban on those deemed criminal, "is a strong argument to show that retrospective laws, merely as such, were not intended to be forbidden."[132]

In January 1868, just before the adoption of North Carolina's second constitution in April 1868, the North Carolina Supreme Court decided *Hinton v. Hinton*.[133] In *Hinton*, the court considered the constitutionality of a law reviving a widow's time-barred dower claim.[134] The widow's dower claim was barred under the original six-month statute of limitation.[135] In 1866, the legislature passed retroactive legislation enabling the widow to bring her time-barred claim.[136] The retroactive legislation at issue in *Hinton* operated similarly to the Revival Provision of the SAFE Child Act.[137]

---

criminal nature, and to them only." (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798))).

131. *See* Jeffries v. Cnty. of Harnett, 817 S.E.2d 36, 50 (N.C. Ct. App. 2018) ("The interpretive canon of *expressio unius est exclusio alterius* instructs that the expression of one thing implies the exclusion of another." (citation omitted)).

132. *Bell*, 61 N.C. (Phil.) at 82–94 ("Whenever a retrospective statute applies to crimes and penalties, it is an *ex post facto* law, and as such is prohibited by the Constitution of the United States, not only to the States, as we have already seen, but to Congress. Art. I, [§] 9, [cl.] 3. The omission of any such prohibition in the Constitution of the United States, and also of the State, is a strong argument to show that retrospective laws, merely as such, were not intended to be forbidden. It furnishes an instance for the application of the maxim *expressio unius est exclusion alterius*. We know that retrospective statutes have been enforced in our courts . . . .").

133. 61 N.C. (Phil.) 410 (1868). North Carolina's second constitution was ratified in April of 1868, *Hinton* was decided in January of 1868. *See* Allen W. Trelease, *Reconstruction*, NCPEDIA (Jan 1, 2006), https://NCpedia.org/Reconstruction-Part-3-Statewide-c [https://perma.cc/3HLV-U5G5]; Hinton v. Hinton, 61 N.C. 410, Phil. Law 410 (N.C. 1868).

134. *Hinton*, 61 N.C. (Phil.) at 414–15; *see also* McKinney v. Goins, 892 S.E.2d 460, 470 (N.C. Ct. App. 2023) ("In *Hinton* . . . , the Court was tasked with determining whether a law reviving the rights of widows to claim dower that had expired under a statute of limitations was an unconstitutional retrospective law.").

135. *Hinton*, 61 N.C. (Phil.) at 410 ("The act of 1784 . . . [,] giving widows of testators six months in which to dissent from wills, is not a statute conferring a right of dower, but a 'statute of limitations' upon that right, as it existed at common law.").

136. *Id.* ("The act of February 1866, giving widows further time for dissenting, is constitutional, and applies to a case in which at its passage the widow was barred under the act of 1784.").

137. Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 18 (discussing *Hinton* and stating that "[t]he validity of a retrospective legislative enactment operating almost exactly like Section 4.2.(b) of the SAFE Child Act was addressed by the North

The *Hinton* court held the General Assembly has the power to pass legislation reviving time-barred claims.[138] In so holding, the court emphasized the distinction between remedies and rights. Statutes of limitations affect only a plaintiff's available *remedy*.[139] When a statute of limitation expires, this does not extinguish plaintiff's claim.[140] Rather, a statute of limitations imposes a procedural bar restricting a plaintiff's right to bring their claim.[141] This procedural bar does not operate to *vest* a right to property in defendants reliance on the original statute of limitation.[142] Legislative enactments removing this procedural bar—i.e., reviving plaintiff's right to bring its claim—take only a defendant's *privilege* of not being subject to suit once the original statute of limitations has run.[143] Revoking this *privilege* is not equivalent to depriving a defendant of a *property right* that invokes due process concerns: "Can the devisee object that [reviving the plaintiff's right of action] deprives him of his land? Surely not. It only takes from him the privilege of claiming the benefit of a former statute, whereby to bar the widow's common-law right."[144] "Stated simply, no claim to or interest in property invariably stems from a defendant's reliance on the procedural bar provided by the statute of limitations, and thus no vested right is impacted when that bar is lifted."[145] The *Hinton* court recognized this important distinction when it held:

> There is in this case no interference with vested rights. The effect of the statute is not to take from the [defendant] his property and give it to the [plaintiff], but merely to take from him a right conferred by the former statute, to bar the [plaintiff] widow's writ of dower, by suspending the operation of that statute for a given time; in other words, it affects the remedy and not the right of property. *The power of the Legislature to pass retroactive statutes affecting remedies is settled*.[146]

Carolina Supreme Court in the same year that Article I, § 24 was amended to prohibit certain types of retrospective civil tax legislation").

138. *Hinton*, 61 N.C. (Phil.) at 415.
139. *Id.*
140. *Id.* at 415–16.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. McKinney v. Goins, 892 S.E.2d 460, 470 (N.C. Ct. App. 2023).
146. *Hinton*, 61 N.C. (Phil.) at 415 (emphasis added).

ii. North Carolina's Constitution of 1868

In April 1868, North Carolina adopted its second state constitution. For almost a century, the Constitution of 1868 served as the skeleton of our State's democratic body.[147] Noticeably more detailed than its predecessor, this expanded text was marked with considerable changes.[148] Of specific importance was newly adopted language in the Ex Post Facto Clause, which was moved to Article I, Section 32:

> Retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty, wherefore, no ex post facto law ought to be made. *No law taxing retrospectively, sales, purchases, or other acts previously done, ought to be passed*.[149]

This new language extended the prohibition on retrospective criminal laws to one specific category of retrospective civil laws: tax laws.[150] Unlike North Carolina's first constitution, the Constitution of 1868 was submitted to and ratified by the electorate.[151] The people of North Carolina spoke through the Ex Post Facto Clause's specific and detailed language to carve out a new limitation on the General Assembly's broad legislative power.[152] This plain language makes clear only two express categories of retrospective laws are prohibited: criminal and tax.[153] Historical context provided by *State v. Bell* confirms this plain meaning.[154] Whether the

147. *See* ORTH & NEWBY, *supra* note 87, at 4.

148. *See id.* at 19.

149. N.C. CONST. OF 1868, art. I, § 32 (emphasis added).

150. *See* ORTH & NEWBY, *supra* note 87, at 64.

151. *See id.* at 19–20; *see also* Ronnie W. Faulkner, *Convention of 1868*, NCPEDIA (Jan. 1, 2006), https://www.NCpedia.org/government/Convention-1868 [https://perma.cc/A23X-D3FA] (showing the 1868 state constitution was ratified by a vote of 93,086 to 74,016).

152. *See* Harper v. Hall, 886 S.E.2d 393, 398 (N.C. 2023); *see also* Sneed v. Greensboro Bd. of Educ., 264 S.E.2d 106, 110 (N.C. 1980) ("Where the construction of a constitutional provision is at issue . . . it is incumbent upon [the] Court to interpret the organic law in accordance with the intent of its framers and the citizens who adopted it. Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation.").

153. *See* ORTH & NEWBY, *supra* note 87, at 64; *see also* Harper, 886 S.E.2d at 399 ("The constitution is interpreted based on its plain language. The people used that plain language to express their intended meaning of the text when they adopted it.").

154. *See* Harper, 886 S.E.2d at 399 ("The historical context of our constitution confirms this plain meaning. As the courts apply the constitutional text, judicial interpretations of that

Constitution of 1776 prohibited the General Assembly from enacting retrospective tax laws posed a novel question first addressed in *State v. Bell*.[155] In response to *State v. Bell*, which upheld the constitutionality of a retrospective tax, the people adopted explicit language prohibiting such enactments in North Carolina's second constitution:[156] "No law taxing retrospectively, sales, purchases, or other acts previously done, ought to be passed."[157] *State v. Bell* illustrates the will of the people to permit the General Assembly to enact retrospective civil laws except those concerning taxes.[158]

The people's choice to leave other matters untouched in North Carolina's second constitution is critical. In *Hinton*, the court recognized that the "power of the Legislature to pass retroactive statutes affecting remedies is settled."[159] Unlike the explicit restriction adopted in response

---

text should consistently reflect what the people agreed the text meant when they adopted it.").

155. State v. Bell, 61 N.C. (Phil.) 76, 90 (1867) ("This case was argued before us at the last term of the Court, *but the questions presented in it were found to be novel, as well as important*, we deemed it proper to take time for deliberation, and to request another argument." (emphasis added)).

156. Coley v. State, 631 S.E.2d 121, 124 (N.C. 2006) ("Shortly after we issued our opinion in *Bell*, the North Carolina Constitutional Convention of 1868 convened. The Journal from the Convention illustrates that preliminary versions of the draft Constitution contained in the Declaration of Rights a provision against *ex post facto* laws. JOSEPH W. HOLDEN, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA 168, 213 (1868). However, the provision did not include a prohibition against retrospective taxation until delegate William B. Rodman, an attorney, moved to add the following language: 'No law taxing retrospectively sales, purchases, or other acts previously done ought to be passed.' As detailed below, plaintiffs argue that Rodman's personal papers indicate that he was aware of the *Bell* decision and *suggest that the holding in that case influenced his motion*. Rodman's amendment was adopted, and the final version, [with the inclusion of the language prohibiting retrospectives taxes] appeared in Article I, Section 32 of the Constitution approved in April of 1868." (emphasis added) (footnotes omitted)).

157. N.C. CONST. OF 1868, art. I, § 32; *see also* McKinney v. Goins, 892 S.E.2d 460, 471 (N.C. Ct. App. 2023) ("Within a year of both *Bell* and *Hinton*, the people of North Carolina saw fit to further restrict the ability of the General Assembly to pass retrospective laws when they ratified a new constitution in 1868." (footnote omitted)).

158. *See* Order Granting Defendant's Motion to Dismiss, McKinney v. Goins, *supra* note 42, at 5 (McGee, J., dissenting) ("Within a year of the *Bell* decision, North Carolina amended its Constitution's *ex post facto* clause to prohibit retrospective taxes . . . . *Bell*, which has not been overturned, provides strong support that retrospective general legislation, such as the provision under consideration here, is not per se unconstitutional. Moreover, the history following *Bell* shows a clear path for how the people of North Carolina could make retroactive general legislation per se unconstitutional—by constitutional amendment." (citations omitted)).

159. Hinton v. Hinton, 61 N.C. (Phil.) 410, 415 (1868).

to *State v. Bell*, the people refrained from disturbing *Hinton*'s holding.[160] Moreover, the North Carolina Supreme Court reaffirmed *Hinton*'s holding in *Tabor v. Ward* after the adoption of the Constitution of 1868.[161]

iii. North Carolina's Constitution of 1971

In November 1970, North Carolina adopted its third and current state constitution, known as the Constitution of 1971.[162] The Ex Post Facto Clause was moved once more to Article I, Section 16, where it remains today, and states as follows:

> Retrospective laws, punishing acts committed before the existence of such laws and by them only declared *criminal*, are oppressive, unjust, and incompatible with liberty, and therefore no *ex post facto law shall be enacted*. No law *taxing* retrospectively sales, purchases, or other acts previously done *shall be enacted*.[163]

Only minor language changes are seen in the Ex Post Facto Clause, with the phrases "ought to be made" and "ought to be passed" replaced by "shall be enacted." In adopting the Constitution of 1971, the people once again chose not to expand the Clause's prohibitions beyond criminal and tax laws. By ratifying the pertinent language of the Constitution of 1868 without change in the Constitution of 1971, the people are "presumed to have confirmed and acquiesced in the prior judicial interpretations of the provision."[164] Thus, *Hinton v. Hinton*'s holding, reaffirmed in *Tabor v. Ward*, remains untouched.[165]

---

160. *See McKinney*, 892 S.E.2d at 471 ("But, beyond restricting *ex post facto* criminal laws and retrospective taxation—the latter in apparent reaction to *Bell*—the people ratified no other express provisions further restricting retrospective acts specifically, let alone those deemed constitutional by *Hinton*.").

161. Tabor v. Ward, 83 N.C. 291, 294 (1880) ("Retroactive laws are not only not forbidden by the State Constitution, but they have been sustained by numerous decisions in our own State." (citing State v. Bond, 49 N.C. (4 Jones) 9 (1856); *Bell*, 61 N.C. (Phil.) 76; State v. Pool, 27 N.C. (5 Ired.) 105 (1844); and *Hinton*, 61 N.C. (Phil.) 410 as cases "where it was expressly held 'that *retroactive legislation is not unconstitutional*, and that *retroactive legislation is competent to affect remedies, not rights*'" (emphasis added))).

162. Coley v. State, 631 S.E.2d 121, 124–25 (N.C. 2006).

163. N.C. CONST. art. I, § 16 (emphasis added).

164. Virmani v. Presbyterian Health Servs. Corp., 493 S.E.2d 310, 320 (N.C. Ct. App. 1997), *aff'd in part, rev'd in part on other grounds*, 515 S.E.2d 675 (N.C. 1999) (citations omitted).

165. *Hinton*, 61 N.C. (Phil.) at 415; *Tabor*, 83 N.C. at 294.

The North Carolina Supreme Court has declared that when interpreting the North Carolina Constitution, "where the meaning is clear from the words used, [the court] will not search for a meaning elsewhere."[166] Through the text of the Ex Post Facto Clause, in light of its historical context and surrounding precedent, the people's voice echoes plain and clear: retrospective civil laws, including those reviving statutes of limitations, are constitutional; retrospective criminal and tax laws are not.[167]

2. The Law of the Land Clause

i. Overview of the Law of the Land Clause

Within the Declaration of Rights of the North Carolina Constitution lies the Law of the Land Clause, providing that: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."[168]

The Law of the Land clause parallels the Fifth and Fourteenth Amendments of the United States Constitution, which protect citizens from deprivation of life, liberty, or property by the Federal and State governments without due process of law.[169] The North Carolina Constitution utilizes the language "but by the law of the land" which simply means the law, thus, encompassing acts of the General Assembly.[170] North Carolina's constitution is the supreme law of the land and enactments of the General Assembly, as the voice of the people, are the law of the land unless prohibited by an express provision of the constitution.[171]

Defendant Board argued the Revival Provision violates the Law of the Land Clause by depriving it of its vested right in a statute of limitations defense.[172] Upon expiration of the statutory period applicable to Plaintiffs' claims under General Statute section 1-52, Defendant Board argues this vested it with a constitutionally protected right not to be sued.[173] Thus, subsequent legislative action reviving Plaintiffs' time-barred claims,

166. State *ex rel.* Martin v. Preston, 385 S.E.2d 473, 479 (N.C. 1989) (citation omitted).

167. McKinney v. Goins, 892 S.E.2d 460, 471 (N.C. Ct. App. 2023) ("This history plainly demonstrates that retroactive civil laws, including ones reviving statutes of limitation, are not inherently unconstitutional . . . .").

168. N.C. CONST. art. I, § 19.

169. ORTH & NEWBY, *supra* note 87, at 69.

170. *Id.*

171. *Id.*

172. Brief for Defendant-Appellees, McKinney v. Goins, *supra* note 1, at 11.

173. *Id.*

allowing them to bring suit within the two-year revival window, operated to deprive Defendant Board of its vested right not to be sued.[174] This purported vested right to a statute of limitations defense is not found within the *text* of the North Carolina Constitution.[175] Rather, this vested right is argued to stem from *Wilkes County v. Forester*[176] and the line of cases that "reaffirmed" *Wilkes County*'s "straightforward pronouncement that a statute of limitations defense is a vested right in North Carolina once the statutory period for bringing a claim has expired."[177]

ii. Wilkes County v. Forester

a. Wilkes County's Predecessors

Before analyzing *Wilkes County*, it is important to highlight the cases that came before it. In *Hinton*, the North Carolina Supreme Court refuted the vested rights argument propounded in *Wilkes County*.[178] The *Hinton* court held there is no such vested rights to a statute of limitations defense and the General Assembly is free to revive time-barred claims.[179] Shortly after *Hinton*, in *Johnson v. Winslow*, the court considered whether the General Assembly could *suspend* the operation of statutes of limitation that had not yet run.[180]

In *Johnson*, a "Stay Law" was passed in 1861 suspending the operation of the statute of limitation applicable to the plaintiff's contract claim until January 1870.[181] The plaintiff brought suit in May 1869 and the defendant argued that the plaintiff's action was time-barred.[182] Under the applicable three-year statute of limitations, the plaintiff's claims would have been

174. *Id.*

175. *See* McKinney v. Goins, 892 S.E.2d 460, 464 (N.C. Ct. App. 2023).

176. 167 S.E. 691 (N.C. 1933).

177. Brief for Defendant-Appellees, McKinney v. Goins, *supra* note 1, at 31; *see also id.* at 11 ("Once a claim extinguishes, it cannot be resurrected, as the erstwhile defendant has a vested right in the extinguishment of claims. This result is not due to an isolated or 'antiquated' decision, but is the rule consistently followed by courts applying North Carolina law." (citing Wilkes Cnty. v. Forester, 167 S.E. 691, 695 (N.C. 1933)).

178. *See* Hinton v. Hinton, 61 N.C. (Phil.) 410, 414–15 (1868).

179. *See id.*; *see also* Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 23. ("[I]n 1868 the North Carolina Supreme Court held in *Hinton v. Hinton* that there is no vested right in a limitations defense and that the legislature can retroactively revive claims.").

180. *See McKinney*, 892 S.E.2d at 473 (citing Johnson v. Winslow, 63 N.C. 552, 553 (1869)).

181. 63 N.C. at 552–53.

182. *Id.* at 552.

barred by 1869 had the "Stay Law" not been passed.[183] Affirming the trial court's judgement for the plaintiff, the court held that the "Stay Law" was constitutional and within the legislature's power to prospectively suspend operation of statutes of limitation.[184]

In explaining its holding, the *Johnson* court stated in dicta that "the Legislature has no power to revive a right of action after it has been barred, i.e., to *suspend* the operation of the Statute of Limitations retrospectively, after it has operated."[185] Defendant Board characterizes this clear dicta as *Johnson*'s explicit holding.[186] The sole issue in *Johnson*, however, was the suspension of statutes of limitations that had not yet run, rather than *expired* statutes of limitations.[187] Whether the legislature could revive expired statutes of limitations was squarely addressed and resolved in *Hinton* just seventeen months before.[188] *Johnson* did not "purport to abrogate or overrule *Hinton*."[189] Moreover, *Hinton* was subsequently reaffirmed after *Johnson* in *Tabor v. Ward*.[190] The misguided elevation of *Johnson*'s dicta from mere commentary to case law sets the stage for *Wilkes County* and its progeny.

In 1884, the North Carolina Supreme Court decided *Whitehurst v. Dey*. In *Whitehurst*, a creditor refrained from filing suit against a testator's estate within the applicable statutory period because of an alleged promise by the estate's executor to pay creditor the debts owed.[191] When the executor failed to pay, the creditor sued.[192] The executor countered suit by raising the defense that the creditor's claims were time-barred. [193] The trial court found that the running of the statute of limitation was suspended based on the executor's alleged promises, thus the creditor was entitled to recover. [194] On appeal, the North Carolina Supreme Court reversed, holding that the creditor's claims were time-barred, reasoning that the executor's conduct did not fraudulently or otherwise cause the creditor's "failure to sue" within

183. *Id.* at 552–53.

184. *Id.* at 553–54.

185. *Id.* at 553 (emphasis added); *see also McKinney*, 892 S.E.2d at 473; Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 24.

186. Brief for Defendant-Appellees, McKinney v. Goins, *supra* note 1, at 22.

187. *See Johnson*, 63 N.C. at 553.

188. *Id.* at 24.

189. McKinney v. Goins, 892 S.E.2d 460, 473 (N.C. Ct. App. 2023).

190. *See* Tabor v. Ward, 83 N.C. 291, 294 (1880).

191. Whitehurst v. Dey, 90 N.C. 542, 542–43 (1884).

192. *Id.* at 543.

193. *Id.*

194. *Id.*

the statute of limitation period, nor did this failure cause the statute of limitation to toll.[195]

After resolving the sole issue on appeal,[196] the court stated in dicta that a retrospective law reviving time barred claims would operate "to be an impairment of vested rights. . . falling within the inhibition of the *federal constitution*."[197] Defendant Board admits this is mere dicta,[198] yet inexplicably asserts *Whitehurst*'s and *Johnson*'s utterances in dicta are authoritative "cases finding a vested right in a limitations defense."[199]

Interestingly, *Whitehurst* made no reference to *Johnson*.[200] Moreover, *Whitehurst* made no reference to a specific provision of the North Carolina Constitution.[201] Rather, in dicta, the court asserted that legislative revival of expired statutes of limitation are an "impairment of vested rights" and are "within the inhibition of the *federal* constitution."[202] The United States Supreme Court disproved *Whitehurst*'s assertion less than a year later in *Campbell v. Holt*, holding that the federal constitution does *not* inhibit legislatures' power to revive time-barred claims because "no right is destroyed when the law restores a remedy which had been lost."[203]

Johnson and *Whitehurst*'s dicta tee up the vested rights discussion for *Wilkes County*. Defendant Board hangs its hat on *Wilkes County* in arguing that the expired statute of limitation applicable to Plaintiffs' claims vested the Board with the right to a limitations defense, such that the Revival Provision's revival of Plaintiffs' time-barred claims violates the Law of the Land Clause.[204] Relying on a *stare decisis* argument, the majority of the three-judge panel and Judge Carpenter, in his dissenting opinion at the

195. *Id.* at 543–44.

196. *Id.* at 543 ("The *only point* presented in the record for our consideration is the sufficiency of the evidence of what transpired between the parties, and of the successive promises of the defendant to remove the statutory bar and warrant a recovery." (emphasis added)).

197. *Id.* at 545.

198. Brief for Defendant-Appellees, McKinney v. Goins, *supra* note 1, at 22 ("Later, in *Whitehurst v. Dey*, 90 N.C. 542, 545–46 (1884), the Court stated *in dicta* . . . ." (emphasis added)).

199. *Id.* at 22.

200. *See Whitehurst*, 90 N.C. 542; *see also* Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 24.

201. *See generally Whitehurst*, 90 N.C. 542.

202. *Id.* at 545; *see also* Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 21–22; McKinney v. Goins, 892 S.E.2d 460, 473–74 (N.C. Ct. App. 2023).

203. *See* Campbell v. Holt, 115 U.S. 620, 628 (1885); *see also McKinney*, 892 S.E.2d at 474 (citing *Campbell*, 115 U.S. at 628).

204. Brief for Defendant-Appellees, McKinney v. Goins, *supra* note 1, at 2, 9–10, 28.

Court of Appeals, believe that *Wilkes County* controls and settles the issue.[205]

However, as the Court of Appeals held, *Wilkes County* is not the silver bullet Defendant Board contends it to be.[206] *Wilkes County*'s purported declaration of a defendant's vested right in limitations defense is dicta.[207] *Wilkes County's* progeny's subsequent parroting of *Wilkes County's dicta* does not imbue these unnecessary utterances with the force of law.[208] Therefore, reliance on *Wilkes County* and its progeny is mistaken, for "[t]he doctrine of stare decisis contemplates only such points . . . *actually involved and determined in a case*, and not what is said by the court or judge outside of the record or on points not necessarily involved therein."[209] Although Judge Carpenter argues in his dissent that "[s]tare decisis binds us beyond a reasonable doubt[,]"[210] dicta from *Wilkes County*, simply, is not binding at all.

Understanding why the vested rights discussion in *Wilkes County* is dicta requires looking beyond sentences of the opinion in isolation.[211] Clarifying which assertions in the opinion are elevated to holdings requires understanding "the question before the court upon which the judgment depended, how (and by what reasoning) the court resolved the question, and what role, if any, the proposition played in the reasoning that led to the judgment."[212] Thus, a detailed look into *Wilkes County* is essential, for "[c]ases do not unfold their principles for the asking. They yield up their kernel slowly and painfully."[213]

b. Wilkes County*'s Factual and Procedural History*

On May 16, 1930, Wilkes County brought suit to foreclose certificates of tax sales the county purchased for unpaid taxes on the Forester's

205. *See* Order Granting Defendant's Motion to Dismiss, McKinney v. Goins, *supra* note 46, at 5; *see McKinney*, 892 S.E.2d at 481–82 (Carpenter, J., dissenting).

206. *See McKinney*, 892 S.E.2d at 474–75.

207. *See id*.

208. *See id.* at 476 ("[*D*]*icta* upon *dicta* does not the law make. Nor can *dicta* in subsequent decisions serve to expand or modify earlier holdings, as *dicta* is itself without legal effect." (citations omitted)).

209. Moose v. Bd. of Comm'rs, 90 S.E. 441, 448 (N.C. 1916) (emphasis added) (citation omitted).

210. *McKinney*, 892 S.E.2d at 481 (Carpenter, J., dissenting).

211. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1257 (2006).

212. *Id.*

213. *Id.* at 1269 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 29 (1921)).

property.[214] The certificates were sold to Wilkes County on November 5, 1928, for the unpaid 1924 taxes, and on November 8, 1928, for the unpaid 1925 taxes.[215] Under C.S. 8037, the applicable statute of limitation at the time, Wilkes County had eighteen months after purchasing the certificates to bring a foreclosure action.[216] Wilkes County failed to institute its foreclosure action until after eighteen months had elapsed, and, thus, Forester plead the statute of limitation as a defense to the suit.[217] In an effort to counter Forester's statute of limitations defense, Wilkes County turned to a revival act enacted in 1931, which extended the statute of limitations for tax certificates.[218] Unfortunately for Wilkes County, the revival act was passed in 1931 *after* Wilkes County filed suit on May 16, 1930.[219] The 1931 revival act did not apply to Wilkes County's *pending* action, as the act's proviso made clear: "Nothing herein shall prevent or prohibit the continuance and suing to completion any of said suit or suits under the laws existing at the time of institution of said action."[220] At the close of Wilkes County's evidence at trial, the superior court granted Forester's motion for judgment of nonsuit which Wilkes County appealed to the Supreme Court of North Carolina.[221]

The sole issue raised on appeal was whether the superior court erred in granting Forester's motion for judgment of nonsuit based on the County's failure to institute its action within the requisite statutory period.[222] After a

214. Appellate Record at 1–2, Wilkes Cnty. v. Forester, 204 N.C. 163 (1933) (No. 575).

215. *Id.* at 1–2, 6–8; *see also* Wilkes Cnty. v. Forester, 167 S.E. 691, 691 (N.C. 1933).

216. *Wilkes Cnty.*, 167 S.E. at 692. The applicable statute of limitation was as follows: "Every county, or political subdivision of the State which is now, or may hereafter become, the holder by purchase at sheriff's sale of land for taxes of any certificate of sale, shall bring action to foreclose the same within eighteen months from the date of the certificate." 1927 N.C. Sess. Laws 584.

217. *Wilkes Cnty.*, 167 S.E. at 692.

218. *See id.* at 692–93.

219. *Id.*

220. 1931 N.C. Sess. Laws 319–20.

221. Appellate Record, Wilkes Cnty. v. Forester, *supra* note 214, at 11.

222. Brief for Plaintiff-Appellants at 1, Wilkes Cnty. v. Forester, 167 S.E. 691 (1933) (No. 575) ("Statement of Questions Involved: 1. Did His Honor err in allowing the defendant's motion as of nonsuit as set out in the record proper? 2. Did His Honor err in signing the judgment as appears in the record?"); Brief for Defendant-Appellees at 1, Wilkes Cnty. v. Forester, 167 S.E. 691 (1933) (No. 575) ("Questions Involved: 1. Did the Court err in sustaining motion for judgment of nonsuit?"). On appeal, Wilkes County argued the court erred by granting Forester's motion for judgment of nonsuit because Wilkes County presented sufficient evidence in support of its claim entitling the case to be submitted to the jury. *See* Brief for Plaintiff-Appellants, Wilkes Cnty. v. Forester, *supra* note 222, at 6. Forester argued that the trial court properly dismissed Wilkes County's claim because Wilkes County failed to satisfy its burden of establishing that suit was brought within 18

straightforward application of the applicable statute of limitation, C. S. 8037, the court held that Wilkes County's action was time-barred and affirmed the superior court's grant of Forester's motion for nonsuit.[223] This is the one, and the only, pertinent and binding holding of *Wilkes County*. The 1931 revival act was of no application to the issue before the court, as the statute's plain language made clear, it did not apply to foreclosure actions filed *before* its enactment.[224]

c. Wilkes County*'s Dicta*

After fully resolving the dispute, the court unnecessarily considered whether the 1931 revival act was constitutional.[225] While considering the constitutionality of the 1931 revival act, the court *explicitly* stated that it was not applicable to the case at hand:

> Again we think under the proviso the present action is exempted from the statute. Public Laws 1931, c. 260, *supra*: "Nothing herein shall prevent or prohibit the continuance and suing to completion any of said suit or suits *under the laws existing at the time of institution of said action*."[226]

After clarifying that the 1931 revival act did not apply to the case, the court offered its mere commentary on the law had it been an issue presented to the court. The *Wilkes* court's opinion was that retrospective legislation, like the 1931 revival act, was unconstitutional because it takes away a defendants vested right to a statute of limitations defense.[227] The *Wilkes* court's vested rights discussion in dicta has become the most referenced, and most misunderstood, portion of the opinion:

---

months of the sale. *See* Brief for Defendant-Appellees, Wilkes Cnty. v. Forester*, supra* note 222, at 2. Neither Wilkes County nor Forester's briefs raised any constitutional challenge to the 1931 revival act.

223. *See Wilkes Cnty.*, 167 S.E. at 693–94.

224. *Id.* at 693 ("Any . . . *board of commissioners of any county* . . . holding a certificate of sale on which an action to foreclose has not been brought . . . shall have until the first day of December, one thousand nine hundred and thirty-one, to institute such action . . . . *Provided, however, that where any action to foreclose has heretofore been instituted or brought for the collection of any tax certificate, prior to the ratification of this act, under the then existing laws, nothing herein shall prevent or prohibit the continuance and suing to completion any of said suit or suits under the laws existing at the time of institution of said action*.").

225. *Id.* at 694.

226. *Id.* at 695.

227. *See id.*

> Whatever may be the holdings in other jurisdictions, we think this jurisdiction is committed to the rule that an enabling statute to revive a cause of action barred by the statute of limitations is inoperative and of no avail. It cannot be resuscitated. The sovereign permitted an old principle to be invaded in this matter, that no time runs against the commonwealth or State, and the General Assembly having passed the statute of limitations which defendants properly pleaded, the statute of 1931, which attempted to destroy defendants' defense of the statute of limitations, is inoperative and void as to them. *It takes away vested rights of defendants, and therefore is unconstitutional*.[228]

Because the revival provision is of no application to the case, the court's purported holding declaring it unconstitutional is "by definition no part of the doctrine of the decision" i.e., it is dicta.[229]

Dicta is essentially a court's commentary on how it "*would* decide some other, different case, and has no effect on its decision of the case before it."[230] However, because this commentary is "not necessary to the decision" it is not binding in later decisions.[231] What is problematic about the *Wilkes County* court's discussion in dicta is not the mere utterance of dicta, but the failure of subsequent appellate decisions to distinguish it from the opinion's holding.[232] Any statement in dicta would present no harm if subsequent courts distinguished between the holding and non-binding commentary of the case. In reality, "[u]nless a court disagrees with the earlier statement and is eager to reject it, the court often does not make the effort to determine whether the proposition was in fact a holding."[233] Subsequent elevation of *Wilkes County*'s utterances in dicta from commentary to case law is exemplary of this all-too-common reality.

---

228. *Id.* (emphasis added) (internal citations omitted).

229. *Dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 307 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914)).

230. Leval, *supra* note 211, at 1256; *see also* Kerr, *supra* note 68, at 60 ("Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase 'obiter dictum,' which means 'a remark by the way.'").

231. *See* Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc., 328 S.E.2d 274, 281 (N.C. 1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." (citations omitted)).

232. *See* Leval, *supra* note 211, at 1253 ("Let me make as clear as I can that I do not in the least oppose the careful use of dictum in judicial opinions. . . . What is problematic is not the utterance of dicta, but the failure to distinguish between holding and dictum." (footnote omitted)).

233. *Id.* at 1269.

In *Wilkes County*, the constitutionality of the 1931 revival act was not an issue before the court and was not briefed by either party.[234] Issues presented for appellate review are carefully considered and thoroughly examined.[235] When courts reach beyond the issues presented in a case, flawed and ill-considered rules are more likely to result.[236] The risk of flawed rules is important to keep in mind when analyzing the following authority utilized by *Wilkes County* to support its assertions in dicta.

The *Wilkes County* court's vested rights analysis begins with a quote from *Campbell v. Holt* cited by *Booth v. Hairston*:

> In *Campbell v. Holt*, it is said: "It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property, without due process of law."[237]

The portion of *Campbell* quoted above is dicta. In *Campbell*, the United States Supreme Court held that the Fourteenth Amendment of the United States Constitution *does not* bar a state legislature from reviving civil claims after a statute of limitations has run because "no right is destroyed when the law restores a remedy which had been lost."[238]

Additionally, *Campbell* is an interpretation of the Fourteenth Amendment of the United States Constitution. Although the North Carolina Constitution's Law of the Land Clause "is held to be the equivalent of 'due process of law'" found in the Fourteenth Amendment of the United States Constitution, interpretations of the federal constitution are not binding

234. *See generally* Brief for Plaintiff-Appellants, Wilkes Cnty. v. Forestor, *supra* note 222 (excluding reference to the 1931 revival act); Brief for Defendant-Appellees, Wilkes Cnty. v. Forestor, *supra* note 222 (excluding reference to the 1931 revival act).

235. *See* Moose v. Bd. of Comm'r, 90 S.E. 441, 449 (N.C. 1916).

236. Leval, *supra* note 211, at 1255 ("[C]ourts are more likely to exercise flawed, ill-considered judgment, more likely to overlook salutary cautions and contraindications, more likely to pronounce flawed rules, when uttering dicta than when deciding their cases. . . . Giving dictum the force of law increases the likelihood that the law we produce will be bad law." (footnote omitted)).

237. Wilkes Cnty. v. Forester, 167 S.E. 691, 694 (N.C. 1933) (citations omitted).

238. Campbell v. Holt, 115 U.S. 620, 628 (1885).

interpretations of the North Carolina Constitution.[239] Perhaps in recognition of either the fact that the portion of *Campbell* quoted is dicta or that interpretations of the Fourteenth Amendment are merely persuasive, not binding, authority, the *Wilkes County* court states "[a]lthough the *Campbell* case, *supra*, is not applicable to the facts in this action, it has been frequently cited to sustain them."[240]

The *Wilkes County* court continues its vested rights analysis with more, this time admittedly so, "*obiter dictum*," found in *Dunn v. Beaman*.[241] First, the court looked to *Dunn*'s discussion of *Hinton*'s and *Campbell*'s holdings that the legislature is free to revive time barred civil claims.[242] Then, the court quoted *Dunn*'s reference to more dicta found in *Whitehurst v. Dey* asserting the following:

> [T]he legislature cannot revive a right of action as to a debt when it has become barred by the lapse of time; *though it is true the decision was not necessary to the disposition of that case*. The point is an interesting and important one, *but it is not necessary that we pass upon it, for there is no state of facts to which it is applicable*.[243]

The layers of dicta between *Wilkes County*, *Dunn*, and *Whitehurst* are dizzying.

The *Wilkes County* court proceeds to "analyze *dicta* from various North Carolina decisions, provisions of various legal treatises, and holdings from other jurisdictions"[244] before uttering the key portion of the opinion essential to Defendant Board's defense.[245] Defendant Board, in arguing that

239. State v. Collins, 84 S.E. 1049, 1050 (N.C. 1915).

240. *Wilkes Cnty.*, 167 S.E. at 694.

241. *Id.*

242. *Id.* ("The ruling, that though a debt is barred by the statute of limitation the legislature may remove the bar by repealing the limitation after it has accrued, is within the reasoning of *Pearson, C. J.*, in *Hinton* . . . , and is sustained by *Justice Miller*, in *Campbell* . . . , decided in 1885 . . . ." (quoting Dunn v. Beaman, 36 S.E. 172, 173 (N.C. 1900)).

243. *Id.* (emphasis added) (quoting *Dunn*, 36 S.E. at 173; and citing Whitehurst v. Dey, 90 N.C. 542 (1884)).

244. McKinney v. Goins, 892 S.E.2d 460, 474 (N.C. Ct. App. 2023).

245. *Wilkes Cnty.*, 167 S.E. at 695 ("Whatever may be the holdings in other jurisdictions, we think this jurisdiction is committed to the rule that an enabling statute to revive a cause of action barred by the statute of limitations is inoperative and of no avail. It cannot be resuscitated. The sovereign, permitted an old principle to be invaded in this matter, that no time runs against the commonwealth or state, and the General Assembly having passed the statute of limitations which defendants properly pleaded, the statute of 1931, which attempted to destroy defendants' defense of the statute of limitations, is inoperative and void

Wilkes County is clear and dispositive as to the constitutionality of the Revival Provision, stated: "The Court [in *Wilkes County*] carefully and thoughtfully reviewed the state of the law and the arguments on all sides, and then pronounced a clear rule: Without exception, the General Assembly cannot resurrect expired claims. Period."[246]

Wilkes County's purported pronouncement of a Defendant's vested right to a statute of limitations defense did not, however, come from a careful review of "the state of the law" or "the arguments on all sides." Instead, the *Wilkes County* court purported to declare the 1931 revival act unconstitutional without citing any binding authority or referencing any provision of the North Carolina Constitution. Additionally, the *Wilkes County* court did not review "the arguments on all sides" for neither the defendant nor the plaintiff raised or briefed such a constitutional challenge to the statute. Moreover, the court explicitly clarified that the 1931 revival act had no application to the case.[247] Thus, the court's declaration that the 1931 revival act "takes away vested rights of defendants, and therefore is unconstitutional"[248] is not a clear rule bearing on the General Assembly's ability to enact similar legislation, for "[s]uch expressions, being *obiter dicta,* do not become precedents."[249]

Subsequent reliance on *Wilkes County*'s dicta by *Wilkes County*'s progeny, often also in dicta, does not magically transform these words into precedent.[250] Defendant Board's reliance on "*Wilkes County* as establishing a vested right in a statute of limitations defense under the North Carolina Constitution begs the question: How can an appellate decision be based on the North Carolina Constitution when that decision never mentions the

---

as to them. It takes away vested rights of defendants and therefore is unconstitutional." (internal citation omitted)).

246. Brief for Defendant-Appellees, McKinney v. Goins, *supra* note 1, at 29.

247. *Wilkes Cnty.*, 167 S.E. at 695. ("Again we think under the proviso, the present action is exempted from the statute. Public Laws, 1931, chapter 260, *supra*: 'Nothing herein shall prevent or prohibit the continuance and suing to completion any of said suit or suits under the laws existing at the time of institution of said action.'" (emphasis omitted)).

248. *Id.*

249. Moose v. Bd. of Comm'rs, 90 S.E. 441, 448 (N.C. 1916).

250. *See* Waldrop v. Hodges, 53 S.E.2d 263, 265 (N.C. 1949) (citing to *Johnson*'s, *Whitehurst*'s, and *Wilkes County*'s assertions that the legislature may not revive time-barred claims before finding these cases of no application because the statute at issue extended a statute of limitation that had not yet expired); Jewell v. Price, 142 S.E.2d 1, 3 (N.C. 1965) (citing *Wilkes County* and its progeny before holding the non-retroactive statute at issue was of no application to the case at bar); Troy's Stereo Ctr., Inc. v. Hodson, 251 S.E.2d 673, 675 (N.C. Ct. App. 1979) (citing *Waldrop*'s discussion in dicta before conceding that retroactive law was of no application to the case).

North Carolina Constitution?"[251] This question is resolved by the simple reminder of a core principle, explained above: "any challenge alleging that an act of the General Assembly is unconstitutional must identify an express provision of the constitution and demonstrate that the General Assembly violated the provision beyond a reasonable doubt."[252]

CONCLUSION

The North Carolina Constitution is a learned document. Its textual commands reflect the will of the people of North Carolina, evolving in response to new understandings and circumstances. This unimpeachable text does not afford child abusers and their enablers the right to manipulate its clear and explicit commands to escape liability for the wrongs they commit and condone. The text is clear: the SAFE Child Act's Revival Provision is constitutional beyond *any* reasonable doubt. To hold the opposite would allow unreasonable doubt extracted from dicta to reign supreme over the plain language of the supreme law of our state. The North Carolina constitution requires more. Victims of child abuse deserve more. In North Carolina's constitution, "[t]here are no hidden meanings or opaque understandings—the kind that can only be found by the most astute justice or academic. The constitution was written to be understood by everyone, not just a select few."[253]

*Allison Heitchue**

251. Brief for Plaintiffs-Appellants, McKinney v. Goins, *supra* note 2, at 21.

252. Harper v. Hall, 886 S.E.2d 393, 399 (N.C. 2023) (emphasis added).

253. *Id.*

*J.D. Candidate, 2025, Campbell University Norman Adrian Wiggins School of Law. Thank you to my mentors at Lanier Law Group, P.A., for the opportunity to witness your exceptional advocacy throughout *McKinney v. Goins* and for your invaluable guidance while writing this Comment. Thank you to the dedicated staff members and Editorial Board of Volume 46 of the Campbell Law Review for their hard work in helping me prepare this Comment for publication. I dedicate this Comment to survivors of childhood sexual abuse. I strive to continue to pursue a career and a life as an advocate for survivors and use my voice to speak for those who have been unjustly silenced.