

## Who Speaks for the State? Examining the Consequences of *Berger v. North Carolina State Conference of the NAACP*\*

*When North Carolinians vote for their attorney general, they select the candidate who can best represent their state in the courtroom. But the U.S. Supreme Court in *Berger v. North Carolina State Conference of the NAACP* upended this common understanding of the attorney general's job. Instead of trusting the executive branch to execute and defend the state's laws, the Court permitted two state legislators, supported by partisan outside counsel, to represent the entire State of North Carolina in nearly any litigation that could arise. Such a major grant of executive power to the legislature ignores the state constitution's strict separation of powers mandate, which protects each branch from seizure of power by the others. This Article discusses the impacts of the *Berger* decision. First, taxpayers will bear significant costs as the North Carolina General Assembly pays outside attorneys to litigate for the State rather than using apolitical career staff at the North Carolina Department of Justice. Second, litigation will become increasingly polarized as the General Assembly employs hyper-partisan counsel or uses pro bono support from ideologically extreme nonprofits. Polarization in the state is only furthered by the Court's characterization of the state attorney general as a pure partisan player rather than a legal advocate for all North Carolinians. And finally, this Article examines the Court's growing deference to state legislatures as supposed bastions of democratic values despite evidence that these bodies are the least democratic branch in most states across the country. While *Berger* specifically applies to North Carolina, its implications extend to all purple states grappling with emboldened legislatures poised to make similar power grabs.*

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INTRODUCTION

In June of 2022, amidst a series of bombshell cases including *Dobbs v. Jackson Women’s Health Organization*<sup>1</sup> and *West Virginia v. EPA*,<sup>2</sup> the case of *Berger v. North Carolina State Conference of the NAACP*<sup>3</sup> did not make many headlines. Two North Carolina General Assembly members brought *Berger* in an effort to intervene on behalf of the entire State of North Carolina in the NAACP’s challenge to North Carolina’s voter-identification (“voter-ID”) law.<sup>4</sup> The issue? The Attorney General was already defending the State.<sup>5</sup> When the U.S. Supreme Court ultimately sided 8–1 with the legislators, “[t]he commentariat did not, this time, clutch their pearls and breathlessly wail about the demise of democracy,” snarked David Thompson, managing partner at the conservative litigation firm Cooper & Kirk and the lead counsel for the General Assembly.<sup>6</sup>

This Article argues that pro-democracy and pro-federalism pearl clutching was, in fact, appropriate. It matters who speaks for the State. Being able to litigate in the name of the State of North Carolina gives the General Assembly’s arguments more weight in court,<sup>7</sup> allows them to better control the narrative to the public,<sup>8</sup> and elevates them to a more powerful position than the state’s executive, now that they wield both legislative and executive powers.

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1. 142 S. Ct. 2228 (2022).

2. 142 S. Ct. 2587 (2022).

3. 142 S. Ct. 2191 (2022).

4. *See id.* at 2207.

5. *See* N.C. State Conf. of the NAACP v. Cooper, 332 F.R.D. 161, 169 (M.D.N.C. 2019).

6. David Thompson, *Berger v. North Carolina State Conference of the NAACP: A Victory for Federalism and State Autonomy*, HARV. J.L. & PUB. POL’Y PER CURIAM, Summer 2022, No. 22., at 1, <https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2022/08/Thompson-Burger-vF1.pdf> [<https://perma.cc/8WN2-3VN9>].

7. One example of the power the mere title of “the state” holds is the rate of success that states have in their petitions for cert in front of the U.S. Supreme Court as opposed to other parties. According to a report by Dan Schweitzer of the National Association of Attorneys General, the success rate of petitions between 2001–18 that were supported by state amicus briefs was forty-five percent, while those without had a nineteen percent success rate. *See* DAN SCHWEITZER, RESULTS OF CERT PETITIONS FILED BY STATES (2020) (on file with the North Carolina Law Review).

8. Hearing that “the State” is litigating a case as opposed to “the legislature” may make it seem to the public, in a state with divided government, like a more serious and legitimate action.

The *Berger* decision also undermines the will of North Carolinians, who voted twice in statewide elections for Attorney General Stein to represent the State of North Carolina in legal matters.<sup>9</sup> Instead, the *Berger* Court bulldozes over the North Carolina Constitution's explicit separation of powers mandate and vests that executive power in individual legislators.<sup>10</sup>

Giving executive power to the state legislature not only violates the state's constitution, but also undermines its democracy. The legislator-intervenors in *Berger* are elected by just a fraction of the state's population<sup>11</sup> and hail from overwhelmingly Republican districts.<sup>12</sup> North Carolina as a whole, meanwhile, has more registered Democrats than Republicans,<sup>13</sup> and has not elected a Republican attorney general since 1896.<sup>14</sup> *Berger* thus shifts unprecedented power to individual legislators who skew much more conservative than the state's general voters.

9. Danielle Battaglia, *NC Attorney General Josh Stein Wins Reelection*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/election/article247172014.html> [<https://perma.cc/A3WN-E44H> (dark archive)] (last updated Nov. 18, 2020, 8:48 AM).

10. See N.C. CONST. art. I, § 6 ("Separation of Powers[:] The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.").

11. In 2020, Phil Berger won 68,712 votes and Tim Moore won 24,491, while Josh Stein won 2,713,400. *Phil Berger*, BALLOTPEDIA, [https://ballotpedia.org/Phil\\_Berger](https://ballotpedia.org/Phil_Berger) [<https://perma.cc/NK63-SNM6>]; *Timothy K. Moore*, BALLOTPEDIA, [https://ballotpedia.org/Timothy\\_K\\_Moore](https://ballotpedia.org/Timothy_K_Moore) [<https://perma.cc/Q3SV-MUXF>]; *Josh Stein*, BALLOTPEDIA, [https://ballotpedia.org/Josh\\_Stein](https://ballotpedia.org/Josh_Stein) [<https://perma.cc/CQ99-Q5WW>].

12. See *Redistricting Report Card: North Carolina 2021 SBK-7 Final State Senate Map (SB 739)*, GERRYMANDERING PROJECT, <https://gerrymander.princeton.edu/redistricting-report-card?planId=rec2DopeEjMZMk6NX> [<https://perma.cc/H6HN-PZNN>]; *Redistricting Report Card: North Carolina 2021 HSA-9 Final State House Map (HB 976)*, GERRYMANDERING PROJECT, <https://gerrymander.princeton.edu/redistricting-report-card?planId=recT3qrY4IXWBixSg> [<https://perma.cc/5M2K-4NB2>]. While these exact 2021 maps may not be used in the upcoming 2024 election, the partisan skew is likely to be similar because the Supreme Court of North Carolina has blessed the Republican supermajority in the General Assembly with the ability to draw their own gerrymandered maps. See Daniela Altimari, *NC Court Reverses Decision on Partisan Gerrymandering, Allows GOP To Draw New Maps*, ROLL CALL (Apr. 28, 2023, 4:03 PM), <https://rollcall.com/2023/04/28/nc-court-reverses-decision-on-partisan-gerrymandering-allows-gop-to-draw-new-maps/> [<https://perma.cc/D49M-B4ZD>].

13. Phillip Joonbae Gong, *Who Are North Carolina's 7.4 Million Registered Voters?*, CAROLINA DEMOGRAPHY (Nov. 4, 2022), <https://carolinademography.cpc.unc.edu/2022/11/04/who-are-north-carolinas-7-4-million-registered-voters/> [<https://perma.cc/D3YK-QDMN>].

14. Steve Doyle, *Rep. Dan Bishop Makes It Official: He Is Running for North Carolina Attorney General*, FOX 8, <https://myfox8.com/news/north-carolina/rep-dan-bishop-makes-it-official-he-is-running-for-north-carolina-attorney-general/> [<https://perma.cc/QW9F-KP5Q>] (last updated Aug. 3, 2023, 3:06 PM) ("[N]o Republican has served as attorney general since Zeb Vance Walser held the office in 1896."). While there have briefly been two appointed Republicans in the position since then, neither won popular election. See N.C. SEC'Y OF STATE, NORTH CAROLINA MANUAL 2011–2012, at 193 (2012) [hereinafter N.C. MANUAL 2011–12].

In examining the fallout from *Berger*, this Article first discusses the financial impact of the General Assembly employing outside counsel to litigate cases that otherwise would have been handled or, in rarer instances, settled, by the Attorney General. Second, this Article details the rise in partisanship due to the General Assembly hiring explicitly partisan law firms and ideological legal nonprofits to handle these cases rather than trusting apolitical career staff at the North Carolina Department of Justice. This politicization is only furthered by the Court's characterization of the attorney general as primarily a political officer. Finally, this Article discusses the implications of the Court's use of selective federalism to both ignore the state framers' intent in crafting a strict separation of powers in the North Carolina Constitution and to bless the state legislature's grab of traditionally executive power.

By giving two legislators the Supreme Court's seal of approval to speak for the State, *Berger* undermines a healthy balance of powers between the three branches of state government in North Carolina, adds to the growing partisan division in a purple state with a divided government, and ultimately damages the state's fragile democracy.<sup>15</sup>

#### I. BACKGROUND OF *BERGER V. NORTH CAROLINA STATE CONFERENCE OF THE NAACP*

In November 2018, North Carolina voters approved a constitutional amendment requiring photographic identification to vote.<sup>16</sup> The next month, the General Assembly passed S.B. 824 to implement the amendment.<sup>17</sup> Because the North Carolina House and Senate had Republican supermajorities at the time, they overrode Democratic Governor Roy Cooper's veto, and the bill became law on December 19, 2018.<sup>18</sup> The next day,

15. See, e.g., Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1742–53 (2021).

16. See *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2198 (2022); Brief for State Respondents at 2, *Berger*, 142 S. Ct. 2191 (No. 21-248).

17. See *Berger*, 142 S. Ct. at 2198; Brief for State Respondents, *supra* note 16, at 2.

18. See Alison Thoet, *What North Carolina's Power-Stripping Laws Mean for New Gov. Roy Cooper*, PBS (Jan. 3, 2017, 3:57 PM), <https://www.pbs.org/newshour/politics/north-carolinas-power-stripping-laws-mean-new-gov-roy-cooper> [<https://perma.cc/F4GY-LUFN>]; *Berger*, 142 S. Ct. at 2198. Though not relevant to the outcome in *Berger*, the voter-ID law has since been heavily litigated by racial justice activists who allege that the law unconstitutionally discriminates against Black voters who are statistically less likely to have valid photo IDs. Robyn Sanders, *Voter ID Law Struck Down by North Carolina Supreme Court*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/analysis-opinion/voter-id-law-struck-down-north-carolina-supreme-court> [<https://perma.cc/L9BL-PP4P>] (last updated Feb. 7, 2023). The Supreme Court of North Carolina initially struck down the law in late 2022, finding that there was sufficient evidence that “the statute was motivated by a racially discriminatory purpose.” *Holmes v. Moore*, 383 N.C. 171, 174, 881 S.E.2d 486, 491 (2022).

the North Carolina State Conference of the NAACP sued Governor Cooper and the State Board of Elections (“State Board”).<sup>19</sup> As is required by state statute,<sup>20</sup> Attorney General Josh Stein and career staff at the North Carolina Department of Justice stepped in to represent the Governor and members of the State Board.<sup>21</sup> The district court later dismissed the suit against Governor Cooper, so only the State Board remained as a named defendant.<sup>22</sup>

Republican leaders Phil Berger, President Pro Tempore of the North Carolina Senate, and Tim Moore, Speaker of the North Carolina House, twice moved to intervene under Federal Rule of Civil Procedure (“FRCP”) 24(a) to join the Attorney General in his defense of S.B. 824.<sup>23</sup> The first time, Berger and Moore purported to represent only the General Assembly.<sup>24</sup> The State Board, represented by Attorney General Stein, did not oppose the intervention.<sup>25</sup> When the district court denied Berger and Moore the opportunity to intervene on grounds of judicial efficiency and on the grounds that the State’s interests were already being adequately defended, Berger and Moore moved to intervene a second time on behalf of the entire State of North Carolina.<sup>26</sup>

Though the State Board again did not oppose the legislators intervening on behalf of the interests of the legislature, they disagreed that the legislators had the power to intervene on behalf of the State—a responsibility they viewed as reserved for the executive branch according to North Carolina’s Constitution and statutory guidance.<sup>27</sup> The district court again denied the

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But after a flip in the court’s partisan majority, the Supreme Court of North Carolina reversed its position in April of 2023. *See* *Holmes v. Moore*, 384 N.C. 426, 460, 886 S.E.2d 120, 144 (2023). Thus, S.B. 824 is back on the books. Gary Robertson, *North Carolina Supreme Court Reverses Electoral District, Voter ID Rulings Decided Last Year*, PBS NEWS HOUR (Apr. 28, 2023, 1:24 PM), <https://www.pbs.org/newshour/politics/north-carolina-supreme-court-reverses-electoral-district-voter-id-rulings-decided-last-year> [<https://perma.cc/AT6A-2MT4>].

19. *Berger*, 142 S. Ct. at 2198.

20. *See* N.C. GEN. STAT. § 114-2 (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.) (“[I]t shall be the duty of the Attorney General: (1) To defend all actions in the appellate division in which the State shall be . . . a party . . . [and] (2) To represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State.”).

21. Brief for State Respondents, *supra* note 16, at 6.

22. *Berger*, 142 S. Ct. at 2199.

23. *See* Brief for State Respondents, *supra* note 16, at 6–12.

24. *Id.* at 6–8.

25. *Id.*

26. *See* Proposed Defendant Intervenors’ Memorandum in Support of Motion to Intervene at 1–2, *N.C. State Conf. of the NAACP v. Cooper*, 332 F.R.D. 161 (M.D.N.C. 2019) (No. 18-CV-1034).

27. The State Board argued that the North Carolina Constitution’s explicit separation of powers mandate and the ambiguity of N.C. GEN. STAT. §§ 114-2.4, 120-32.6 indicated that while the legislators could intervene in the interest of the legislature, they could not represent the entire State

intervention: “[I]t is abundantly clear that the State Board is actively and adequately defending this lawsuit,”<sup>28</sup> and that any discrepancies between the hypothetical strategy of the legislators and the Attorney General could be chalked up to “litigation choices.”<sup>29</sup>

Berger and Moore appealed to the Fourth Circuit, where a divided panel vacated the district court’s decision.<sup>30</sup> But after an en banc rehearing, a nine-judge majority affirmed the district court and denied the intervention.<sup>31</sup> In the majority opinion, Judge Harris highlighted the sufficiency of the Attorney General’s continued defense of S.B. 824.<sup>32</sup> “[C]onsistent with [statutory] duty, the Attorney General is very much *in* this case, defending the constitutionality of S.B. 824,” Judge Harris wrote.<sup>33</sup> “[T]he ‘alignment’ between the Attorney General and the would-be governmental intervenors is one-for-one . . . .”<sup>34</sup> The majority thus concluded that the district court had not abused its discretion in denying the legislators’ motions to intervene.<sup>35</sup> The legislators petitioned for certiorari, which the Supreme Court granted.<sup>36</sup>

The Supreme Court overwhelmingly sided with Berger and Moore and reversed the Fourth Circuit’s opinion with an 8–1 majority.<sup>37</sup> Justice Gorsuch wrote for the majority and focused much of his argument, grounded in federalism concerns, on deferring to a state statute that provides: “a federal court presiding over any such action where the State of North Carolina is a named party is requested to allow both the legislative branch and the executive branch of the State of North Carolina to participate in any such action as a party.”<sup>38</sup> The Court found the statutory language dispositive. “[W]e are hardly final arbiters of North Carolina law,” the majority opinion

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of North Carolina. Brief for State Respondents, *supra* note 16, at 51–56; see N.C. CONST. art. I, § 6 (“Separation of Powers[:] The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.”); N.C. GEN. STAT. § 114-2 (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.) (“[I]t shall be the duty of the Attorney General: (1) To defend all actions in the appellate division in which the State shall be interested, or a party”).

28. Brief for State Respondents, *supra* note 16, at 10.

29. N.C. State Conf. of NAACP v. Berger, 999 F.3d 915, 936 (4th Cir. 2021), *rev’d*, 142 S. Ct. 2191 (2022).

30. N.C. State Conf. of NAACP v. Berger, 970 F.3d 489, 495 (4th Cir. 2020), *aff’d on reh’g en banc*, 999 F.3d 915 (4th Cir. 2021), *rev’d*, 142 S. Ct. 2191 (2022).

31. See *Berger*, 999 F.3d at 927.

32. See *id.* at 918.

33. *Id.* at 928 (emphasis in original).

34. *Id.* at 933.

35. See *id.* at 918.

36. See *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2198 (2022).

37. See *id.* at 2206.

38. See *id.*; N.C. GEN. STAT. § 1-72.2 (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.).

admitted, “[but] the Board’s argument seems more than a little difficult to square with the express statutory language . . . .”<sup>39</sup>

Because of the North Carolina Constitution’s strict separation of powers provision and the ambiguous language of the statute, the State Board argued that, if any intervention was allowed, legislators should only be able to intervene on behalf of the *legislature*, not the entire State.<sup>40</sup> The Court did not find this persuasive.<sup>41</sup> The majority instead drew a distinction between the legislature’s interest in defending the pure theoretical law with the executive’s interests in the “administration” of the law.<sup>42</sup> The Court found that the legislature’s interest in “vigorously” defending the voter-ID law “on the merits” was a different enough prerogative from the State Board, which had to consider “administrative concerns” such as election administration, to merit intervention in the name of the State.<sup>43</sup>

The Court also mentioned Attorney General Stein’s voting record during his tenure as a state senator, when Stein had not supported a previous (albeit more constraining) voter-ID law,<sup>44</sup> and used this fact to underscore the point that the attorney general is, after all, “an elected official” with concerns about “the voting public.”<sup>45</sup> The Court did not mention the fact that state legislators are also elected officials, subject to the whims of an even smaller voting public.<sup>46</sup>

To remedy this apparent problem of perspectives, the Court held that state legislators may intervene in such situations to represent the State of North Carolina.<sup>47</sup> The majority reasoned that this would allow for the various angles of the State’s interests to be adequately represented, something the Attorney General, according to the majority, could not accomplish alone.<sup>48</sup> “For a federal court to presume a full overlap of interests when state law more nearly presumes the opposite would do much violence to our system of cooperative federalism,” the majority demurred, failing to address the legality of the statute itself under the North Carolina Constitution or the ambiguity in

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39. *See Berger*, 142 S. Ct. at 2202.

40. Brief for State Respondents, *supra* note 16, at 19.

41. *See Berger*, 142 S. Ct. at 2205.

42. *See id.*

43. *See id.* at 2199, 2205.

44. *See id.* at 2194; Brief for State Respondents, *supra* note 16, at 5.

45. *See Berger*, 142 S. Ct. at 2205.

46. *See id.*

47. *See id.* at 2206.

48. *See id.* at 2204.

the statutory language about whether legislators can intervene on behalf of the legislature or the State itself.<sup>49</sup>

Justice Sotomayor was the sole dissenter. She agreed with the district court and Fourth Circuit en banc opinion that the State Board already “[a]dequately represented” the interests of the state legislature in defending S.B. 824.<sup>50</sup> She also rejected the idea that the Attorney General was not able to fully defend a law he may not agree with personally.<sup>51</sup> This reasoning would, “[f]l[y] in the face of the presumption that public officials can be trusted to exercise their official duties,” Sotomayor argued.<sup>52</sup>

## II. *BERGER*’S IMPLICATIONS IN NORTH CAROLINA AND BEYOND

It is hard to see what, if any, limiting factor *Berger* places on legislative intervention. After all, nearly any imaginable North Carolina law or state constitutional provision the Attorney General and Department of Justice career staff would be defending would have an administrative concern in addition to a defense of the “pure” theoretical law.<sup>53</sup> Because this distinction, according to the Court, is sufficient to trigger intervention, it seems unlikely that the *Berger* opinion would ever prevent the legislature from intervening to represent the State.<sup>54</sup>

The 8–1 *Berger* majority was an overwhelming vote in favor of state legislative power, and one that transcended the political lines often drawn on the Court.<sup>55</sup> But what the majority overlooked was the reality of a *Berger* regime in purple states, the states that the Court’s holding will ultimately impact. This part examines these consequences, including: (A) the cost of state funds to pay for private law firms representing legislators; (B) increased polarization as (i) partisan firms and nonprofits take over representation and

49. *See id.* The statutory language, “the legislative branch” must be able “to participate in any such action as a party,” could easily be read to permit legislators to intervene as the legislature but not as the State. The word “party” is entirely ambiguous. *See* N.C. GEN. STAT. § 1-72.2 (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.).

50. *Berger*, 142 S. Ct. at 2212–13 (Sotomayor, J., dissenting).

51. *Id.* at 2213–14.

52. *Id.*

53. *See id.* at 2205 (majority opinion).

54. *See id.*

55. This exact bipartisan split was seen in another intervention case in the 2021–22 term, *Cameron v. EMW Women’s Surgical Ctr.*, 142 S. Ct. 1002 (2022), in which the Court permitted a newly elected Republican Attorney General to intervene in litigation defending Kentucky’s abortion law that the previous Democratic Attorney General had declined to appeal. *Id.* at 1010–14. While *Cameron* does not implicate the same separation of powers concerns that *Berger* does, some commentators have grouped the two as “birds of a feather.” *See, e.g.*, Thompson, *supra* note 6, at 4. Perhaps Justices Breyer and Kagan also thought of these two cases as linked, without appreciating the more dire implications at stake for purple states in *Berger*.

(ii) the Attorney General is viewed as representing a particular voting bloc; and (C) a diminishment of equal power balancing in divided state governments as state legislatures are given powers typically reserved for the executive branch.

A. *Cost to the State*

One of the immediate consequences of this expansive *Berger* holding is the cost this will bring to North Carolina taxpayers. Traditionally, and under North Carolina's Constitution, statutes, and common law, the Attorney General and his<sup>56</sup> career staff are the default attorneys for the General Assembly.<sup>57</sup> When the Attorney General personally disagreed with the General Assembly's position, the common practice was to appoint career staff at the Department of Justice to take the lead on the case.<sup>58</sup> However, in recent years, the General Assembly has hired private outside counsel both for general legal advice and as representation in lawsuits that involve individual legislators.<sup>59</sup> According to a study commissioned by the General Assembly in 2018, the legislature spent \$4,023,488 on private attorneys in fiscal year 2016.<sup>60</sup> More than half of this sum was paid to law firms and experts with no connection to North Carolina, meaning that little tax benefit was coming back to the state through these transactions.<sup>61</sup>

56. To date, North Carolina has never elected a female attorney general. See N.C. MANUAL 2011-12, *supra* note 14, at 190-93.

57. See N.C. GEN. STAT. § 114-2 (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.) ("Pursuant to Section 7(2) of Article III of the North Carolina Constitution, it shall be the duty of the Attorney General[] . . . (2) To represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State . . ."); see also Lacy H. Thornburg, *Changes in the State's Law Firm: The Powers, Duties, and Operations of the Office of the Attorney General*, 12 CAMPBELL L. REV. 343, 348-49 ("Even though the [North Carolina] Attorney General has a wide array of statutory powers, duties, and responsibilities, the common law is the fountainhead of the Attorney General's authority to represent, defend, and enforce the legal interests of State government and the citizens of our state.").

58. See, e.g., Kevin Maurer, *Josh Stein Makes His Case*, ASSEMBLY (Jan. 18, 2023), <https://www.theassemblync.com/politics/josh-stein-governor-2024/> [<https://perma.cc/SV2N-RG7N>] (dark archive)] (describing "Stein's decision to recuse himself from certain cases on which he personally disagreed, leaving career employees to represent the General Assembly").

59. See PROGRAM EVALUATION DIV., N.C. GEN. ASSEMBLY, THE SYSTEM OF ATTORNEY ALLOCATION IN NORTH CAROLINA STATE GOVERNMENT IS DECENTRALIZED, 2018-01, at 36 (2018), [https://www.ncleg.gov/Files/ProgramEvaluation/PED/Reports/documents/Attorneys/Attorneys\\_Report.pdf](https://www.ncleg.gov/Files/ProgramEvaluation/PED/Reports/documents/Attorneys/Attorneys_Report.pdf) [<https://perma.cc/9PG6-F5XX>] [hereinafter ATTORNEY ALLOCATION REPORT].

60. The Governor's office, by contrast, spent \$1.3 million in private attorney's fees in the same time period. See *id.* at 36-37.

61. *Id.* According to the report, \$2,207,827 in total was paid to law firms Bancroft PLLC; Cooper & Kirk, PLLC; Kirkland and Ellis, LLP; Schaerr Duncan, LLP; and experts Sean Patrick

Compared to years where redistricting litigation ramps up, \$4,023,488 is likely a low estimate of what the General Assembly was spending annually on private counsel.<sup>62</sup> According to law firm invoices between late November 2021 to July 2022 obtained by the watchdog group NC Policy Watch through a public records request, the General Assembly had spent \$2.9 million on private law firm assistance in just that eight-month period.<sup>63</sup> And that number shockingly omits any fees paid to Cooper & Kirk, a Washington, D.C., conservative litigation boutique<sup>64</sup> and the primary litigators of both *Berger* and *Moore v. Harper*,<sup>65</sup> the high-profile redistricting case heard before the Court in December of 2022.<sup>66</sup> Though the numbers on Cooper & Kirk payments have not been made public, Governor Ron DeSantis of Florida recently engaged the firm for up to \$725 an hour to defend his “anti-woke” law limiting

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Trende and Thomas L. Bruell. According to their websites, none of these firms had or have locations in North Carolina, and these experts do not reside or practice in the state. See Casey Sullivan, *How the SCOTUS Firm Conservatives Love Got Acquired by Kirkland (in Two Weeks!)*, BLOOMBERG L. (Sept. 12, 2016, 5:48 PM), <https://news.bloomberglaw.com/business-and-practice/how-the-scotus-firm-conservatives-love-got-acquired-by-kirkland-in-two-weeks> [<https://perma.cc/WC4H-EZDX> (staff-uploaded, dark archive)] (describing the former Bancroft PLLC as “a prominent Washington D.C. boutique”); *Contact Us*, COOPER & KIRK, <https://www.cooperkirk.com/contact-us/> [<https://perma.cc/RP9V-VYGM>] (noting the firm’s only location as Washington, D.C.); *Locations*, KIRKLAND, <https://www.kirkland.com/offices> [<https://perma.cc/2NMZ-5BXM>] (indicating no North Carolina offices); *Locations*, SCHAERR-JAFFE, <https://www.schaerr-jaffe.com/about/locations> [<https://perma.cc/E369-LKDZ>] (indicating Schaerr Jaffe LLP, formerly Schaerr Duncan LLP, is located in D.C. and San Francisco); Affidavit of Sean P. Trende ¶ 2, N.C. League of Conservation Voters v. Hall, 21 CVS 015426 (N.C. Super. Ct. Dec. 3, 2021) (stating that affiant, an expert for the General Assembly, resides in Ohio and was paid \$400 an hour by the North Carolina legislature); Thomas L. Brunell, *Curriculum Vitae*, available at <https://personal.utdallas.edu/~tbrunell/papers/vita.pdf> [<https://perma.cc/GML8-8GAZ>] (identifying the residence of an expert for the General Assembly as Richardson, Texas).

62. See Lynn Bonner, *Here’s How Much NC Republicans’ Redistricting Lawyers Cost Taxpayers*, NC NEWSLINE (Sept. 29, 2022, 7:00 AM), <https://pulse.ncpolicywatch.org/2022/09/29/heres-how-much-nc-republicans-redistricting-lawyers-cost-taxpayers/> [<https://perma.cc/8E2S-RTEW>].

63. See *id.*

64. John Sadler, *Former State AG Adam Laxalt Joins Conservative Law Firm*, L.V. SUN (Mar. 25, 2019, 11:32 AM), <https://lasvegassun.com/news/2019/mar/25/former-state-ag-adam-laxalt-joins-conservative-law/> [<https://perma.cc/6EC3-U8A6> (staff-uploaded archive)] (“Cooper and Kirk is known as a heavyweight conservative legal player.”).

65. 142 S. Ct. 1089 (2022).

66. See *Our Team*, COOPER & KIRK, <https://www.cooperkirk.com/lawyers/> [<https://perma.cc/7FSC-6FC9> (staff-uploaded archive)]; Petition for a Writ of Certiorari, *Berger v. N.C. State Conf. of NAACP*, 142 S. Ct. 2191 (No. 21-248) [hereinafter *Berger* Petition for a Writ of Certiorari]; Petition for Writ of Certiorari, *Moore v. Harper*, 142 S. Ct. 1089 (No. 21-1271) [hereinafter *Moore* Petition for Writ of Certiorari]; Amy Howe, *Justices Will Hear Case That Tests Power of State Legislatures To Set Rules for Federal Elections*, SCOTUSBLOG (June 30, 2022, 12:47 PM), <https://www.scotusblog.com/2022/06/justices-will-hear-case-that-tests-power-of-state-legislatures-to-set-rules-for-federal-elections/> [<https://perma.cc/HXZ9-WL4H>].

educational instruction on race and racism.<sup>67</sup> One can imagine those numbers would be similar for a contract with the North Carolina legislature.

With the *Berger* holding, and the opportunity for virtually unlimited intervention opportunities, the General Assembly's use of private counsel will only increase. And with it, the cost to the state will inevitably rise. High level career attorneys at the North Carolina Department of Justice are currently making between \$72,500 and \$143,070 a year,<sup>68</sup> and even the Attorney General himself is only making \$146,421 this year according to the 2022–23 North Carolina budget.<sup>69</sup> Meanwhile, entry level associates at the firms the General Assembly has hired are now making \$215,000,<sup>70</sup> and that is before their significant end-of-year bonuses.<sup>71</sup> Partners at these firms, who are often handling high profile litigation like the redistricting cases in which the North Carolina General Assembly is so often engaged,<sup>72</sup> are making millions of dollars a year.<sup>73</sup> By increasing the opportunities for the General Assembly to litigate alongside the Attorney General and hire their own private attorneys to do so, the *Berger* decision will have a serious impact on North Carolina

67. Skyler Swisher, *DeSantis Taps D.C. Law Firm Billing \$725 an Hour To Defend Culture War Laws*, ORLANDO SENTINEL, <https://www.orlandosentinel.com/2022/06/19/desantis-taps-dc-law-firm-billing-725-an-hour-to-defend-culture-war-laws/> [<https://perma.cc/LWZ7-YXAJ>] (dark archive) (last updated June 21, 2022, 6:37 PM).

68. These numbers are according to the *News & Observer's* database of state employee salaries. See David Raynor, *Look Up Salaries of State Government Workers*, NEWS & OBSERVER, <https://www.charlotteobserver.com/news/databases/article11865482.html> [<https://perma.cc/C793-L3X9> (staff-uploaded archive)] (last updated Feb. 10, 2023, 10:54 AM) (In the State Personnel Salary generator, select “justice” under the “agency” drop-down menu, and leave every other field blank. Then, click the “search” button).

69. Current Operations Appropriations Act of 2022, ch. 74, 2022 N.C. Sess. Laws 494.

70. See *Law Firm Salaries: The 2023 Salary Survey*, CHAMBERS ASSOC., <https://www.chambers-associate.com/law-firms/law-firm-salaries> [<https://perma.cc/TV8P-RYQW>]; David Lat, *A Leading Litigation Boutique Turns 25*, ORIGINAL JURISDICTION (Jan. 18, 2022), <https://davidlat.substack.com/p/a-leading-litigation-boutique-turns> [<https://perma.cc/2EL2-FS45>].

71. See, e.g., Emily Lever, *A&O, Kirkland, Perkins Coie Set Associate Bonuses*, LAW360 (Dec. 21, 2022, 4:13 PM), <https://www.law360.com/articles/1560408/a-o-kirkland-perkins-coie-set-associate-bonuses> [<https://perma.cc/MC84-HWBE> (staff-uploaded, dark archive)].

72. Travis Fain, *N.C.'s Last Redistricting Case Cost Taxpayers \$2.9 Million*, WRAL NEWS, <https://www.wral.com/nc-s-last-redistricting-case-cost-taxpayers-2-9-million/20508565/> [<https://perma.cc/TT37-YBU2>] (last updated Oct. 6, 2022, 9:18 AM). For instance, named counsel for the N.C. legislature in *Moore v. Harper* were Cooper & Kirk's David H. Thompson (Managing Partner), Peter A. Patterson (Partner), John D. Ohlendorf (Partner), and Megan M. Wold (Partner). See *Moore* Petition for Writ of Certiorari, *supra* note 66, at 39; *Our Team*, COOPER & KIRK, <https://www.cooperkirk.com/lawyers/> [<https://perma.cc/4BWE-8M65>].

73. While it is hard to get data on partner compensation from these firms, the personal finance disclosures of Adam Laxalt indicate that as a newly hired partner at Cooper & Kirk in 2019, he was making \$2.2 million a year. Riley Snyder, *Between Campaigns, Laxalt Turned to Lucrative Private Practice, Right-Wing Litigation*, NEV. INDEP., <https://thenevadaindependent.com/article/between-campaigns-laxalt-turned-to-lucrative-private-practice-right-wing-litigation> [<https://perma.cc/3456-DJ6Z>] (last updated Dec. 20, 2021, 1:01 PM).

taxpayers. Those litigation costs are ultimately externalized to taxpayers either through higher taxes, or, more likely, funds taken away from other appropriations to cover the costs of private attorneys.<sup>74</sup>

While it is true that the Governor and Attorney General are permitted to retain private outside counsel, and the General Assembly could point their fingers back at the executive branch for this same practice, there is one key difference. According to state statute, the General Assembly must “expressly authorize[]” any payment for private counsel across the state government.<sup>75</sup> Thus, while the expenditures of the Governor and Attorney General can (and likely will) be scrutinized and limited by the General Assembly, there is no equivalent check or balance on the General Assembly’s expenditure on private counsel. It will be hard to document just how much money the General Assembly spends on these private firms and experts in a post-*Berger* world. With the passage of the 2023–24 state budget, the General Assembly has now entirely exempted itself from existing public records laws,<sup>76</sup> a move that even fellow Republicans have rebuked.<sup>77</sup> Thus, apart from self-imposed reports, which seem unlikely, access to these expenditures will be kept secret from the very taxpayers footing the bill.

The General Assembly could also argue that given the number of permissive interventions by legislators that already occur in hot-button political cases (such as redistricting), *Berger* may not cause a significant net increase in the cases where the General Assembly would be hiring private

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74. A likely place where the General Assembly could cut appropriations to cover these costs is the Department of Justice, which they have cut back on funding in recent years. See Anne Blythe, *GOP Lawmakers Target Democrat Josh Stein with Surprise Budget Cuts*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/state-politics/article157510939.html> [https://perma.cc/YWN6-2HFN (staff-uploaded, dark archive)] (last updated June 22, 2017, 10:49 PM). Defunding the Department of Justice to fund private outside counsel is an interesting parallel to the “school choice” phenomenon that the General Assembly has also favored: taking funding away from North Carolina public schools to pay for students to attend private schools. See, e.g., Kris Nordstrom, *Nine Ways in Which “School Choice” and Its Overzealous Backers Are Harmful to NC Public Schools*, NC NEWSLINE (June 12, 2019, 5:00 AM), <https://ncpolicywatch.com/2019/06/12/nine-ways-in-which-school-choice-and-its-overzealous-backers-are-harmful-to-nc-public-schools/> [https://perma.cc/VYV6-ZY6K].

75. N.C. GEN. STAT. § 114-2.3(d) (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.) (“No State funds shall be withdrawn from the State treasury to pay for litigation services provided by private counsel except as expressly authorized by an appropriation of the General Assembly.”).

76. Dawn Baumgartner Vaughan, *How ‘a Couple of Very Powerful Individuals’ Gave Themselves More Power in NC Budget*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/article279843984.html> [https://perma.cc/H62A-223L (staff-uploaded archive)] (last updated Oct. 16, 2023, 8:49 AM).

77. Travis Fain, *Folwell Criticizes Fellow Republicans on Public Records Rollback*, WRAL NEWS, <https://www.wral.com/story/folwell-criticizes-fellow-republicans-on-public-records-rollback/21090549/> [https://perma.cc/P2UC-DYAH] (last updated Oct. 10, 2023, 4:58 PM).

counsel.<sup>78</sup> Clearly, however, the General Assembly did not feel that permissive intervention was enabling them to independently litigate as many lawsuits as they wished to, or else they would not have litigated *Berger*.

However, even if this were true, there is significant potential for increased litigation costs in cases traditionally settled by the Attorney General. Given the number of lawsuits the State defends annually, the Attorney General has often settled when he determined the State had a losing case.<sup>79</sup> After *Berger*, the General Assembly, using its private counsel, may now intervene in these settlements and turn them into timely and costly litigation. That means North Carolina taxpayers will be paying expensive legal fees to litigate cases that the State will ultimately lose.

Republican legislators and their allies have been critical of past settlements between Attorney General Stein and the State Board of Elections, even going so far in 2021 as to pass a bill to prohibit all settlements by the Attorney General unless the General Assembly signed off on them.<sup>80</sup> While that bill (entitled “Prohibit Collusive Settlements by the AG”) was ultimately vetoed by Governor Cooper,<sup>81</sup> its goal has now been accomplished through the *Berger* holding.

By opening the door for increased intervention by the General Assembly, represented by private counsel, into both ongoing litigation and settlement discussions, *Berger* will have a concrete financial impact on North Carolina taxpayers. Whether this is accomplished by increasing taxes overall or diminishing funding to other state agencies and programs, more taxpayer dollars will inevitably go toward paying for private counsel litigating these

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78. This was, after all, an argument by the State Board throughout the litigation: permissive intervention already allows for the legislature to intervene on behalf of the legislature quite frequently. See Brief for State Respondents, *supra* note 16, at 54–55.

79. See, e.g., Maurer, *supra* note 58 (describing settlements Attorney General Stein has made on opioid litigation, Juul litigation, and election laws with the State Board of Elections).

80. Matthew Burns, *Bill Requiring Legislative Approval of Legal Settlements Headed to Governor*, WRAL NEWS, <https://www.wral.com/bill-requiring-legislative-approval-of-legal-settlements-heading-to-governor/19877629/> [<https://perma.cc/2738-JNKX>] (last updated Sept. 15, 2021, 6:40 PM) (reporting Rep. Destin Hall (R-Caldwell) called the settlement between the 2021 State Board of Elections and Attorney General Stein over mail-in ballot policies a “scam settlement” that would “create[] chaos” in upcoming elections); see also Brief of Amicus Curiae of the American Legislative Exchange Council in Support of Petitioners at 23, *Berger v. N.C. State Conf. of NAACP*, 142 S. Ct. 2191 (2022) (No. 21-248) (arguing that “the Fourth Circuit’s decision opens the door for hostile state Attorneys General to hijack state election law by negotiating favorable settlements with politically friendly plaintiffs”).

81. Press Release, Governor Roy Cooper, Governor Cooper Vetoes One Bill (Sept. 27, 2021), <https://governor.nc.gov/news/press-releases/2021/09/27/governor-cooper-vetoes-one-bill> [<https://perma.cc/P2HC-PJBV>]. Explaining his decision to veto the bill, Governor Cooper called the bill “unconstitutional and unwise” and stated that it “would prevent the Attorney General from doing his job to protect the people of North Carolina.” *Id.*

more drawn-out cases. Ultimately, though, because the General Assembly holds the state's purse strings<sup>82</sup> and determines how much transparency is involved with legislative expenditures,<sup>83</sup> North Carolina citizens may never know just how much of their money is being spent employing private attorneys.

### B. *Increased Polarization*

In permitting a purple state to be represented by both the General Assembly and the state's attorney general, the Court may have seen themselves as recognizing the reality of politicization in states with divided government. But by opening the door for more involvement by hyper-partisan outside counsel and by treating the attorney general as inherently and primarily a political officer, *Berger* both furthers and legitimizes increased polarization in state government.

#### 1. Reliance on Partisan Outside Counsel

By increasing the opportunities for legislative intervention with private counsel as detailed above, the Court has perhaps inadvertently increased the opportunities for even more partisan influence at the state level. Based on the law firms that were hired by the General Assembly in fiscal year 2016, the legislature is largely selecting conservative litigation boutiques.<sup>84</sup> And as shown by its most recent choice of Cooper & Kirk to represent the General Assembly in both *Berger* and *Moore v. Harper* this past term, that trend is not

82. N.C. CONST. art. III, § 5(3) (providing that North Carolina's budget is enacted by the General Assembly).

83. See ATTORNEY ALLOCATION REPORT, *supra* note 59, at 1. It took Session Law 2017-57, enacted by the General Assembly, to produce a survey into how private attorneys were being used across the state. *Id.*; Current Operations Appropriations Act of 2017, ch. 57, § 17.3, 2017 N.C. Sess. Laws 248, 558. Data for other years has not voluntarily been made public by the General Assembly.

84. See *id.* at 13–15, 36–40. In fiscal year 2016–17, the General Assembly spent a total of \$2,018,427 on the services of D.C. conservative litigation boutiques (including \$1,427,299 at Schaerr Duncan LLP, \$205,501 at Cooper & Kirk PLLC, and \$385,627 at Bancroft PLLC). See Mike Scarcella, *Conservative Boutique Adds Mayer Brown Appellate Veteran*, REUTERS (Jan. 10, 2022, 9:56 PM), <https://www.reuters.com/legal/legalindustry/conservative-boutique-adds-mayer-brown-appellate-veteran-2022-01-10/> [<https://perma.cc/63X7-WEPC>] (describing Schaerr Jaffe, formerly Schaerr Duncan, as a “conservative litigation boutique”); Marcia Coyle & Brad Kutner, *Schaerr | Jaffe Partner Represents Ginni Thomas in Jan. 6 Committee Imbroglio*, NAT'L L.J. (June 29, 2022, 10:30 AM), <https://www.law.com/nationallawjournal/2022/06/29/former-thomas-clerk-represents-ginni-thomas-in-jan-6-committee-imbroglio> [<https://perma.cc/ZM6R-XSJF>] (staff-uploaded, dark archive)] (describing Schaerr Jaffe as a “conservative [law] firm”); Sullivan, *supra* note 61 (describing Bancroft as “the SCOTUS Firm Conservatives Love”); Sadler, *supra* note 64 (describing Cooper & Kirk as “a Washington, D.C.-based law firm with a conservative track record”).

going away.<sup>85</sup> Cooper & Kirk is a D.C. litigation boutique that self-identifies as “a heavyweight conservative legal player.”<sup>86</sup> As the National Law Journal wrote in 2021 on the twenty-fifth anniversary of Cooper & Kirk’s founding, “[i]f there is a conservative value that needs championing or defending, there is little doubt in the minds of people in the know who to call.”<sup>87</sup> They are the law firm that Governor Ron DeSantis trusts with his most provocative “culture wars.”<sup>88</sup> Schaerr Jaffe, another conservative litigation boutique the General Assembly has relied on heavily in the past,<sup>89</sup> recently represented Justice Clarence Thomas’s wife, Ginni, during the congressional investigation into her involvement with the January 6 insurrection.<sup>90</sup>

The trouble with employing firms like Schaerr Jaffe and Cooper & Kirk to represent the State is that such representation risks having a conservative slant to it. Hiring skilled “Champions of the [Conservative] Cause” to represent the State of North Carolina simply does not reflect the political makeup of a purple state that consistently elects Democrats in statewide elections unhampered by partisan gerrymandering.<sup>91</sup>

Of course, the General Assembly may decide to save the taxpayers money by opting instead for pro or low bono support from legal nonprofits. But these groups often come with their own political and policy agendas.<sup>92</sup> Recently, Senate President Pro Tempore Phil Berger and Speaker of the House Tim Moore, the same intervenors in *Berger*, engaged the Alliance Defending Freedom (“ADF”), a right-wing pro-life group that helped bring down *Roe v. Wade*,<sup>93</sup> to intervene in a Planned Parenthood challenge to North Carolina’s abortion law.<sup>94</sup> ADF’s online mission statement explains: “ADF

85. See *Berger* Petition for a Writ of Certiorari, *supra* note 66, at 34; *Moore* Petition for Writ of Certiorari, *supra* note 66, at 39.

86. *About Cooper & Kirk*, COOPER & KIRK, <https://www.cooperkirk.com/about/> [<https://perma.cc/J67X-UXD3>].

87. Bruce Love, *How Cooper & Kirk Became One of the Most Influential Firms in Washington*, NAT’L L.J. (Dec. 9, 2021), <https://www.cooperkirk.com/wp-content/uploads/2022/04/NLJ1214021528993Cooper.pdf> [<https://perma.cc/G73J-NCEM> (staff-uploaded archive)].

88. See Swisher, *supra* note 67.

89. See ATTORNEY ALLOCATION REPORT, *supra* note 59, at 36–40.

90. See Coyle & Kutner, *supra* note 84.

91. See Love, *supra* note 87; N.C. MANUAL 2011–12, *supra* note 14, at 840, 860.

92. In the past, the General Assembly has employed right-wing impact litigation groups such as the Liberty Justice Center to represent them on cases like challenges to the state’s school voucher program. See *Case: Kelly v. North Carolina*, LIBERTY JUST. CTR., <https://libertyjusticecenter.org/cases/kelly-v-north-carolina/> [<https://perma.cc/2FHU-BMZY>].

93. 410 U.S. 113 (1973).

94. *Lawmakers Respond to Planned Parenthood Effort To Subvert NC’s Pro-life Laws*, ALL. DEFENDING FREEDOM (July 31, 2023), <https://adfflegal.org/press-release/lawmakers-respond-planned-parenthood-effort-subvert-ncs-pro-life-laws> [<https://perma.cc/FTT7-GMSX> (staff-uploaded archive)]; *What You May Not Know: How ADF Helped Overturn Roe v. Wade*, ALL. DEFENDING

advances the God-given right to live and speak the Truth,” and its CEO is quoted as saying: “We will do—as we have done—the hard things to which God has called us with the expectation that He will accomplish His purposes.”<sup>95</sup> With such an agenda-driven organization representing the State of North Carolina, it seems inevitable that the tone and substance of the state’s litigation will be impacted.

In sharp contrast, if *Berger* had been decided differently, career staff at the North Carolina Department of Justice would be representing the State in many of these hot button political cases. Department of Justice career attorneys are apolitical and cannot be hired and fired based on the current attorney general’s party affiliation.<sup>96</sup> Replacing these politically neutral public servants with conservative litigators only pushes the state’s representation to a more partisan extreme.

## 2. The Attorney General as a Partisan Player

The *Berger* decision further exacerbates the problem of partisanship in state government by painting the state attorney general as an inherently political creature. Though the Fourth Circuit’s en banc opinion presumed Attorney General Stein offered adequate representation given courts’ traditional assumption “that government officials properly discharge their duties,”<sup>97</sup> the Court rejected this reasoning.<sup>98</sup> In its analysis, the majority opinion raised the concern that “at all times, the Board has been represented by an attorney general who, though no doubt a vigorous advocate for his clients’ interests, is also an elected official who may feel allegiance to the voting public.”<sup>99</sup> This is hardly a compliment. The Court raises the complication of the Attorney General being “an elected official” to suggest Stein’s attention to his political career did, in fact, impact his “vigorous”

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FREEDOM, <https://adflegal.org/article/what-you-may-not-know-how-adf-helped-overturn-roe-v-wade> [<https://perma.cc/9Z7C-FMKX> (staff-uploaded archive)] (last updated May 18, 2023).

95. *Alliance Defending Freedom*, ALL. DEFENDING FREEDOM, <https://adflegal.org/about> [<https://perma.cc/8MMJ-QPAR> (staff-uploaded archive)].

96. See N.C. GEN. STAT. § 126-14.2(b), (c)(5) (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.) (“All State departments, agencies, and institutions shall select from the pool of the most qualified persons for State government employment without regard to political affiliation or political influence . . . It is a violation of this Section if . . . [t]he hiring decision was based upon political affiliation or political influence.”); § 126-34.02(b)(1) (outlining a grievance procedure for state career employees who believe their “termination” was because of “discrimination . . . based on . . . political affiliation”). See generally § 126 (demarcating a legal difference between political and career staff in state government).

97. N.C. State Conf. of NAACP v. *Berger*, 999 F.3d 915, 933 (4th Cir. 2021) (citing *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926)), *rev’d*, 142 S. Ct. 2191 (2022).

98. See *Berger*, 142 S. Ct. at 2205.

99. See *id.*

advocacy for the State of North Carolina.<sup>100</sup> Interestingly enough, the Court does not raise this same concern for the state legislators who are elected by a much smaller percentage of the State.<sup>101</sup>

The Court further highlighted the importance of having Berger and Moore speaking for the State because, he says, “[t]hey are not burdened by misgivings about the law’s wisdom . . . [T]hey will focus on defending the law vigorously on the merits without an eye to crosscutting administrative concerns.”<sup>102</sup> This again is a direct insult to the capability of the Attorney General to vigorously defend a law about which he had not even indicated his personal views.<sup>103</sup>

While the Court mentioned Attorney General Stein’s voting record on a previous voter-ID law to indicate that he would not be able to be a full advocate for the law at issue, the previous law was considerably more constraining and constitutionally fraught than the version that the Attorney General was tasked with defending here.<sup>104</sup> The law then-State Senator Stein had opposed was significantly more demanding on voters and was ultimately struck down by the Fourth Circuit for the legislature’s attempt to disenfranchise Black voters with “almost surgical precision.”<sup>105</sup> It seems reasonable that a state senator would have opposed such a bill. Understanding that a public official’s stance on legislation may change as it is modified and narrowed, the Supreme Court held in *Abbott v. Perez*<sup>106</sup> that one cannot assume a government official’s opinions about a previous law are the same for subsequent laws.<sup>107</sup>

Yet even if Attorney General Stein did personally disagree with the voter-ID law at issue, he had already shown his ability to fulfill his statutorily mandated job of defending the State.<sup>108</sup> As district court Judge Loretta Biggs

100. *See id.*

101. In 2020, Phil Berger won 68,712 votes and Tim Moore won 24,491, while Josh Stein won 2,713,400. *See supra* note 11 and accompanying text.

102. *Berger*, 142 S. Ct. at 2205.

103. Additionally, there is no discussion of how a state senator, representing a small and usually highly gerrymandered district, might have a different view on a bill than when he takes on the role of the Attorney General defending a law that the majority of North Carolinians supported. *See id.*

104. *See* N.C. Conf. of NAACP v. McCrory, 831 F.3d 204, 214, 216 (4th Cir. 2016).

105. *See id.* at 214. Though the case was appealed to the U.S. Supreme Court, the Court declined to review it. *North Carolina v. N.C. Conf. of NAACP*, 137 S. Ct. 1399, 1399 (2017).

106. 38 S. Ct. 2305 (2018).

107. *Id.* at 2324–25 (holding that the discriminatory intent of a previous state legislature enacting a law should not be imported onto the intent or substance of a new legislature’s fresh legislation).

108. As Justice Sotomayor wrote in her dissent, the majority’s assumption that the Attorney General cannot robustly defend a law he may not agree with personally portrays the Attorney General and his staff as “incapable of executing their statutory duty.” *Berger v. N.C. Conf. of NAACP*, 142 S. Ct. 2191, 2213 (2022) (Sotomayor, J., dissenting).

wrote in her assessment of Attorney General Stein’s legal strategy: “[I]t is abundantly clear that [the Attorney General] is actively and adequately defending this lawsuit.”<sup>109</sup>

Further, the Court’s critique undermines the nonpartisan capacity of career staff at the Department of Justice who have traditionally served as an apolitical backstop.<sup>110</sup> As Justice Sotomayor responded, quoting the Fourth Circuit, to suggest that the Attorney General and his career staff cannot defend this law “does a grave ‘disservice to the dignified work of government lawyers who each day put aside their own policy and political preferences to advocate dutifully on behalf of their governments and the general public.’”<sup>111</sup>

The Court’s logic, taken to an extreme, would indicate that Attorney General Stein is not the state attorney for all North Carolinians, but instead represents and is accountable only to those who elected him on partisan grounds. This legitimizing of increased partisan polarization within state government sends a troubling message to the public about a state official who has traditionally been seen as standing up for all North Carolinians, and not just those who share his political beliefs.<sup>112</sup>

### C. *Selective Federalism*

The majority grounds much of *Berger* in the values of federalism and respect for state autonomy. The Court calls for “[a]ppropriate respect” for states’ decisions to allocate power in different ways and cautions federal courts against “evin[ing] disrespect for a State’s chosen means of diffusing its sovereign powers among various branches and officials.”<sup>113</sup> And the Court warns that a preemption assumption for FRCP 24(a) would “do much violence to our system of cooperative federalism.”<sup>114</sup> Yet if the Court practices the federalism it preaches, it does so in a selective way. First, the majority focuses on a state statute that permits intervention by the state legislature at the expense of competing state constitutional mandates of strict separation of powers. Second, by interpreting the statutory power the way it does and

109. See N.C. Conf. of NAACP v. Cooper, No. 18-CV-1034, 2019 WL 5840845, at \*2 (M.D.N.C. Nov. 9, 2019), *aff’d on reh’g en banc*, 999 F.3d 915 (4th Cir. 2021), *rev’d*, 142 S. Ct. 2191 (2022).

110. See Maurer, *supra* note 58; see also N.C. GEN. STAT. § 126 (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.).

111. *Berger*, 142 S. Ct. at 2214 (Sotomayor, J., dissenting) (quoting N.C. State Conf. of NAACP v. Berger, 999 F.3d 915, 937 (4th Cir. 2021)).

112. Thornburg, *supra* note 57, at 356–59 (“As the chief legal officer of the State, the Attorney General’s Office is . . . the principal legal representative of the public interest for all citizens . . . [T]he [Attorney General’s] ultimate duty is to the citizens of North Carolina . . .”).

113. *Berger*, 142 S. Ct. at 2201.

114. See *id.* at 2204.

allocating law enforcement authority to the General Assembly, the Court puts its thumb on the scale in favor of the legislature over the executive branch. Ultimately, the Court's federalism is not one of equal opportunity.

### 1. Short Shrift to the State Constitution

"Within wide constitutional bounds, States are free to structure themselves as they wish," Justice Gorsuch began the *Berger* opinion.<sup>115</sup> But in determining *how* North Carolina chose to structure its government, the Court ignored a key aspect of the state's constitution.<sup>116</sup> North Carolina has a strong mandate of separation of powers in its constitution that would foreclose the legislature from taking on traditionally executive powers of enforcing the law.<sup>117</sup> Unlike the Federal Constitution, the North Carolina Constitution explicitly states, in its enumerated "Declaration of Rights," that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."<sup>118</sup> This mandate of a strict division of powers has been in every single version of the North Carolina Constitution, dating back to the state's first in 1776.<sup>119</sup>

The framers of the original North Carolina Constitution were very concerned about an all-powerful state legislature and wrote the founding document with that threat in mind. James Iredell, who helped develop North Carolina's newly formed government, described how the state's framers were careful to avoid a version of the British Parliament in their new legislature:

It was, of course, to be considered how to impose restrictions on the Legislature . . . [to] guard against the abuse of unlimited power, which was not to be trusted, without the most imminent danger, to any man or body of men on earth. We had not only been sickened and disgusted for years with the high and almost impious language from Great Britain, of the omnipotent power of the British parliament, but had severely smarted under its effects. We . . . should have been guilty of . . . the grossest folly, if in the same moment when we spurned at the *insolent despotism* of Great Britain, we had established a *despotic* power among ourselves.<sup>120</sup>

115. *Id.* at 2197.

116. *See id.* at 2202.

117. *See* N.C. CONST. art. I, § 6.

118. *Id.*

119. *See* N.C. CONST. of 1776, § 4; N.C. CONST. of 1868, art. I, § 8; N.C. CONST. of 1971, art. I, § 6; *see also* State *ex rel.* Wallace v. Bone, 304 N.C. 591, 595, 286 S.E.2d 79, 81 (1982) ("[E]ach of our constitutions has explicitly embraced the doctrine of separation of powers.").

120. N.C. BAR ASS'N, PROCEEDINGS OF THE SEVENTEENTH ANNUAL SESSION OF THE NORTH CAROLINA BAR ASSOCIATION 27 (Thomas W. Davis ed., 1915); *see also* James Iredell, OYEZ, [https://www.oyez.org/justices/james\\_iredell](https://www.oyez.org/justices/james_iredell) [<https://perma.cc/P5GR-9X93>].

The framers of the 1868 constitution were also extremely wary of the state legislature that had recently unilaterally abolished the state's public school system<sup>121</sup> and used critical state funds to buy up Confederate war bonds to support the Confederate army at the expense of its own citizens' needs.<sup>122</sup> The 1868 framers drafted language of the new constitution with this context of an abusive state legislature in mind.<sup>123</sup> Most recently, the framers of the current 1971 constitution took separation of powers one step further and replaced the language that the branches "ought to be forever separate" with the mandate that the branches "*shall* be forever separate and distinct from each other."<sup>124</sup> Strict separation of powers has been a clear state priority since its founding.

Naturally, the first place to look to understand a state's constitution is that state's supreme court.<sup>125</sup> Justice Gorsuch admitted, "we are hardly the final arbiters of North Carolina law."<sup>126</sup> Yet the Court only needed to look to state court precedent to see that the "final arbiters" have held time and again that the state constitution's separation of powers provision has teeth.<sup>127</sup> In *State ex rel. Wallace v. Bone*,<sup>128</sup> the Supreme Court of North Carolina held that, based on the North Carolina Constitution's explicit separation of powers in Article I, Section 6, members of the General Assembly were prohibited from joining an executive branch committee given the power to "institute actions in superior court" and "agree upon or enter into settlements" in the course of litigation.<sup>129</sup> In *Advisory Opinion In re Separation of Powers*,<sup>130</sup> the state supreme

121. See John L. Bell, *Samuel Stanford Ashley, Carpetbagger and Educator*, 72 N.C. HIST. REV. 456, 473 (1995).

122. James L. Leloudis, *Civil War and Reconstruction*, DOCUMENTING AM. S., [https://docsouth.unc.edu/unc/essay/unc\\_ess08.html](https://docsouth.unc.edu/unc/essay/unc_ess08.html) [<https://perma.cc/6RCJ-VC2Y>].

123. See generally JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH-CAROLINA AT ITS SESSION (1868), <https://docsouth.unc.edu/nc/conv1868/conv1868.html> [<https://perma.cc/YHK9-8SYL>] (reporting delegates' discussions at the 1868 Constitutional Convention).

124. See *Wallace*, 304 N.C. at 595, 286 S.E.2d at 81 (emphasis added).

125. See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16 (2018) ("State courts have authority to construe their own constitutional provisions however they wish.").

126. *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2202 (2022).

127. In any other state, the Court also could have certified the question to the state's highest court. However, North Carolina is perhaps the only state in the nation that does not have a process for certification. Vikram David Amar & Jason Mazzone, *Why the North Carolina Berger Voter ID Case Pending in the U.S. Supreme Court Would Benefit from Certification to the State High Court: Part Two in a Series*, VERDICT (May 11, 2022), <https://verdict.justia.com/2022/05/11/why-the-north-carolina-berger-voter-id-case-pending-in-the-u-s-supreme-court-would-benefit-from-certification-to-the-state-high-court> [<https://perma.cc/7F4B-9A2P>]. Thus, state court precedent was the next best way to discern the highest state court's view on the matter.

128. 304 N.C. 591, 286 S.E.2d 79 (1982).

129. See, e.g., *id.* at 607, 286 S.E.2d at 88.

court struck down a statute that empowered legislators to decide whether the State would accept federal block grants.<sup>131</sup> The court ruled that this kind of “encroachment” upon the executive powers of the Governor was a “violation of the separation of powers” in the state’s constitution.<sup>132</sup>

And perhaps most tellingly, the Supreme Court of North Carolina recently denied staying a superior court decision on *this very issue*.<sup>133</sup> In a case challenging Governor Cooper’s COVID-19 measures, the superior court held that the Speaker of the House and the President Pro Tempore of the Senate were not authorized to “represent the interests of . . . the State, including any interest of the State in the execution and enforcement of its laws.”<sup>134</sup> And to read statutory authority otherwise, “would violate the North Carolina Constitution’s separation of powers clause.”<sup>135</sup> Thus, the Supreme Court of North Carolina, the ultimate authority on North Carolina constitutional law, believes the constitution’s separation of powers provision mandates a clear delineation between legislative, executive, and judicial authority.

The U.S. Supreme Court spends only one paragraph out of the entire *Berger* opinion addressing the State Board’s constitutional argument, supported by the amicus of former Republican Supreme Court of North Carolina Justice Robert Orr,<sup>136</sup> that giving the state legislature the power to intervene on behalf of the entire State was an unconstitutional delegation of executive power to the legislature.<sup>137</sup> While the Court relies on the line in

130. 305 N.C. 767, 295 S.E.2d 589 (1982).

131. *See id.* at 780–81, 295 S.E.2d at 596.

132. *Id.* This same protection of executive power has been seen recently in *State v. Berger* and *Cooper v. Berger*, where the state supreme court disallowed legislative attempts to take control of membership on administrative commissions and to assume control over the State Board of Elections. *See, e.g., State v. Berger*, 368 N.C. 633, 781 S.E.2d 248, 258 (2016); *Cooper v. Berger*, 370 N.C. 392, 414–18, 809 S.E.2d 98, 111–14 (2018).

133. Order Denying Temporary Stay, 848 S.E.2d 495, 495 (N.C. 2020) (mem.).

134. N.C. All. of Retired Ams. v. N.C. State Bd. of Elections, 20 CVS 8881, 2020 WL 10758664, at \*4 (N.C. Super. Ct. Oct. 5, 2020).

135. *Id.*

136. As Orr notes, in addition to serving on the Supreme Court of North Carolina for ten years, he also taught a class on the North Carolina Constitution at University of North Carolina School of Law for more than two decades. He also spent seven years exclusively litigating cases involving North Carolina’s Constitution at the North Carolina Institute for Constitutional Law. In short, the man knows what he is talking about. Brief of Former North Carolina Supreme Court Justice Robert F. Orr as Amicus Curiae in Support of Respondents at 1–2, *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191 (2022) (No. 21-248).

137. *Berger*, 142 S. Ct. at 2202–03. One reason Gorsuch dismisses the State Board’s separation of powers argument is that the General Assembly has always been able to intervene permissively under FRCP 24(b). But Gorsuch fails to engage with a key difference between FRCP 24(b) and the litigation here: there is no debate that the General Assembly can intervene on behalf of the interests of the *state legislature*. However, as discussed above, North Carolina courts have held that the state’s executive branch holds the uniquely executive power to represent the interests of the entire state. *See,*

North Carolina's Constitution that the attorney general's "respective duties shall be prescribed by law" to support its contention that the legislature has full control over the scope of the attorney general's role, this interpretation is contrary to the traditional rule of statutory interpretation that one provision of the constitution should not be read to violate others.<sup>138</sup> The framers of each version of North Carolina's three constitutions were wary of an overly powerful legislature and cannot have intended for the "respective duties" provision to be used as a constitutional work-around to permit the General Assembly to delegate unlimited executive powers to the legislature.<sup>139</sup> Had the Court dug an inch deep into state supreme court precedent and examined the intentions of North Carolina's framers, it would have discovered that this constitutional provision was meant to have legal force and that permitting two legislators to intervene and litigate on behalf of the entire State was a clear violation of it.

Glossing over the North Carolina Constitution, as the *Berger* Court did, does not respect the federalism the majority purports to hold so dearly.<sup>140</sup> Instead, it undermines the power of state supreme courts in determining the meaning of their own constitutions. As Judge Jeffrey Sutton argues, "[s]tate courts have authority to construe their own constitutional provisions however they wish."<sup>141</sup> And by extension, it undermines the will of the North Carolina people who both voted to ratify their state constitution and elected the Supreme Court justices who interpret it.<sup>142</sup> As Vikram and Akhil Amar have identified based on historical research, "state constitutions were the very heart

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*e.g.*, Order Denying Temporary Stay, 848 S.E.2d at 495 (mem.) (stay on this decision denied by both North Carolina Court of Appeals and Supreme Court of North Carolina).

138. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quoting 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 46.06, 181–186 (6th ed. 2000))).

139. *See* N.C. CONST. OF 1776, Declaration of Rights, § 4; N.C. CONST. OF 1868, art. I, § 8; N.C. CONST. OF 1971, art. I, § 6; *see also* *State ex rel. Wallace v. Bone*, 304 N.C. 591, 595, 286 S.E.2d 79, 81 (1982).

140. As the majority gushes in *Berger*, federalism "better enables the States to serve as a 'balance' to federal authority"; "permits States to accommodate government to local conditions and circumstances"; and "allows States to serve as laboratories of 'innovation and experimentation.'" 142 S. Ct. at 2201–02 (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

141. *See* SUTTON, *supra* note 125, at 16.

142. True, *Berger* and Moore are elected representatives, but in the most recent election (2022), they were elected by a combined 78,050 voters out of a State of over 10.46 million. *See supra* note 11 and accompanying text; *Population & Demographics*, N.C. OFF. STATE BUDGET & MGMT., <https://www.osbm.nc.gov/facts-figures/population-demographics> [<https://perma.cc/34F8-VUYK>]. Meanwhile, a new state constitution must be ratified by a majority of voters, N.C. CONST. art. XIII, § 3, and a state supreme court justice is elected by a majority in a statewide election, N.C. CONST. art. IV, § 16.

and soul, legally, of the American revolution. These state constitutions were universally understood as creations of the American people themselves.”<sup>143</sup>

Undermining the power of a state constitution, as interpreted by the state’s highest court, is a worrisome practice. And it is threatening to become a trend. In *Moore v. Harper*, North Carolina Speaker of the House Tim Moore advocated for the adoption of the “Independent State Legislature Theory,” which, in its most extreme form, would have prohibited state supreme courts from weighing in on questions of state constitutionality in federal redistricting cases.<sup>144</sup> While the majority of the Court ultimately did not adopt the most wide sweeping version of the Independent State Legislature Theory, Chief Justice Roberts noticeably qualified his majority holding by stating: “In interpreting state law . . . state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislature . . . .”<sup>145</sup> Election law scholar Richard Hasen has argued that the door *Moore* leaves open is “a new tool to be used to rein in especially voter-protective rulings of state courts.”<sup>146</sup>

Try as the majority might to write the *Berger* opinion as an ode to federalism,<sup>147</sup> it is actually the Court that does “much violence to our system of cooperative federalism” by largely ignoring North Carolina’s constitutional mandate of a strict separation of powers and the state supreme court’s interpretation of that provision. And, based on the dicta in *Moore* that reserves a role for the Court to elevate state legislatures over state supreme courts in future redistricting battles, it seems that the Court will continue to undermine state courts’ understanding of their own constitutions.<sup>148</sup>

143. Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 19 (2022).

144. See Brief for Petitioner at 3, *Moore v. Harper*, 143 S. Ct. 2065 (2023) (No. 21-1271).

145. *Moore v. Harper*, 143 S. Ct. at 2090. Justice Thomas, in his dissent, points out the obvious questions left open by this language in the majority: “What are ‘the bounds of ordinary judicial review’? What methods of constitutional interpretation do they allow? Do those methods vary from State to State? And what about *stare decisis*—are federal courts to review state courts’ treatment of their own precedents for some sort of abuse of discretion?” *Id.* at 2106 (Thomas, J., dissenting).

146. Richard L. Hasen, *There’s a Time Bomb in Progressives’ Big Supreme Court Voting Case Win*, SLATE (June 27, 2023, 12:44 PM), <https://slate.com/news-and-politics/2023/06/supreme-court-voting-moore-v-harper-time-bomb.html> [<https://perma.cc/D7SW-MBX2>].

147. As the Bard put it: “The lady doth protest too much, methinks.” WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2, l. 254.

148. See Hasen, *supra* note 146.

## 2. Playing Favorites: The Danger of Vesting More Power in State Legislatures

Another way the Court practices a selective form of federalism is by stepping in to empower one branch of state government over another. Whether or not such a delegation of power amounted to a violation of separation of powers under the North Carolina Constitution, it is undeniable that the Court permitted the legislative branch to assume some executive power by allowing legislators Berger and Moore to intervene on behalf of the entire State rather than just the legislature. This is a troubling move because it vests extra-legislative power in North Carolina's least democratic branch.

In *Berger*, the Court seems comfortable giving the General Assembly the authority to speak for the State and thus enforce the state's laws because of the legislature's democratic nature. "Through the General Assembly, the people of North Carolina" have authorized the legislature to speak on behalf of the State, the majority explains.<sup>149</sup> This reasoning that the state legislature is a mere reflection of popular will is not uncommon from the Supreme Court.<sup>150</sup> Chief Justice Earl Warren in *Reynolds v. Sims*<sup>151</sup> stated that "[s]tate legislatures are, historically, the fountainhead of representative government in this country."<sup>152</sup> Justice Gorsuch, who penned the *Berger* majority, has been a frequent proponent of the democratic values of state legislatures over other branches, noting that "[l]egislators can be held accountable by the people for the rules they write or fail to write"<sup>153</sup> while state executive entities are "largely unaccountable bodies."<sup>154</sup>

But rather than a bastion of democracy, North Carolina's legislature is, in reality, the state's least democratic branch. Due to partisan gerrymandering, North Carolina's state legislative maps do not produce a General Assembly that is politically reflective of the state as a whole.<sup>155</sup> According to the Princeton Gerrymandering Project, which crunches the numbers on democratic representation, North Carolina "is one of the most extremely

149. *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2204 (2022).

150. Seifter, *supra* note 15, at 1753 (quoting Justice Gorsuch's assertion in support of the Independent State Legislature Theory that North Carolina's legislature reflected "the power of the people").

151. 377 U.S. 533 (1964).

152. *Id.* at 564; Seifter, *supra* note 15, at 1745.

153. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring); Seifter, *supra* note 15, at 1753.

154. *Moore v. Circosta*, 141 S. Ct. 46, 48 (2020) (Gorsuch, J., dissenting); Seifter, *supra* note 15, at 1753.

155. See generally *North Carolina, GERRYMANDERING PROJECT*, <https://gerrymander.princeton.edu/reforms/NC> [<https://perma.cc/6XMS-N62X>] (assigning partisan fairness grades to North Carolina legislative maps).

gerrymandered states in the nation.”<sup>156</sup> The most recent state legislative maps that the General Assembly drew were ranked an “F” by Princeton’s Redistricting Report Card, which analyzes partisan fairness and competitiveness compared to other possible maps.<sup>157</sup>

In fact, North Carolina gained national notoriety in 2016 when the Electoral Integrity Project, which grades the health of democracies around the world declared that North Carolina no longer fulfilled the requirements to be a full democracy.<sup>158</sup> The report found that if North Carolina were a nation, the health of its democracy would rank slightly above Cuba thanks in large part to its partisan gerrymandering and the unfettered, unrepresentative power its legislative supermajority wields.<sup>159</sup> Meanwhile, the executive branch and members of the state judiciary are elected by the state as a whole,<sup>160</sup> so the same unrepresentative gerrymandering concerns are not implicated.<sup>161</sup>

In the past decade, Republican members of the General Assembly have used their engineered supermajorities to wrestle authority from both the executive and judicial branches.<sup>162</sup> Upon Democratic Governor Roy Cooper’s election in 2016, the General Assembly passed a series of laws that required senate approval of cabinet members, eliminated the Governor’s power to appoint trustees to the University of North Carolina school system, decreased the number of state employees under executive control from 1,500 to 425, and

156. *Id.*

157. *Redistricting Report Card: North Carolina 2021 SST-13 Draft State Senate Map (10/29 Official)*, GERRYMANDERING PROJECT, <https://gerrymander.princeton.edu/redistricting-report-card?planId=receSUOmFMRW2c1Ab> [<https://perma.cc/Z5CP-SUWT>] (last updated Jan. 5, 2023); *Redistricting Report Card: North Carolina 2021 HBK-14 Draft State House Map (Rep. Hall 11/1 Official)*, GERRYMANDERING PROJECT, <https://gerrymander.princeton.edu/redistricting-report-card?planId=rec1dkPGEydLw7SFy> [<https://perma.cc/D8N5-EWDN>] (last updated Jan. 5, 2023). In *Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022), the case that would lead to *Moore v. Harper*, the Supreme Court of North Carolina struck these maps down in February 2022 due to extreme levels of partisan gerrymandering. *Id.* at 323, 868 S.E.2d at 510. However, a newly reconstituted and ideologically flipped state Supreme Court reheard and redecided the case, ultimately reinstating the original gerrymandered maps. *Harper v. Hall*, 384 N.C. 292, 300–01, 886 S.E.2d 393, 400–01 (2023).

158. See Dylan Matthews, *Political Scientist: North Carolina “Can No Longer Be Classified as a Full Democracy,”* VOX (Dec. 27, 2016, 2:00 PM), <https://www.vox.com/policy-and-politics/2016/12/27/14078646/north-carolina-political-science-democracy> [<https://perma.cc/X496-AYBE>].

159. *See id.*

160. N.C. CONST. art. III § 7; N.C. CONST. art. IV, § 16.

161. *See* Seifter, *supra* note 15, at 1735 (“[S]tate legislatures are typically a state’s least majoritarian branch. Often they are outright countermajoritarian institutions . . . . Meanwhile, the other branches of state government, now overwhelmingly selected via statewide elections, do not face any of these problems.”).

162. Amber Phillips, *Amid Outcry, N.C. GOP Passes Law To Curb Democratic Governor’s Power*, WASH. POST (Dec. 16, 2016, 3:15 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/16/amid-growing-outcry-nc-gop-pushes-forward-with-plan-to-curb-democratic-govs-power/> [<https://perma.cc/TU3Z-FHBV> (dark archive)].

reworked the makeup of the State Board of Elections to move it out of reach of the governor's control.<sup>163</sup> In the fall of 2023, Berger and Moore rolled back the executive branch's power even further by taking the Governor's power to appoint Board of Election administrators and vesting it in the legislature.<sup>164</sup> Moore admitted to reporters for the *Raleigh News & Observer* earlier this year that the General Assembly's latest efforts to curtail the Governor's powers might raise "some separation of powers issues."<sup>165</sup> Finally, in pressing forward the independent state legislature theory in *Moore v. Harper*, the North Carolina General Assembly attempted to strip the North Carolina Supreme Court of its power to review state election legislation, including hyper-gerrymandered maps, for state constitutional violations.<sup>166</sup> When considered in this context, the actions of the legislators in *Berger* follow a trend of the state's least democratic branch reaching for authority beyond its constitutional purview.

These concerns of *Berger* as a legislative power grab go beyond the purple borders of North Carolina. Though the *Berger* majority hangs its decision on a North Carolina statute that grants the General Assembly some authority to intervene,<sup>167</sup> at least one lower court has already granted the right of state legislators to intervene without such a statute.<sup>168</sup> And even if courts looked to statutory language, any legislature with enough votes to pass this kind of statute can now delegate executive authority to themselves, stripping the state's executive branch of its unique authority to enforce the state's laws.

Arizona's state legislators have already relied on *Berger* to intervene on behalf of the State of Arizona in a challenge to state abortion laws that the Democratic Attorney General was already defending.<sup>169</sup> It did not matter that

163. Thoet, *supra* note 18.

164. Gary D. Robertson, *North Carolina Republicans Enact Voting Changes That Weaken Governor's Ability To Oversee Elections*, AP NEWS, <https://apnews.com/article/north-carolina-elections-governor-legislature-vetoes-5c22afdce6b92171f64cbde047748b78> [https://perma.cc/JJ7F-KTC2] (last updated Oct. 10, 2023, 7:39 PM).

165. See Dawn Baumgartner Vaughan, *More Changes to the Balance of Power in NC Are in the Works, Republican Leaders Say*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/article272319253.html> [https://perma.cc/DR3X-4QQL (staff-uploaded, dark archive)] (last updated Feb. 12, 2023, 9:24 AM).

166. See Eliza Sweren-Becker & Ethan Herenstein, *Moore v. Harper Explained*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/moore-v-harper-explained> [https://perma.cc/6RNB-YQY6] (last updated June 27, 2023). See generally *Moore v. Harper*, 143 S. Ct. 2065 (2023).

167. See *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2202 (2022). As discussed previously, the ambiguity in the statute is whether legislators can intervene on behalf of the legislature or on behalf of the entire state. See N.C. GEN. STAT. § 1-72.2 (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.).

168. *Isaacson v. Mayes*, No. CV-21-01417, 2023 WL 2403519, at \*1 (D. Ariz. Mar. 8, 2023).

169. *Id.*

Arizona lacked an equivalent statute to North Carolina granting the legislature the right to intervene in certain scenarios.<sup>170</sup> Wisconsin's legislature is only two house seats away from a supermajority.<sup>171</sup> The State would be a prime candidate for such a legislative power grab given the fraught dynamics between the legislature and executive<sup>172</sup> and a history of mimicking the North Carolina General Assembly's antidemocratic path in this arena.<sup>173</sup> Other states with divided government are at particular risk of this kind of action, and, while state legislatures are more likely to be Republican in purple states,<sup>174</sup> this cuts across ideological lines. Virginia currently has a Democratic Senate<sup>175</sup> and a Republican Attorney General.<sup>176</sup> If state senators wish to intervene on behalf of the Commonwealth of Virginia, *Berger* is their ticket to do so.

Additionally, according to Miriam Seifter, the Co-Director of the State Democracy Research Initiative at the University of Wisconsin Law School who has studied state legislatures extensively,<sup>177</sup> North Carolina's legislature is far from alone in being the least democratic branch in the state's government.<sup>178</sup> "[S]tate legislatures are almost always a state's least majoritarian branch," Seifter has found through her state-by-state research. "Often they are outright counter-majoritarian institutions."<sup>179</sup> Seifter explains this phenomenon through a combination of the part-time nature of the job which may make them "more susceptible to interest group pressure,"

170. *See id.*

171. Todd Richmond, *Democratic Victories Block Republican Supermajority in the Wisconsin Assembly*, PBS WIS. (Nov. 9, 2022), <https://pbswisconsin.org/news-item/democratic-victories-block-republican-supermajority-in-the-wisconsin-assembly/> [<https://perma.cc/7MZG-P7BC>].

172. Shawn Johnson & Laurel White, *Wisconsin Legislature Works Overnight To Approve Limiting Gov.-Elect Tony Evers' Power*, WIS. PUB. RADIO (Dec. 5, 2018, 8:40 AM), <https://www.wpr.org/wisconsin-legislature-works-overnight-approve-limiting-gov-elect-tony-evers-power> [<https://perma.cc/F89Q-VFPL>].

173. Maggie Astor, *Wisconsin, Limiting Governor, Borrows a Page from North Carolina's Book*, N.Y. TIMES (Dec. 5, 2018), <https://www.nytimes.com/2018/12/05/us/politics/wisconsin-governor-legal-challenge.html> [<https://perma.cc/V8V7-PVML> (dark archive)] ("By passing legislation to strip power from the incoming Democratic governor and attorney general, Wisconsin Republicans followed the lead of their counterparts in North Carolina . . .").

174. *See State Partisan Composition*, NAT'L CONF. STATE LEGISLATORS, <https://www.ncsl.org/about-state-legislatures/state-partisan-composition> [<https://perma.cc/B66K-82GH>] (last updated May 23, 2023).

175. *Seniority*, SENATE VA. (2023), <https://apps.senate.virginia.gov/Senator/seniority.php> [<https://perma.cc/H4DS-2KAQ>].

176. Justin Jouvenal, *Republican Del. Jason Miyares Elected Virginia's First Latino Attorney General*, WASH. POST (Nov. 4, 2021, 10:47 AM), [https://www.washingtonpost.com/local/virginia-politics/miyares-wins-virginia-attorney-general-race/2021/11/03/45f1dc46-3cb2-11ec-bfad-8283439871ec\\_story.html](https://www.washingtonpost.com/local/virginia-politics/miyares-wins-virginia-attorney-general-race/2021/11/03/45f1dc46-3cb2-11ec-bfad-8283439871ec_story.html) [<https://perma.cc/M6LH-8RJY> (dark archive)].

177. *See Miriam Seifter: Professor of Law*, UNIV. WIS.-MADISON L. SCH., <https://secure.law.wisc.edu/profiles/seifter@wisc.edu> [<https://perma.cc/A76A-WWPQ>].

178. *See Seifter, supra* note 15, at 1735.

179. *See id.*

geographic constraints on full democratic representation, and the common practice of partisan gerrymandering.<sup>180</sup>

The *Berger* majority may have had the best intentions of empowering the voice of the people in its decision to let the General Assembly speak for the State. But this is not reflective of the reality of North Carolina's legislature, nor that of most states across the country.<sup>181</sup> Vesting the least democratic branch with even more extra-legislative power is concerning for state democracies. And in a state like North Carolina, where the legislature has been aggressive about clawing power from the other branches of government, the Court merely exacerbates this problem.

#### CONCLUSION

*Berger* may not have made a splash in the news cycle when it was decided, but its impact on North Carolina and the potential implications for other states with divided government are not to be ignored. By opening the door for legislators to intervene in any case where a North Carolina statute or constitutional provision has been challenged, the Court has increased costs to North Carolina taxpayers as they foot the bill for expensive outside counsel, largely coming from law firms outside North Carolina.<sup>182</sup> This has increased the opportunity for partisan polarization in high profile cases where the General Assembly has historically employed conservative boutique litigation firms with agendas of their own.<sup>183</sup> And by portraying the attorney general as a primarily political officer, the Court has rewritten the way North Carolina's Constitution, statutes, and common law have viewed their chief law enforcer.<sup>184</sup>

By largely glossing over the North Carolina Constitution's separation of powers mandate and the state supreme court's strong interpretation of that provision, the Court practices a selective version of federalism that actually undermines state institutions. This practice is likely to play out yet again in what seems an inevitable sequel to *Moore v. Harper*.<sup>185</sup> Selective federalism is threatening to become a trend.

In a state where the legislature is the least representative branch of its citizens, *Berger's* empowerment of state legislators exacerbates North Carolina's challenges with maintaining a robust democracy.<sup>186</sup> And while the

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180. *See id.* at 1757–58.

181. *See id.* at 1735.

182. *See* ATTORNEY ALLOCATION REPORT, *supra* note 59, at 36–40.

183. *See* Burns, *supra* note 80.

184. *See* Thornburg, *supra* note 57, at 348–49.

185. *See* Hasen, *supra* note 146.

186. *See* Matthews, *supra* note 158.

Court seemed to consider this a uniquely North Carolinian problem due to the statutory language at issue, legislatures in states with divided government need only use North Carolina as a blueprint for their own legislative power grabs. Thus, *Berger* may come to have a serious impact on the balance of power in purple states and the health of our most fragile state democracies.

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