POPULAR SOVEREIGNTY, DEMOCRATIC EQUALITY, AND THE PAST AND FUTURE NORTH CAROLINA CONSTITUTION*

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In recent years, the Supreme Court of North Carolina has been called upon—again and again—to answer fundamental questions about the nature of democracy and the structure of North Carolina's constitutional system of government. Perhaps unsurprisingly, the court's answers have changed along with its partisan composition. This Essay examines one major jurisprudential fault line that has consistently divided the Democratic and Republican justices: how to harmonize the principles of popular sovereignty and democratic equality, which are both inscribed in the state constitution's Declaration of Rights.

*The principle of popular sovereignty requires deference to the state legislature as the sole branch of government authorized to exercise the People of North Carolina's sovereign authority, the exclusive source of political power in the state. The principle of democratic equality requires that all North Carolinians be afforded an equal opportunity to participate in the political processes through which the People's sovereign power is transferred to their representatives. In cases where the two principles have come into tension—where litigants have sought to invalidate legislative actions by demonstrating the exclusion of one group from the voting process—Republican justices have emphasized the need for deference to legislative prerogatives, while Democratic justices have emphasized the need to carefully scrutinize the underlying political process. This Essay examines the principle of democratic equality and suggests that it provides a foundation for a progressive state constitutionalism in North Carolina. This approach to the North Carolina Constitution pays heed to the profound legal transformation that occurred with the enactment of North Carolina's Reconstruction-era constitution, which made baseline political equality among North Carolinians of all races a prerequisite to the legitimate exercise of the People's sovereign political power. The Essay concludes by recounting how Democratic justices breathed life into this promise of meaningful equality in two landmark decisions—*Harper v. Hall*, which considered whether partisan*

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gerrymandering violated the state constitution, and NAACP v. Moore*, which addressed the authority of a racially gerrymandered legislature to amend the constitution.*

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INTRODUCTION

In North Carolina, civil rights advocates, the causes they advocate for, and the people and communities they work alongside, are under siege. For a brief window, the Supreme Court of North Carolina was controlled by jurists who endorsed an expansive interpretation of the rights and protections afforded by the North Carolina Constitution. But, since 2020, Republican candidates for the state appellate courts have run the table in judicial elections, and, barring unexpected retirements, conservatives will dominate the judiciary until at least 2028.[1] Once in office, conservative judges rapidly erased some of the progressive court's most consequential rulings.[2] In the process, they gifted Republican legislators the opportunity to engage in an unprecedented mid-decade reapportionment, which will all but guarantee a Republican supermajority in both chambers of the state legislature through 2030.[3] In the

1. *See, e.g.*, Aaron Mendelson, *'Lose the Courts, Lose the War': The Battle over Voting in North Carolina*, CTR. FOR PUB. INTEGRITY (July 25, 2023), https://publicintegrity.org/politics/high-courts-high-stakes/battle-over-voting-north-carolina-supreme-court/ [https://perma.cc/7S2H-6CXB]; Kelan Lyons, *Worries Abound for Criminal Justice Under a Republican State Supreme Court*, NC NEWSLINE (Nov. 17, 2022, 6:00 AM), https://ncnewsline.com/2022/11/17/worries-abound-for-criminal-justice-under-a-republican-state-supreme-court/ [https://perma.cc/4ZQS-4QKA] [hereinafter Lyons, *Worries Abound*] ("The Republican majority [on the Supreme Court of North Carolina] is guaranteed through at least 2028.").

2. *See, e.g.*, Harper v. Hall (*Harper III*), 384 N.C. 292, 326, 886 S.E.2d 393, 416 (2023) (reversing 2022 decision that North Carolina Constitution imposed limitations on partisan gerrymandering and holding "that claims of partisan gerrymandering are nonjusticiable, political questions under the North Carolina Constitution"); Holmes v. Moore (*Holmes II*), 384 N.C. 426, 428, 886 S.E.2d 120, 125 (2023) (reversing decision concluding that voter identification requirement impermissibly discriminated on the basis of race).

3. *Harper III*, 384 N.C. at 376, 886 S.E.2d at 447 (agreeing that "the General Assembly must be given the opportunity to redraw constitutionally compliant districts"); *see also* Dawn Baumgartner Vaughan & Kyle Ingram, *North Carolina Has New Maps for the 2024 Elections. What They Change and*

parlance of legal scholar Jack Balkin, the ideological parameters of the next decade have been fixed by this ascendant conservative "regime": Republicans may not win every election in the next few years, but they have already won enough to "set[] the agenda for what people think is politically possible at [this] particular period of time" in North Carolina.[4]

The consequences of the conservative takeover of North Carolina's judiciary have been immediate and wide-ranging. In 2023 alone, conservative jurists eliminated constitutional limitations on partisan gerrymandering,[5] halted efforts to secure constitutionally adequate funding for the state's public school system,[6] and declared that life begins at conception (before that decision was hastily withdrawn without explanation).[7] The judiciary's bureaucratic apparatus has been used to harass ideological opponents, most prominently by initiating multiple investigations into Justice Anita Earls based on comments she made describing the conservative majority's efforts to change North Carolina's appellate rules and recounting her experiences as the only Black woman on the Supreme Court of North Carolina.[8] Conservative jurists have belittled their colleagues, questioned their motives, and crowed about Republican political gains.[9] Progressives will be forced to grapple with a judiciary that offers little but unremitting hostility.

Who May Run, NEWS & OBSERVER, https://www.newsobserver.com/news/politics-government/article280960213.html [https://perma.cc/5LH4-SCPK (dark archive)] (last updated Dec. 6, 2023, 9:54 AM) (describing new maps as "likely to give Republicans who drew them at least three more seats in Congress and shore up their supermajority in the legislature").

4. Jack M. Balkin, *Race and the Cycles of Constitutional Time*, 86 MO. L. REV. 443, 445 (2021).

5. *See Harper III*, 384 N.C. at 326, 886 S.E.2d at 416.

6. *See* Hoke Cnty. Bd. of Educ. v. State, 385 N.C. 380, 380, 892 S.E.2d 594, 594–95 (2023) (granting petition for discretionary review for rehearing of decision ordering legislature to transfer funds to satisfy obligation to maintain adequate public education system on grounds that court may have lacked subject matter jurisdiction).

7. *See* Kelan Lyons, *NC Appeals Court: Mom Who Committed Crime While Pregnant Can Lose Parental Rights*, NC NEWSLINE (Oct. 18, 2023, 6:00 AM), https://ncnewsline.com/2023/10/18/nc-appeals-court-mom-who-committed-crime-while-pregnant-can-lose-parental-rights/ [https://perma.cc/5QDG-24Y7] (quoting opinion of Judge Hunter Murphy stating, in termination of parental rights case, that "[b]iologically speaking, the life of a human being begins at the moment of conception in the mother's womb"); Kelan Lyons, *Appeals Court 'Life Begins at Conception' Ruling Withdrawn*, NC NEWSLINE (Nov. 10, 2023, 5:15 AM), https://ncnewsline.com/briefs/appeals-court-life-begins-at-conception-ruling-withdrawn/ [https://perma.cc/YH9K-VYJ3] ("A controversial opinion published by the North Carolina Court of Appeals last month has been withdrawn, effectively making it as if it were never written.").

8. *See, e.g.*, Billy Corriher, *State Republicans Try To Remove Top Jurist for Mentioning the Existence of Racial Bias*, SLATE (Aug. 30, 2023, 2:47 PM), https://slate.com/news-and-politics/2023/08/north-carolina-gop-anita-earls-ethics-case.html [https://perma.cc/AZM4-5BJ4].

9. *See, e.g.*, *Hoke Cnty. Bd. of Educ.*, 385 N.C. at 382, 892 S.E.2d at 595 (Berger, J., concurring) (stating, with respect to Justice Earls's dissent: "Once again, we endure ad nauseum these fanciful protestations."); Walker v. Wake Cnty. Sheriff's Dep't, 385 N.C. 300, 302, 890 S.E.2d 905, 907 (2023) (Dietz, J., concurring) (describing Justice Earls's dissent as "a bit unhinged"); Holmes v. Moore

In contrast to conservative efforts to use the governor's mansion to secure hard-right policy wins—which met a concerted and highly effective countermobilization in the form of the Moral Monday Movement[10]—the conservative takeover of the state judiciary has proceeded with little fanfare. To be sure, recent decisions on high-profile issues like partisan gerrymandering have received widespread media coverage.[11] But the tenor of recent judicial elections has not matched their stakes for North Carolina's democracy. Republican candidates running for judicial office have been explicit about the practical stakes of judicial elections, arguing, for example, that people should vote for "conservative" judges because "[v]oter ID is on the line in North Carolina."[12] By contrast, Democratic judicial candidates have generally relied on well-meaning but amorphous bromides about judicial independence, apolitical judging, and the rule of law.[13] However important these values may be, their universality likely diminishes voters' understanding of the stakes of judicial elections, lending the false impression that nothing much distinguishes Democratic and Republican judicial candidates.[14]

(*Holmes I*), 383 N.C. 171, 208 n.2, 222 n.4, 881 S.E.2d 486, 512 n.2, 520 n.4 (2022) (Berger, J., dissenting) (citing Brian Murphy, *'Ramifications Are Substantial.' How Republicans Gained a Lasting Grip on the NC Supreme Court*, WRAL NEWS, https://www.wral.com/ramifications-are-substantial-how-republicans-gained-a-lasting-grip-on-the-nc-supreme-court/20570554 [https://perma.cc/ZG86-QZBJ] (last updated Nov. 15, 2022, 10:29 AM)), *withdrawn and superseded on rehearing by Holmes II*, 384 N.C. 426, 886 S.E.2d 120 (2023).

10. Martha Quillin, *'It's Time for Another Fight.' Barber and Moral Monday Protestors Return to NC Capitol*, NEWS & OBSERVER, https://www.newsobserver.com/news/politics-government/article274652586.html [https://perma.cc/N43T-CMA8 (dark archive)] (last updated Apr. 25, 2023, 11:56 AM).

11. *See, e.g.*, Zach Montellaro, Josh Gerstein & Ally Mutnick, *North Carolina Supreme Court Clears Way for Partisan Gerrymandering*, POLITICO, https://www.politico.com/news/2023/04/28/north-carolina-supreme-court-clears-way-for-partisan-gerrymandering-00094433 [https://perma.cc/ARD2-TQSU] (last updated Apr. 28, 2023, 3:10 PM).

12. NCGOP (@NCGOP), TWITTER (Sept. 23, 2020, 10:01 AM), https://twitter.com/NCGOP/status/1308768385111646209 [https://perma.cc/8HVH-BDZJ].

13. *See, e.g.*, Justice Sam J. Ervin, IV, *My Judicial Philosophy*, ERVIN FOR JUST. CAMPAIGN, https://web.archive.org/web/20221104215922/https://www.ervinforjustice.org/page3.html [https://perma.cc/8UZJ-NRBP (staff-uploaded archive)] ("I decided to run for re-election because I believe that you deserve a Supreme Court where every case is decided based solely on the law and the facts; not on a judge's partisan politics or ideological beliefs.").

14. As Professor Jedediah Britton-Purdy has observed, in recent North Carolina judicial elections "ordinary voters seem to have had little way of knowing last fall that they were choosing between two competing theories of democracy and probably deciding the future of majority rule in the state for decades." Jedediah Britton-Purdy, Opinion, *The Courts Should Be More Political, Not Less*, N.Y. TIMES (May 17, 2023), https://www.nytimes.com/2023/05/17/opinion/north-carolina-courts-democracy.html [https://perma.cc/QY5V-LHGL (staff-uploaded, dark archive)]. In that same piece, Professor Britton-Purdy argued that Democratic candidates should foreground their ideological and doctrinal commitments, contending that "[i]f North Carolina's Democratic judicial candidates had (without commenting on any specific case, which judicial ethics forbids) focused their campaigns more aggressively on a commitment to constitutional values such as voting rights and reproductive rights, the balance of the court might be different today." *Id.*

The forecast for progressives in North Carolina is undoubtedly gloomy. Nevertheless, the stakes are too high for defeatism. Progressive lawyers, elected officials, scholars, and law students alike all have a critical role to play in the coming years, even if they will encounter little success litigating cases in state court. And, if optimism is lacking, they can look to the not-so-distant past, when a progressive majority on the Supreme Court of North Carolina took meaningful steps to realize the North Carolina Constitution's foundational promise of democratic equality for all North Carolinians.[15] Building upon this example, progressives should use this time in the political wilderness to define and articulate a forthright, unapologetic vision of the freedoms and protections offered under the North Carolina Constitution. They should refuse to accept conservative jurists' onslaught on the legitimacy of progressive interpretations of state law.[16] Instead, they should construct a progressive "constitution in exile"[17] that provides voters with a clear alternative to the narrow, punitive approach favored by the ascendant conservative regime.

In this Essay, I begin to sketch out a framework for what this progressive state constitutionalism might look like in North Carolina, one that is firmly rooted in the text, structure, and purpose of the North Carolina Constitution. I do this by examining what I understand to be the lodestar of progressive state constitutionalism: the North Carolina Constitution's substantive commitment to foundational democratic equality. First, I examine the origins of the principle of democratic equality in North Carolina's Reconstruction-era constitution, which dramatically transformed North Carolina's basic charter by requiring, for the first time, basic equality among North Carolinians of all races in the state's political processes. In turn, this requirement altered the nature of popular sovereignty by imposing a new definition of the "People" whose political power the legislature exercises. Next, I illustrate how conservative jurists' refusal to give effect to the principle of popular sovereignty, and progressive jurists' efforts to bring this principle into reality, produced wildly disparate outcomes in two recent cases implicating basic questions of how North Carolina's democracy should function. In so doing, I aim to demonstrate how the principles of popular sovereignty and democratic equality are mutually reinforcing, and how respect for both is necessary to realize the radical promise of the Reconstruction constitution and its disestablishment of white supremacy as the law of the land.

15. *See, e.g.*, Harper v. Hall (*Harper I*), 380 N.C. 317, 321, 868 S.E.2d 499, 508–09, *cert. granted sub nom*. Moore v. Harper, 142 S. Ct. 2901 (2022), *overruled in later appeal by Harper III*, 384 N.C. 292, 886 S.E.2d 393 (2023), *and aff'd sub nom.* Moore v. Harper, 143 S. Ct. 2065 (2023); *Holmes I*, 383 N.C. 171, 174 881 S.E.2d 486, 490–91 (2022) *withdrawn and superseded on rehearing by Holmes II*, 384 N.C. 426, 886 S.E.2d 120 (2023); Hoke Cnty. Bd. of Educ. v. State (*Leandro IV*), 382 N.C. 386, 389–90, 879 S.E.2d 193, 197–98 (2022).

16. *See, e.g.*, *Harper III*, 384 N.C. 292, 379–80, 886 S.E.2d 393, 449–50 (2023).

17. *See* William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 165–66 (2001).

I. THE CONSTITUTIONAL TRANSFORMATION OF 1868

The North Carolina Constitution begins with a Declaration of Rights, which predates the U.S. Constitution's Bill of Rights.[18] Its first three provisions articulate the nature of the government the constitution as a whole intends to enact.[19] These provisions declare it "self-evident that all persons are created equal," establish that "[a]ll political power is vested in and derived from the people," and reserve for the people alone "the inherent, sole, and exclusive right of regulating the internal government . . . and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness."[20]

These provisions, as today's Chief Justice, Paul Newby, has explained in his treatise on the North Carolina Constitution, "contain both a general and a specific assertion of democratic theory," namely a "revolutionary faith in popular sovereignty."[21] The principle of popular sovereignty means that there is no source of political power in North Carolina except for the people themselves.[22] In the context of the first North Carolina Constitution, authored and ratified in 1776 amid the tumult of the Revolutionary War, this principle could be understood as both a specific repudiation of the English monarchy and a general assertion of the state legislature's institutional primacy as the only body legitimately imbued with the people's will.[23] As the persistence of the institution of slavery after ratification in 1776 demonstrates, the principle of popular sovereignty does not imply universal political equality in the modern sense—the men who crafted and voted on North Carolina's first constitution did not understand their radical theory to be irreconcilable with the complete exclusion of Black people from the polity.[24] Indeed, the men who crafted and

18. Rachel E. Grossman, *North Carolina's Establishment Clause: History and Interpretation*, 3 N.C. C.R. L. REV. 69, 71, 74 (2023).

19. N.C. CONST. art. I, §§ 1–3.

20. *Id.*

21. *Harper I*, 380 N.C. 317, 370, 868 S.E.2d 499, 538 (quoting JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 48 (2d ed. 2013)), *cert. granted sub nom.* Moore v. Harper, 142 S. Ct. 2901 (2022), *overruled in later appeal by Harper III*, 384 N.C. 292, 886 S.E.2d 393 (2023), *and aff'd sub nom.* Moore v. Harper, 143 S. Ct. 2065 (2023).

22. *Id.* ("Under popular sovereignty, the democratic theory of our Declaration of Rights, the 'political power' of the people . . . is channeled through the proper functioning of the democratic processes of our constitutional system to the people's representatives in government." (quoting N.C. CONST. art. I, § 2)).

23. *See, e.g.*, Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 669 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)) (summarizing contemporaneous debates about the meaning of popular sovereignty and noting that "[m]ost English thinkers were careful to locate popular sovereignty in Parliament").

24. Indeed, the framers of the 1776 constitution—which purported to define for all the people of North Carolina their rights and the structure of the government they were subject to—instantiated the

voted on North Carolina's first constitution were the ones who defined for all North Carolinians who the "People of North Carolina" were, at least in the constitutional sense.[25] The 1776 constitution's commitment to popular sovereignty enacts a particular theory of power and institutional arrangement for implementing it, but it does not itself provide grounds for challenging the exclusion of certain classes of citizens from the "People of North Carolina" from whom the legislature's authority derives.

Indeed, because the 1776 constitution enacted "the doctrine of white supremacy" as "the law of North Carolina either in form or in substance," the principle of popular sovereignty could operate without a concomitant concern for defining the "people" whose power the legislature exercised.[26] It was only with the enactment of the 1868 constitution that "[t]he promises of justice, democracy, and equality for African-Americans . . . bec[a]me a reality," at least under law.[27] This transformation extended well beyond the adoption of formal political equality and represented a wholesale transformation in North Carolina's constitutional order. The 1776 constitution was, as Judge Robert N. Hunter Jr. has written, "a document that restrained government power over its citizens."[28] In this light, the principle of popular sovereignty can be understood as a safeguard against monarchical overreach, as a way of preemptively delegitimizing any assertion of governmental authority besides that which the people expressly authorized through their chosen institutions. By contrast, the 1868 constitution "required affirmative governmental power to enhance equality."[29] As Judge Hunter explains,

> While the Constitution of 1776 reflected the electorate's desire to restrain government power, the Constitution of 1868 reflected the electorate's desire to ensure equality by placing in the Constitution social

principle of racial exclusion they wrote into North Carolina's founding charter: all the framers were property-owning white men. *See* John V. Orth, *"Fundamental Principles" in North Carolina Constitutional History*, 69 N.C. L. REV. 1357, 1360–61 (1991) ("Despite the radical claim of 'all power in the people,' effective political power was confined in 1776 to certain 'freeman of the age of twenty-one years': to vote for members of the senate, one had to possess a freehold of fifty acres; to vote for members of the house of commons, one had to at least be a taxpayer. To be eligible for legislative service there were higher property qualifications: membership in the senate was restricted to men with 'not less than three hundred acres of land in fee,' while each member of the house of commons had to hold 'not less than one hundred acres of land in fee, or for the term of his own life.' The governor had to be a man of still more substantial property, possessed of 'a freehold in lands and tenements, above the value of one thousand pounds.'" (quoting N.C. CONST. of 1776 §§ 7, 8, 5, 6, 15)).

25. Robert N. Hunter, Jr., *The Past as Prologue: Albion Tourgée and the North Carolina Constitution*, 5 ELON L. REV. 89, 94–95 (2013) (describing the rights enumerated in the North Carolina Constitution, such as the right to vote, which applied only to "freemen").

26. *See* Irving Joyner, *North Carolina's Racial Politics: Dred Scott Rules from the Grave*, 12 DUKE J. CONST. L. & PUB. POL'Y, no. 3, 2017, at 141, 204.

27. *Id.* at 204–05.

28. Hunter, *supra* note 25, at 92.

29. *Id.*

> policies designed to promote not only equal protection of the laws, but also social equality . . . . Within the social structure of 1868, these changes greatly expanded the citizenship and constitutional guarantees of both the 1776 Constitution and the 1868 Constitution . . . . [These changes] provid[ed] the public with the tools to become a social democracy.[30]

Thus, the principle of democratic equality was introduced as both a prerequisite for the government to legitimately exercise political power and as an aspiration that the government was obligated to use its power to realize.

Following the 1868 constitutional transformation, then, the principle of popular sovereignty must function alongside the principle of democratic equality, the essential predicate for North Carolina's readmission into the Union. The people who reign sovereign in North Carolina today must be *all* its citizens, not just those to whom the framers of 1776 saw fit to extend the privilege of inclusion in North Carolina's political community. As a consequence, the legitimacy of any governmental act is predicated on *two* threshold questions, not one: First, to respect the principle of popular sovereignty, courts ask whether the entity that acted was authorized to undertake the action being challenged, consistent with how the people of North Carolina allocated their sovereign political people in their constitution. Second, to respect the principle of democratic equality, courts ask whether the entity that has exercised the people's political power was constituted by a process that allowed for the participation of all North Carolina's citizens on equal terms, consistent with the (post-1868) state constitution's foundational commitment to fundamental political equality.

Democratic equality guarantees every citizen the right to participate in the collective act of self-governance on terms equal to those of any other citizen.[31] Democratic equality does not mean that every citizen's exercise of their political power must be successful, nor that every citizen (or candidate) is entitled to the support of their fellow citizens for their personal political preferences.[32] Instead, it requires that every citizen be afforded the same opportunity to participate in the processes and institutions that structure how the people of North Carolina imbue their government with the authority to exercise political power on their

30. *Id.* at 97–98, 102.

31. *See, e.g.*, Robert Post, Commentary, *Democracy and Equality*, 1 LAW, CULTURE & HUMANS. 142, 147 (2005) ("Democracy requires that persons be treated equally insofar as they are autonomous participants in the process of self-government.").

32. *Cf. id.* at 148 ("The purpose of communication within public discourse, by contrast, is not to make decisions, but to empower citizens to contribute to public opinion in ways that will permit them to believe that public opinion will be potentially responsive to their views.").

behalf.[33] No citizen's political power may be diminished or aggrandized in relation to any other citizen on the basis of who they are or what they believe.[34]

II. THE PRINCIPLE OF DEMOCRATIC EQUALITY BEFORE THE MODERN COURT

A limited conceptualization of popular sovereignty—which sees the legislature as the rightful vessel for the people's will, no matter its makeup—supplies the intellectual foundation for recent opinions authored by the Supreme Court of North Carolina's conservative jurists rejecting challenges to actions undertaken by the North Carolina legislature on purported democratic grounds. A broader concept—which recognizes how the principle of popular sovereignty must be operationalized alongside the principle of democratic equality[35]—underpins recent opinions authored by liberal jurists asserting that the mere fact of legislative enactment does not conclusively answer the question of an act's constitutionality. These divergent perspectives were on full display in two recent, high-profile disputes. In *Harper v. Hall*,[36] the plaintiffs asserted that extreme partisan gerrymandering was irreconcilable with the principle of popular sovereignty because it undermined the legislature's claim to representing the people's will, in that partisan gerrymandering gives rise to a legislature that, by design, does not fairly reflect what the people voted for, voting being the mechanism by which an amorphous "will" is translated into legislatures and legislation.[37] In *NAACP v. Moore*,[38] the plaintiffs asserted that the enactment of two constitutional amendments was inconsistent with the principle of popular sovereignty because the legislature that initiated the amendment process was itself unconstitutionally racially gerrymandered, such

33. *Id.* (proposing democratic equality "signifies that each citizen is to be regarded as formally equal to every other in the influence that their agency can contribute to public decisions"); N.C. CONST. art. I, §§ 2–3 (saying "[a]ll political power is vested in and derived from the people" and "people of this State have the inherent, sole, and exclusive right of regulating the internal government").

34. *See* Post, *supra* note 31, at 147 ("To the extent that the state treats citizens unequally in a relevant manner, say by allowing some citizens greater freedom of participation in public discourse than others, the state becomes heteronomous with respect to those citizens who are treated unequally.").

35. *See, e.g.*, *Harper I*, 380 N.C. 317, 370–371, 868 S.E.2d 499, 538–39 ("The principle of equality and the principle of popular sovereignty are the two most fundamental principles of our Declaration of Rights . . . . While these are two separate fundamental principles under our present constitutional system, one cannot exist without the other. Equality, being logically as well as chronologically prior, is essential to popular sovereignty."), *cert. granted sub nom.* Moore v. Harper, 142 S. Ct. 2901 (2022), *overruled in later appeal by Harper III*, 384 N.C. 292, 886 S.E.2d 393 (2023), *and aff'd sub nom.* Moore v. Harper, 143 S. Ct. 2065 (2023).

36. 384 N.C. 292, 886 S.E.2d 393 (2023).

37. *See* Opening Brief of *Harper* Plaintiffs-Appellants at 16, *Harper III*, 384 N.C. 292, 886 S.E.2d 393 (No. 413PA21), 2022 WL 2717548.

38. 382 N.C. 129, 876 S.E.2d 513 (2022).

that it lacked any legitimate claim to exercise the people's exclusive authority to amend the constitution.[39]

In both of these cases, the conservative response was, essentially, that claims challenging the acts were paradoxical and internally contradictory: laws duly enacted by the legislature were, in their view, *necessarily* consistent with the principle of popular sovereignty because the principle of popular sovereignty assigns the power to exercise the people's will exclusively to the legislature.[40] What matters, from the vantage point of the framers in 1776 and the conservative court in 2023, is that the laws enacted by the institution which is imbued with "the People['s]" will are respected, not how "the People" are defined.[41] As described above, this position is not entirely divorced from constitutional principles.[42] But conservative jurists' fetishization of the legislature—their insistence that constitutional questions regarding an act's validity are answered merely by pointing to the fact that it was the legislature that enacted it—is ahistorical and profoundly myopic.[43] It ignores the way in which a foundational premise of the 1776 constitution—the idea that the "people" whose power the legislature was authorized to exercise could be defined to exclude entire categories of citizens[44]—was comprehensively repudiated by the constitutional transformation of 1868, when North Carolina, like all states that seceded during the Civil War, was required to enact a new constitution recognizing the fundamental political equality of Black and white North Carolinians.[45]

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39. *See* Plaintiff-Appellee Brief at 13–14, NAACP v. Moore, 382 N.C. 129, 876 S.E.2d 513 (2022) (No. 19-384), 2019 WL 3384003 at *13–14.

40. *See Harper III*, 384 N.C. at 326, 886 S.E.2d at 416; *Moore*, 382 N.C. at 170, 876 S.E.2d at 542 (Berger, J., dissenting).

41. N.C. CONST. art. I, §§ 1–3; *see, e.g.*, *Harper III*, 384 N.C. at 350, 886 S.E.2d at 431.

42. *See supra* Part I.

43. Given the composition of the legislature, it is also, arguably, contingent and self-serving: it is difficult to imagine this Republican-dominated court adhering so faithfully to the idea of popular sovereignty if Democrats retained super-majority control of the institution. For example, Chief Justice Newby has oscillated on his view of what the North Carolina Constitution has to say about elections in two high-profile cases. In the first, in a concurrence to an opinion ruling in favor of a Republican political candidate, Chief Justice Newby emphasized that "[a] system of *fair elections* is foundational to self-government." Comm. To Elect Dan Forest v. Emps. Pol. Action Comm., 376 N.C. 558, 610, 853 S.E.2d 698, 734 (2021) (Newby, C.J., concurring) (emphasis added). Just one year later, in oral arguments in *Harper I*, the Chief stated during questioning of the plaintiffs' attorney that the North Carolina Constitution "ha[s] 'free.' We don't have 'fair.' [Other states] have 'free and fair,' correct?" Dallas Woodhouse, Opinion, *Stunning Lack of Good Faith in Bob Orr's Lawsuit*, CAROLINA J. (Feb. 2, 2024), https://www.carolinajournal.com/opinion/stunning-lack-of-good-faith-in-bob-orrs-lawsuit/ [https://perma.cc/U6BX-C6XE].

44. *See supra* notes 25–27 and accompanying text.

45. *See supra* notes 27–30 and accompanying text.

A. Harper v. Hall

The setup to *Harper v. Hall* likely came as no surprise to anyone who has followed North Carolina politics in recent years. After almost a decade of wrangling, the federal courts slammed the door shut on North Carolina Republicans' persistent efforts to secure a durable majority through unconstitutional racial gerrymandering.[46] So, Republicans changed course, reframing their strategy in more explicit terms: as the Chair of the House redistricting committee memorably explained, "I acknowledge freely that this would be a political gerrymander, which is not against the law. . . . I think electing Republicans is better than electing Democrats. So, I drew this map to help foster what I think is better for the country."[47] A three-judge federal court panel held the map to be an unconstitutional partisan gerrymander[48] but was ultimately overruled when the U.S. Supreme Court declared partisan gerrymandering nonjusticiable under the Federal Constitution in *Rucho v. Common Cause*.[49] Then, in a subsequent state court proceeding, a three-judge superior court panel concluded that extreme partisan gerrymandering "unconstitutionally deprive[d] every citizen of the right to elections for members of the General Assembly conducted freely and honestly to ascertain, fairly and truthfully, the will of the People."[50] Fearing that a Democratic-controlled supreme court would affirm the ruling—and, perhaps, expecting that the 2020 elections would deliver a favorable change in the composition of that court—the Republican legislative defendants decided to forego an appeal.[51]

By constitutional mandate, the North Carolina legislature was required to undertake another round of redistricting after the 2020 census.[52] The 2020 elections failed to deliver Republicans control of the Supreme Court of North

46. Covington v. North Carolina, 316 F.R.D. 117, 178 (M.D.N.C. 2016), *aff'd*, 581 U.S. 1015 (2017).

47. David A. Graham, *North Carolina's Landmark Ruling Against Partisan Gerrymanders*, ATLANTIC (Jan. 9, 2018), https://www.theatlantic.com/politics/archive/2018/01/north-carolina-partisan-gerrymander/550139/ [https://perma.cc/UH64-4QZY (staff-uploaded, dark archive)].

48. Common Cause v. Rucho, 318 F. Supp. 3d 777, 801 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019).

49. Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019).

50. Common Cause v. Lewis, No. 18 CVS 014001, 2019 WL 4569584, at *3 (N.C. Super. Ct. Sept. 03, 2019).

51. *See* Michael Wines & Richard Fausset, *North Carolina's Legislative Maps Are Thrown Out by State Court Panel*, N.Y. TIMES (Sept. 3, 2019), https://www.nytimes.com/2019/09/03/us/north-carolina-gerrymander-unconstitutional.html [https://perma.cc/BFL4-7Y6Y (staff-uploaded, dark archive)] ("The Republican leader of the State Senate, Phil Berger, cast the decision as part of a national Democratic strategy to overturn Republican rule via the courts, but said the Legislature would not appeal the ruling. The North Carolina Supreme Court, which would hear any appeal, has six Democratic justices and one Republican.").

52. N.C. CONST. art. II, §§ 3, 5.

Carolina.[53] Nevertheless, Republican legislators proceeded to draw districts that, notwithstanding North Carolina's evenly divided and highly competitive partisan makeup, would almost certainly have entrenched Republican control of the state House and Senate—and a significant majority of the state's congressional delegation—through the subsequent decade.[54] Multiple nonprofit organizations and groups of voters sued, alleging that the maps were unlawful partisan gerrymanders under various provisions of the North Carolina Constitution.[55] A three-judge trial court panel agreed with the plaintiffs that "each of the three enacted maps were 'extreme partisan outliers' and the product of 'intentional, pro-Republican partisan redistricting.'"[56] But the panel, following the U.S. Supreme Court's lead in *Rucho*, concluded that partisan gerrymandering claims were similarly nonjusticiable under the North Carolina Constitution, declaring that "[t]he constitutional provisions relevant to the issue before [it] establish that redistricting is in the exclusive province of the legislature."[57]

On appeal, the legislative defendants did not meaningfully challenge the trial court's factual findings that the maps intentionally implemented a durable skew towards Republican candidates not otherwise explainable by reference to traditional districting criteria.[58] Accordingly, the Supreme Court of North Carolina was left with two purely legal questions to resolve: "[W]hether plaintiffs' claims are justiciable under the North Carolina Constitution and, if so, whether Legislative Defendants' enacted plans for congressional and state legislative districts violate the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of our constitution."[59] A four-justice majority composed of the court's Democratic jurists answered both questions in the affirmative, "conclud[ing] that partisan gerrymandering claims are justiciable under the North Carolina Constitution and that Legislative

53. *See* Danielle Battaglia & Charlie Innis, *Paul Newby Wins NC Chief Justice Race as Incumbent Cheri Beasley Concedes*, NEWS & OBSERVER, https://www.newsobserver.com/news/politics-government/election/article247781960.html [https://perma.cc/YSL9-MJBV (dark archive)] (last updated Dec. 13, 2022, 2:06 PM).

54. *See* Reid J. Epstein & Nick Corasaniti, *Republicans Gain Heavy House Edge in 2022 as Gerrymandered Maps Emerge*, N.Y. TIMES, https://www.nytimes.com/2021/11/15/us/politics/republicans-2022-redistricting-maps.html [https://perma.cc/K8DG-QC6N (staff-uploaded, dark archive)] (last updated Nov. 17, 2021).

55. N.C. League of Conservation Voters, Inc. v. Hall, No. 21 CVS 015426, 2022 WL 124616, at *1 (N.C. Super. Ct. Jan. 11, 2022).

56. *Harper I*, 380 N.C. 317, 332, 868 S.E.2d 499, 515, *cert. granted sub nom*. Moore v. Harper, 142 S. Ct. 2901 (2022), *overruled in later appeal by Harper III*, 384 N.C. 292, 886 S.E.2d 393 (2023), *and aff'd sub nom.* Moore v. Harper, 143 S. Ct. 2065 (2023).

57. *Id.* at 349, 868 S.E.2d at 525.

58. Legislative Defendants-Appellees' Brief at 3 & n.1, *Harper I*, 380 N.C. 317, 868 S.E.2d 499 (No. 413PA21), 2022 WL 3109615 at *3 & n.1.

59. *Harper I*, 380 N.C. at 353, 868 S.E.2d at 527–28.

Defendants' enacted plans violate each of these provisions of the North Carolina Constitution beyond a reasonable doubt."[60]

The *Harper I* majority acknowledged North Carolina's constitutional commitment of "all 'political power' under the Declaration of Rights in 'the people,'" who, in their constitution, retained for themselves "the inherent, sole, and exclusive right of regulating the internal government and police thereof."[61] But, the majority explained, for any putative exercise of "the people's" political power to be legitimate, the body exercising that power must have been composed in accordance with "the proper functioning of the democratic processes of our constitutional system to the people's representatives in government."[62] Put more concretely, while the North Carolina Constitution makes the legislature the sole entity authorized to exercise the people's political power, the North Carolina Constitution also establishes the processes by which the people's political power is transmuted to the legislature, that is, elections.

Popular sovereignty may require deference to legislative enactments, given that the legislature is the constitutionally assigned repository of the people's political power, but democratic equality requires careful attention to the way the legislature is constituted. "The people" from whom the legislature's power to act derives are not only the citizens the framers of the 1776 constitution envisioned. Rather, for the legislature to legitimately claim the people's mantle, that legislature must have been elected through a process conducted in accordance with the fundamental principle that all the citizens of North Carolina are equal members of the state's political community. As Justice Hudson explained in *Harper I*:

> The principle of equality and the principle of popular sovereignty are the two most fundamental principles of our Declaration of Rights. N.C. Const. art. I, §§ 1–2. The principle of equality, adopted into our Declaration of Rights from the Declaration of Independence and the Gettysburg Address, provides that "all persons are created equal." N.C. Const. art. I, § 1. Meanwhile, under the principle of popular sovereignty, the "political power" of the people is channeled through the proper functioning of the democratic processes of our constitutional system to the people's representatives in government. N.C. Const. art. I, § 2. While these are two separate fundamental principles under our present constitutional system, one cannot exist without the other. Equality, being logically as well as chronologically prior, is essential to popular sovereignty. *See* Abraham Lincoln, "On Slavery and Democracy," *I Speeches and Writings*, 484 (1989) ("As I would not be a *slave*, so I would not be a *master*. This expresses my idea of democracy. Whatever differs

60. *Id.* at 353, 868 S.E.2d at 528.
61. *Id.* at 370, 868 S.E.2d at 538 (quoting N.C. CONST. art. 1, §§ 2–3).
62. *Id.* at 370–71, 868 S.E.2d at 538–39.

> from this, to the extent of the difference, is no democracy."); "Address at Gettysburg, Pennsylvania," *II Speeches and Writings* at 536 (connecting "the proposition that all men are created equal" to "government of the people, by the people, for the people"). Consequently, sections 1 and 2 of our Declaration of Rights, when read together, declare a commitment to a fundamental principle of democratic and political equality. The principle of political equality, from the Halifax Resolves and the Declaration of Independence to Lincoln's Gettysburg Address and the Reconstruction Convention to our Declaration of Rights today, can mean only one thing—to be effective, the channeling of "political power" from the people to their representatives in government through the democratic processes envisioned by our constitutional system must be done on equal terms. If through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to "derive[ ]" its power from the people or to be "founded upon their will only," and the principle of political equality that is fundamental to our Declaration of Rights and our democratic constitutional system is violated. N.C. Const. art. I, §§ 1, 2; *see Bayard*, 1 N.C. (Mart.) at 7 (recognizing this principle in holding that judicial review is needed to prevent legislators from permanently insulating themselves from popular will); *see also* John Hart Ely, *Democracy and Distrust* 103 (1980) ("In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust, when [ ] the ins are choking of the channels of political change to ensure that they will stay in and the outs will stay out.").[63]

Under the post-Reconstruction constitution, the principles of popular sovereignty and democratic equality are mutually reinforcing—respect for the principle of democratic equality in the political process ensures that the legislature is ultimately representative of (and accountable to) all the people whose power it deigns to exercise.

Thus, in *Harper I*, the way these two principles operate in conjunction led the majority to conclude that partisan gerrymandering claims were both judicially cognizable and violative of the North Carolina Constitution. The legislative defendants had argued that, under North Carolina law, partisan gerrymandering was a nonjusticiable political question because "there is a textually demonstrable constitutional commitment of the issue [of redistricting] to the sole discretion of a coordinate political department."[64] The majority rejected this premise as "flatly inconsistent with our precedent interpreting and applying constitutional limitations on the General Assembly's redistricting

63. *Id.* (alterations in original).
64. *Id.* at 362, 868 S.E.2d at 533 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

authority."[65] Although Article II, Sections 3 and 5 "vest[] the responsibility for apportionment of legislative districts in the General Assembly,"[66] North Carolina courts routinely "interpreted and applied both the expressly enumerated limitations contained in [Article II], and the limitations contained in other constitutional provisions such as the equal protection clause."[67] The legislature was tasked with redistricting but was required to carry out its responsibility consistent with the rights and restrictions contained elsewhere in the North Carolina Constitution. The legislative defendants' justiciability argument would write the principle of democratic equality out of the constitution by depriving courts of their authority to scrutinize the manner in which a legislative body was composed. That argument would "strike[] at the foundation stone of our state's constitutional caselaw—Bayard v. Singleton, 1 N.C. 5 (1787)," in which the court for the first time "asserted the power and duty of judicial review of legislative enactments for compliance with the North Carolina Constitution, and to strike down laws in conflict therewith."[68]

On the merits, the majority—although analyzing the challenged gerrymander under four distinct provisions of the state constitution—maintained its overriding focus on the need to ensure basic equality in the processes that imbue the legislature with the authority to exercise "the people's" power. As the majority explained, "While plaintiffs do not contend the enacted plans constitute partisan gerrymanders in violation of article I, sections 1 and 2, the fundamental principle of political equality underpinning those sections guides our interpretation of other provisions of the Declaration of Rights."[69] The majority expressly recognized that the meaning of these constitutional provisions necessarily changed with Reconstruction's newfound commitment to political equality.[70] And, in turn, the constitutional demand for political equality informed the majority's substantive interpretation of each of these provisions.[71]

65. *Id.*

66. *Id.*

67. *Id.* at 362, 868 S.E.2d at 533 (citing Stephenson v. Bartlett, 355 N.C. 354, 370–71, 378–81, 562 S.E.2d 377 (2002) ("determining whether the General Assembly's use of its article II power to apportion legislative districts complied with [federal law in accordance with Article I, Sections 3 and 5] of our constitution, and our state's equal protection clause in article I, section 19"); Blankenship v. Bartlett, 363 N.C. 518, 525–26, 681 S.E.2d 759, 765 (2009) ("holding that [the] General Assembly's exercise of its power under article IV, section 9 to establish the election of superior court judges in judicial districts must comport with our state's equal protection clause in article I, section 19")).

68. *Id.* at 365, 868 S.E.2d at 535.

69. *Id.* at 372, 868 S.E.2d at 539.

70. *Id.* at 376, 868 S.E.2d at 542 ("[T]hough those in power during the early history of our state may have viewed the free elections clause as a mere 'admonition' to adhere to the principle of popular sovereignty through elections, a modern view acknowledges this is a constitutional requirement.").

71. *Id.* at 379, 868 S.E.2d at 544 ("Our reading of the equal protection clause is most consistent with the fundamental principles in our Declaration of Rights of equality and popular sovereignty—together, political equality.").

As the majority explained in its section addressing the plaintiffs' equal protection claim:

> Our reading of the equal protection clause is most consistent with the fundamental principles in our Declaration of Rights of equality and popular sovereignty—together, political equality. *See* N.C. Const. art. I, §§ 1, 2. Popular sovereignty requires that for a government to be "of right" it must be "founded upon [the people's] will only." . . . Otherwise, the "will" on which the government "is founded" is not that of the people of this state but that of the ruling party.[72]

Extreme partisan gerrymandering was inconsistent with these fundamental constitutional principles because where "through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to 'derive[ ]' its power from the people or to be 'founded upon their will only.'"[73]

When these questions came back to the now conservative-dominated court in 2023, the new majority's answers were radically different. Whereas the liberal majority had focused on the interplay between popular sovereignty and democratic equality, the conservative majority emphasized the former, explaining that "our long-standing standard of review . . . presumes that acts of the General Assembly are constitutional. . . . If a court engages in policy questions that are better suited for the legislative branch, that court usurps the role of the legislature by deferring to its own preferences instead of the discretion of the people's chosen representatives."[74] Thus, in the absence of an express provision of the state or federal constitution limiting the legislature's authority or specifying how that authority must be exercised, the only check on the legislature's exercise of the people's political power is the people themselves in elections.[75] In essence, the conservative majority resurrected the pre-Reconstruction understanding of popular sovereignty—because the legislature represents the people's will, acts of the legislature are legitimate. Indeed, the only time the conservative majority used the word "equality" was when quoting the previous decision it was now repudiating.[76]

B. NAACP v. Moore

A similar dynamic played out in *NAACP v. Moore* which, like *Harper v. Hall*, emerged out of a bitter redistricting fight.[77] But while the litigants in

72. *Id.* at 379, 868 S.E.2d at 544 (citing N.C. Const. art. I, §§ 1–2).

73. *Id.* at 382, 868 S.E.2d at 546.

74. *See Harper III*, 384 N.C. 292, 349–50, 886 S.E.2d 393, 431 (2023) (citing State v. Berger, 363 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)).

75. *Id.* at 322–23, 886 S.E.2d at 414.

76. *Id.* at 306, 886 S.E.2d at 404.

77. NAACP v. Moore, 382 N.C. 129, 132, 876 S.E.2d 513, 518–19 (2022).

Harper were grappling over who would wield political power in North Carolina for the upcoming decade, *NAACP v. Moore* centered on the consequences of Republicans' largely successful efforts to forestall final judgment on their gerrymandering efforts in the previous decade.[78] As in many circumstances, given the protracted nature of redistricting litigation, the officials who were elected pursuant to the unconstitutionally racially gerrymandered districts served as legislators while challenges to their districts were adjudicated.[79] By necessity, these legislators exercised lawmaking functions: if it were otherwise, legislatures would be paralyzed anytime anyone filed a colorable challenge to a redistricting plan.[80] What made the circumstances of *NAACP v. Moore* so unique, then, was how legislators from challenged districts exercised legislative authority, and when. The plaintiffs in *NAACP v. Moore* raised a straightforward question with potentially dramatic consequences: Does a legislature possess the authority to exercise all powers constitutionally assigned to it if that legislature was elected pursuant to racially gerrymandered districts, even if that permits the legislature to insulate itself from democratic accountability?[81]

In *NAACP v. Moore*, the plaintiffs challenged the legislature's choice to initiate the process of changing North Carolina's fundamental law by passing a bill placing multiple proposed constitutional amendments on the ballot for an up or down referendum by the voters.[82] These proposed amendments included a voter identification requirement and a cap on property tax assessments.[83] And, controversially, the legislature voted to put these proposed amendments on the ballot *after* federal courts had, on numerous occasions, held that the legislature was unconstitutionally racially gerrymandered, and they did so in the very last legislative session *before* elections would take place using presumptively constitutional remedial maps.[84] This choice—for "a legislative body composed of a substantial number of legislators elected from unconstitutional districts . . . to exercise powers relating to the passage of constitutional amendments after it had been conclusively established that numerous districts were unconstitutional"—was what made *NAACP v. Moore* unprecedented, and what made it into a matter of constitutional concern.[85]

78. *Id.* at 131–34, 876 S.E.2d at 518–20.

79. *Id.* at 134–39, 876 S.E.2d at 520–24.

80. *See id.* at 160–61, 876 S.E.2d at 536.

81. *Id.* at 131, 876 S.E.2d at 518.

82. Second Amended Complaint for Declaratory and Injunctive Relief at 1–2, NAACP v. Moore, No. 18 CVS 9806, 2019 WL 2331258 (N.C. Super. Ct. Feb. 22, 2019).

83. *Id.* at 24, 25.

84. *See* Alan Greenblatt, *Why a Judge Ruled That the Entire North Carolina Legislature Is Illegitimate*, GOVERNING (Feb. 27, 2019), https://www.governing.com/archive/gov-north-carolina-supreme-court-gerrymander.html [https://perma.cc/84EM-M33W].

85. *Moore*, 382 N.C. at 132, 876 S.E.2d at 519.

As a doctrinal matter, *NAACP v. Moore* did not explicitly turn on the court's resolution of a state constitutional question. Instead, the precise question was whether the legislature's actions should be ratified under the de facto officer doctrine, which posits that the actions of an individual who is exercising the powers of a political office—but whose claim to that office is somehow legally deficient—should be treated as legitimate, at least until it is public knowledge that the individual's title to the office is lacking.[86] This is a prudential, common law doctrine: it attempts to strike a balance between the need to assure the integrity of the selection processes that endow political officeholders with their legal authority and the need to protect the interests of third parties who, reasonably, assume that the individuals who exercise the powers of a political office possess the authority to do so.[87]

Nevertheless, as the majority explained, the plaintiffs' claims "directly implicat[ed] two fundamental principles upon which North Carolina's constitutional system of government is predicated: the principles of popular sovereignty and democratic self-rule."[88] As the majority framed it:

> The issue is whether legislators elected from unconstitutionally racially gerrymandered districts possess unreviewable authority to initiate the process of changing the North Carolina Constitution, including in ways that would allow those same legislators to entrench their own power, insulate themselves from political accountability, or discriminate against the same racial group who were excluded from the democratic process by the unconstitutionally racially gerrymandered districts.[89]

Put another way, judicial review was necessary to guard against the risk that a legislature constituted through a political process that *deviated* from the principle of political equality would permanently alter those political processes to *entrench* political inequality. Or, in concrete terms, the risk that a legislature constituted through elections that impermissibly devalued the political strength of Black North Carolinians would amend the constitution to perpetuate that inequality. This would essentially recreate the kind of wholesale racial exclusion from North Carolina's political community that the Reconstruction constitution was designed to remedy.

Allowing this kind of entrenchment to go unchecked would, in turn, undermine the principle of popular sovereignty. As the majority explained, echoing *Harper I*, in North Carolina "there is no legislative power independent of the people. Instead, the constitution defines and structures political processes that allow individuals to assume offices to which the people of North Carolina

86. *Id.* at 145, 876 S.E.2d at 526.
87. *Id.* at 159, 876 S.E.2d at 535.
88. *Id.* at 131, 876 S.E.2d at 518.
89. *Id.*

have delegated sovereign power."[90] Individuals who did not attain elected office in a manner consistent with constitutional requirements—legislators who were elected pursuant to unconstitutionally racially gerrymandered districts—thus lacked a legitimate claim to exercise the people's political power. Moreover, in acting to initiate the process of amending the North Carolina Constitution, these officials were claiming for themselves a power that the people, through the constitution, had expressly reserved for themselves.[91]

Accordingly, while rejecting the plaintiffs' theory that legislators elected pursuant to unconstitutional districts were "usurpers" who had no authority to exercise *any* lawmaking power, the majority held that an unconstitutionally constituted legislature did not have *carte blanche* authority to initiate the process of amending North Carolina's constitution. Under a narrow set of circumstances where "the votes of legislators elected due to an unconstitutional gerrymander could have been decisive in enacting a bill proposing a constitutional amendment,"[92] courts would play a limited role in ensuring that the amendment would not undermine the principles of popular sovereignty and democratic equality. Specifically, courts would assess whether the challenged amendment would "(1) immunize legislators from democratic accountability; (2) perpetuate the ongoing exclusion of a category of voters from the political process; or (3) intentionally discriminate against a particular category of citizens who were also discriminated against in the political process leading to the legislators' election."[93] If so, the principles of popular sovereignty and democratic equality—what the majority called "the beating heart of North Carolina's system of government"—would no longer function.[94]

As in *Harper III*, the conservative justices vehemently disagreed. In a caustic dissent, Justice Berger accused the majority of itself undermining the principle of popular sovereignty by assuming for the court the people's exclusive power to amend the constitution, asking rhetorically whether the majority's "seizure of popular sovereignty . . . violate[d] the federal constitution," an apparent reference to the U.S. Constitution's guarantee clause.[95] Again, the conservative justices' reasoning was straightforward:

90. *Id.* at 146–47, 876 S.E.2d at 527.

91. *Id.* at 147, 876 S.E.2d at 527 ("Consistent with the principles of popular sovereignty and democratic self-rule, only the people can change the way sovereign power is allocated and exercised within North Carolina's system of government.").

92. *Id.* at 165, 876 S.E.2d at 539.

93. *Id.*

94. *Id.* at 146, 876 S.E.2d at 527.

95. *Id.* at 169, 876 S.E.2d at 541. Tellingly, Justice Berger would later compare the majority's imposition of limitations on a racially gerrymandered legislature's authority to amend the state constitution to further exclude Black people from the political process to the U.S. Supreme Court's infamous decision depriving Black people of citizenship in *Dred Scott*. *Id.* at 172, 876 S.E.2d at 543 (Berger, J., dissenting).

because "[p]roposing amendments to our state constitution is a power clearly granted to the General Assembly," any effort to review the legitimacy of the legislature's actions in exercising this authority "egregiously violates separation of powers."[96] Again, the conservative justices emphasized a pre-Reconstruction conception of popular sovereignty to the exclusion of any consideration of democratic equality: even though the elections that produced the legislature that enacted the challenged amendments had indisputably violated the principle of democratic equality by unconstitutionally diminishing the political strength of Black North Carolinians, the dissent reasoned that the mere fact that a vote had occurred ensured the democratic legitimacy of the resulting legislature and immunized its actions from judicial review.[97] In this view, the principle of popular sovereignty commanded nothing more—and nothing less—than respect for the legislature's exclusive prerogative to exercise political power, without regard for whether the underlying political process was conducted on terms of democratic equality.

CONCLUSION

North Carolina's Reconstruction constitution redefined the state's political community. No longer could a legislature predicated on the exclusion of Black North Carolinians deign to exercise the People's sovereign authority. Instead, the legislature's legitimacy would depend upon maintaining political processes that were equally open to all North Carolinians, regardless of their race.

The principle of political equality has, throughout North Carolina's post-Reconstruction history, often been neglected. But, in recent years, progressive jurists sought to realize the state constitution's promise of democratic equality by refusing to accede to the exclusion of groups of North Carolinians from the political process. Their efforts—and the history of the Reconstruction constitution from which they drew—offer a roadmap for realizing the Reconstruction constitution's radical promise. And control of North Carolina's courts is only three elections away.[98] A more expansive constitutional vision centered on democracy, equality, and justice for all North Carolinians remains within reach.

96. *Id.* at 183, 876 S.E.2d at 550.

97. *Id.* at 188, 876 S.E.2d at 553 ("Now, despite electing their legislators to office, North Carolinians are no longer able to trust that a legislator, or the legislature as a whole, has the requisite authority to act. And being that the legislature is merely a law-enacting agent of the true sovereign, i.e., the people, it is the authority of the people that is truly at risk.").

98. Lyons, *Worries Abound*, *supra* note 1.