# THE CONSTITUTIONAL HISTORY OF THE NORTH CAROLINA FREE ELECTIONS CLAUSE*

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*[W]ithout a doubt those able heads that settled [the Constitution of Carolina] did not forget that even those representative assemblies might . . . be modelled and influenced in manners of party to oppress and injure the people they acted for.*

Daniel Defoe 1705†

*This Article sets out the legal history of the constitutional right to a free election, and the judiciary's obligation to vindicate it. The right and remedy trace back to the dawn of representative democracy in England. They remain essential to keep the executive and the legislature within the limits of their assigned authority and to preserve the liberties that are the birthright of citizens.*

*Assaults on the integrity of elections have been a cancer in the bloodstream of representative government for as long as history records. The 1776 drafters of the North Carolina Constitution (like those of Pennsylvania, Virginia, and other states) guarded against anyone in authority, including the legislature, from subverting the fundamental democratic power of the right to vote, using the words "elections ought to be free." This phrase has a 750-year pedigree. It originated in the First Statute of Westminster (1275) to foreclose actions that imperil freely elected representation. The Articuli Super Cartas of 1300 provided*



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† DANIEL DEFOE, PARTY-TYRANNY: OR AN OCCASIONAL BILL IN MINIATURE (1705), *reprinted in* 2 THE COLONIAL RECORDS OF NORTH CAROLINA 891, 892 (William L. Saunders ed., 1886) (noting the additional subtitle of Defoe's *Party-Tyranny* is "*As Now Practiced in Carolina*"). "Men of design might have great opportunities from the power and the purse of the people to bypass and awe the election, and having filled their assembly with men of their own principles, all manner of mischiefs may ensue." *Id.*

*for remedy by an independent judicial body. The right was reasserted in the English Declaration of Rights of 1688 after a contest in which religious toleration and representative government were undermined through the strategic alteration of electoral districts. The phrase extinguished the idea that the most powerful political actors, the monarch and Parliament, were vested with a prerogative to effectively disenfranchise segments of the electorate. The right of free election remains the oldest active provision in English constitutional law.*

*This constitutional right carried to British North America. When the architects of the North Carolina Constitution of 1776 entrusted power to the legislature on the precondition that "elections . . . ought to be free," they prohibited the legislature from subverting the power of an individual's vote by any means, including gerrymandering. Since 1776, North Carolina has only strengthened this right. Under the North Carolina Constitution, the legislature has the prerogative to enact elections regulations, but not to contrive them so that the votes of their critics are ineffective. Throughout North Carolina's history, even in the baleful post-reconstruction period, the judiciary has checked the legislature's districting power. But, in 2023, following a change in its composition, the Supreme Court of North Carolina in* Harper v. Hall *(*Harper III*) found for the first time in history that the assignment of districting power to the legislature includes the power to selectively disenfranchise qualified voters. More fundamentally, the court subverted the North Carolina Constitution's founding principle of popular sovereignty, replacing it with legislative supremacy in elections. This decision is incongruous with constitutional text, history, structure, and precedent.*

*This Article is not a specific answer to* Harper III, *but a chronology that traces the right of free elections from its origins in England to the present. In this way, it seeks to not only guide North Carolina back to its original liberties but to serve as a helpful reference to those that share the same English constitutional law origins.*

## INTRODUCTION

The people are the source of all political power in North Carolina.[1] Through periodic elections, they appoint or remove their servants in the legislature, executive, and judiciary. Under the North Carolina Constitution, this right is supreme. The Free Elections Clause of the Declaration of Rights of the North Carolina Constitution guarantees to the people that "[a]ll elections shall be free."[2] Elections cannot be subverted by any means, direct or indirect, including through partisan gerrymandering. If the legislature violates the right of free election, the judiciary is obligated to remedy the wrong.

This constitutional order traces unbroken from the dawn of representative government in England to the current North Carolina Constitution. In 2022, the Supreme Court of North Carolina, in *Harper v. Hall* (*Harper I*)[3] and *Harper v. Hall* (*Harper II*),[4] nullified gerrymandered maps that violated the Free Elections Clause. The remedial maps established by an independent tribunal resulted in a seven-Republican-and-seven-Democrat congressional delegation, reflecting the partisan composition of the state. The law and procedure that led to this representative outcome might have been the blueprint for eliminating gerrymandering in the state. But in 2023, a newly elected majority in *Harper v. Hall* (*Harper III*)[5] overruled *Harper I* and vacated *Harper II*. It licensed the General Assembly to redraw maps for future elections unrestrained by the Free Elections Clause. In the 2024 elections, it enabled the effective disenfranchisement of one million North Carolina voters. *Harper III* disavowed the court's obligation to act as trustee for the people and elevated the partisan interests of the legislature over the people's right to representation.[6]

*Harper III* was wrongly decided. The judgment is inattentive to constitutional text, history, structure, and precedent. However, this Article is

1. N.C. CONST. art. I, § 2.

2. N.C. CONST. art. I, § 10. The term "Free Elections Clause" used herein refers to this section of the North Carolina Constitution or, as the context requires, predecessor forms in the 1776 and 1868 Constitutions. References to "Constitution" are to the constitutions of North Carolina, as the context requires, of 1776, 1868, or 1971.

3. Harper v. Hall (*Harper I*), 380 N.C. 317, 868 S.E.2d 499 (2022).

4. Harper v. Hall (*Harper II*), 383 N.C. 89, 881 S.E.2d 156 (2022).

5. Harper v. Hall (*Harper III*), 384 N.C. 292, 886 S.E.2d 393 (2023).

6. The Founders understood this obligation as an important function of the courts' role in the constitutional order, arguing:

> It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.

THE FEDERALIST No. 78, at 404 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (1787).

not intended to be a particular answer to the majority opinion in *Harper III*. Instead, this Article adheres to a precise chronology of the right of free elections in North Carolina and its antecedents, recalling to the people of North Carolina their ancient birthrights. Their eyes being opened, they may better decide which form of government will best secure their freedoms and realize their hopes for government.

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This Article charts the evolution of the right to free elections and its remedy in law across six constitutional eras.

Section I.A traces the origins of North Carolina's free elections right and its judicial enforcement back to the constitutional order that emerged in England in the 13th century. The king's powers of state were limited by law and by an elected parliament; to safeguard these checks, the First Statute of Westminster of 1275 declared that "elections ought to be free." The Articuli Super Cartas of 1300 provided for its remedy by an independent judicial body. The core ideas of stability through consent of the governed and the sanctity of conscience carry to North Carolina law.

Section I.B then discusses the role of the right to free elections in the authoritarian challenge of the Stuart dynasty and its Tory allies in the 17th century, who used gerrymandering as a primary weapon. They asserted the prerogative to define electoral units to achieve partisan control of parliament over their rival Whigs. But with the intervention of a foreign power in 1688, parliament and representative government ultimately triumphed. The new constitutive document—the Declaration of Rights of 1688—reasserted the individual right to elections free from partisan interference with the phrase "elections . . . ought to be free." Drawing on this experience, the North Carolina Constitution incorporates the same operative phrase that denies the Assembly the power to sculpt unrepresentative electoral districts.

Section I.C closes with an explanation of the importance of free elections in the proprietary and royal periods preceding American independence, an often-overlooked era in North Carolina constitutional history. North Carolina was established as a highly autonomous palatinate with chartered individual liberties, rights to self-government, and judicial review. Challenges to liberty came when local religious or commercial factions captured the Assembly. In the absence of a strong local judiciary, the superintending power of the mother country usually was the only peaceful way to restore representative government in North Carolina. These experiences were recent in the legal memory, particularly the War of Regulation of 1771, where an Assembly-led partisan force violently suppressed yeoman farmers in the Piedmont. Five years later, their truce and the founding principle of independent North Carolina was the

covenant of true representation expressed in the phrase "elections . . . ought to be free" of the North Carolina Constitution of 1776.

Part II discusses how these prerevolutionary experiences translated into the right to free elections in the State of North Carolina after independence. The North Carolina founders fortified the right in the North Carolina Constitution of 1776 by reserving it to the people—in writing and using the ancient words—in the structurally superior Declaration of Rights. In the Form of Government, they entrusted the judiciary with the responsibility to protect those rights from legislative overreach. The Hillsborough Debates of 1788 specifically noted that biased districting was illegitimate and redressable by courts. Courts from *Bayard v. Singleton*[7] through the ultimate partisan failure—the American Civil War—performed their obligation to protect individual liberty.

These rights continued to develop through the nineteenth century. In the aftermath of the American Civil War, the North Carolina Constitution of 1868 established universal male suffrage, made equality an explicit fundamental right, expanded the right of free elections to *all* elections, and strengthened the independence of the judiciary. But in the subversive rage that followed, the Assembly gerrymandered Wilmington, then the largest city in North Carolina, for partisan supremacy. The Supreme Court of North Carolina in *Van Bokkelen v. Canaday*[8] invalidated the act on the fundamental principle that government is founded on the will of the people, and regardless of the purported *intent* of the legislature, any act that has a discriminatory effect on *voting power* is unconstitutional. This landmark case has never been overturned. But with federal power withdrawn, by 1900, partisans had fully circumvented *Van Bokkelen* by amending the constitution to deploy literacy tests as the chief means of disenfranchisement, neutering a now-servient state judiciary. Representative democracy in North Carolina was vexed for six decades.

But in the twentieth century, voting rights in North Carolina were restored by federal power under the federal Equal Protection Clause in *Baker v. Carr*[9] and its progeny. The North Carolina Constitution of 1971 added a State Equal Protection Clause that preserves in amber the spirit of this pro-representation jurisprudence. The Supreme Court of North Carolina invalidated undemocratic districting in *Stephenson v. Bartlett* (*Stephenson I*)[10] based on the state constitution and established the remedy of court-supervised alternative maps, a solution ratified by the Assembly in 2003.

7. 1 N.C. 5, 1 Mart. 48 (1787).
8. 73 N.C. 198 (1875).
9. 369 U.S. 186 (1962).
10. 355 N.C. 354, 562 S.E.2d 377 (2002).

Part III discusses how, after federal power was withdrawn again in 2019 in *Rucho v. Common Cause*,[11] *Harper I* and *Harper II* vindicated the right of free elections embodied in the current state constitution and every ancestor back to 1275. But *Harper III*—perhaps reacting to a sense that the prior court overextended its authority—retrenched. For the first time in North Carolina's history, the right of free election was rendered almost meaningless, as was the judiciary's obligation to protect it. More profoundly, *Harper III*'s erosion of the safeguards of the people and the practically unrestricted prerogative surrendered to the legislature lays the foundation for future trouble in other areas of law. Legislative supremacy appears to have replaced, at least in selected areas, popular sovereignty as the paramount principle.

Such a profound revision is impossible because it is in effect a constitutional amendment without a convention.[12] *Harper III* must be understood for the narrow proposition that the right of free elections is not an affirmative mandate for proportional representation. At the present writing, North Carolina awaits a second coming—unlikely to emerge from the people themselves given the Assembly's power in this new model to insulate themselves from public accountability. Ameliorative federal action may eventually reemerge, but ideally salvation will come from the self-initiated restoration of a more traditional supreme state judiciary minded to defend the ancient rights of the people it serves. The Article closes by offering a path forward that is faithful to the North Carolina Constitution.

The great North Carolina jurists of the past approached constitutional questions with a wide aperture. In the classical tradition, a "constitution" is the aggregate of laws, institutions, customs, and public expectations that order society, not just the text of any particular written legal instrument. The timeframe of precedents extends to Magna Carta of 1215 and the concatenation of the common law, with 1776 understood as a civil war, a constitutional reformation, and a continuation. The geographic scope includes all three kingdoms of the British archipelago as well as the British Atlantic world (North America and Caribbean). Commerce and religion are interwoven with law. The supreme objects of law are the sanctity of the individual and the common welfare, especially in North Carolina's diverse, egalitarian, and dynamic populace.[13] Illuminating North Carolina's constitutional texts, history, and

11. 588 U.S. 684 (2019).

12. N.C. CONST. art. XIII, § 2 (reserving to the people the right to revise or amend the Constitution).

13. The thread of this ideal is traced below. Throughout history, laws have classified and excluded groups (bondsmen, Catholics, enslaved persons, Indian nations, people with assets below a certain threshold, African Americans, women, felons, etc.) from enjoying rights. The right of free elections attaches to and perfects the right to vote of a qualified elector. But it does not define the scope of the electorate. *See infra* notes 536–45 and accompanying text (distinguishing the scope of suffrage from the right of free election).

precedent through these many perspectives is the classical science of jurisprudence and is the frame through which constitutional justice is authoritatively renewed.

This Article draws, often through the words of contemporaries, the long patterns in the kinetic line of battle between government prerogative and individual liberty. Recurringly, incumbents degrade the right to free elections (which is to say, representative government), often by denying an effective judicial remedy. Once appropriated by a partisan state, welfare suffers, and the people seldom recover free elections without civil violence or the intervention of an external power. A judiciary committed to freedom thus is vital to avoid such vortices. A fresh understanding of how law propels these dynamics could be an element in the political rejuvenation of North Carolina.

## I. THE ORIGINS OF THE RIGHT OF FREE ELECTIONS

The architects of the North Carolina Constitution of 1776 entrusted power to the legislature on the precondition that "elections . . . ought to be free." These words did not materialize from the ether; they are the 750-year-old English constitutional law phrase for an important safeguard of representative government, the right of free elections. The right of free elections prohibits anyone in authority from subverting the power of the right to vote. By using the specific phrase "elections . . . ought to be free" the 1776 Founders incorporated by reference the customs and political, religious, and commercial wisdom accumulated over two millennia by the institutions of North Carolina's legal heritage.

### A. *First Statute of Westminster (1275)*

The phrase "elections . . . ought to be free" originated in the First Statute of Westminster of 1275, closely contemporaneous with the origins of representative democracy in England. This statute and its older common law right were fundamental to the constitutional order of England that emerged in the 13th century and lasted until the 1640s. Under that order, the power of the monarch was subject to the obligation to obtain the advice and consent of parliament in taxation and other important matters of state. The right to free election prevented partisans from subverting representation in the elected House of Commons. The judiciary was bound by oath and office to redress violations of that law, even if it was against the king's interests.

Consent of the governed through representation in government has long been the accepted basis for the legitimacy of laws.[14] The maxim *quod omnes tangit*

14. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 301 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690) ("The *Liberty of Man*, *in Society*, is to be under no other Legislative

*ab omnibus comprobetur*[15]—what touches all must be consented to by all—originated in the Roman Republic under a constitution that divided government into branches that aspired to the best qualities of monarchy (the consuls or magistrates), aristocracy (the senate), and democracy (the assemblies), but were checked by the reciprocal control of the others to avoid their worst traits—autocracy, oligarchy, and mob rule.[16] A civic culture arrayed against corruption and dedicated to the welfare of the people as the supreme object of law—*salus populi suprema lex*—created a cohesiveness that enabled Rome to become an unrivaled power.[17] Every eligible voter was assigned to one of thirty-five "tribes" (effectively electoral districts, but unconnected with territory) which cast one vote each determined by a majority of the tribe.[18] However, over time, partisan censors (the magistrates responsible for assigning citizens to electoral tribes) disempowered rivals by consolidating them into a single tribe or splitting them across multiple tribes to ensure they would remain a minority.[19] Vote dilution and an escalating assault on the electoral process paved the way to the republic's descent into chaos and despotic rule by 27 BCE.[20] Elections became artifices in which incumbents "decanted" the votes of political adversaries.[21] For the North Carolina founders designing a republic to last, Rome was a precautionary example of the collapse of a governing system

Power, but that established, by consent . . . ."); *see also* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 56, 60 (1983) (explaining that *consent* to be subjected to the political power of another depends on *trust* in the person or institution to deliver peace, prosperity, justice, community, counsel, collective protection, and other objectives).

15. CODE JUST. 5.59.5.2 (Justinian 531).

16. *See* 3 POLYBIUS, THE HISTORIES 296, 311 (Robin Waterfield trans., Oxford Univ. Press 2010) (c. 117 B.C.E.); *see also* ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 16 (1999); *see infra* note 299 and accompanying text (discussing separation of powers in the North Carolina Constitution).

17. LINTOTT, *supra* note 16, at 39 ("A new aristocracy was created which in principle was dependent on popular election and merit rather than birth."); *see also* 1 EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 2 (J.B. Bury ed., Fred de Fau & Co. 1906) (1776) ("The principal conquests of the Romans were achieved under the republic."); *see also* THE FEDERALIST NO. 34, *supra* note 6, at 163 (Alexander Hamilton) (observing the ways in which "the Roman republic attained to the pinnacle of human greatness").

18. LILY ROSS TAYLOR, THE VOTING DISTRICTS OF THE ROMAN REPUBLIC 17 (1960).

19. *See id.* at 297.

20. *See* 3 APPIAN, ROMAN HISTORY 183 (Horace White trans., Harvard Univ. Press 1964) (c. 65) ("The Romans did not like it, but they had no more opportunities for elections according to law."). For a survey of electoral abuses that marked the end of the Roman Republic, see generally Howard Troxler, Electoral Abuse in the Late Roman Republic (Apr. 2, 2008) (M.A. thesis, University of South Florida), https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=1536&context=etd [https://perma.cc/E7QX-SHFH (staff-uploaded)].

21. The Roman poet Lucan analogized the separation of votes from power to the decanting of dregs from wine. *See* LUCAN, CIVIL WAR 268 (Susan H. Braund trans., Oxford Univ. Press 1992) (c. 61) ("Et non admissae dirimit suffragia plebis, Decantatque tribus et vana versat in urna."); *see also* Ursula Hall, *'Species Libertatis' Voting Procedure in the Late Roman Republic*, 42 BULL. INST. CLASSICAL STUD. 15, 30 (1998) (describing how "the heavy bribery of electoral *comitia* and the violence and manipulation of legislative *comitia*" greatly depressed Roman citizens' participation in elections).

that had endured for almost 500 years, and it was marked by the loss of electoral integrity.

On the Eastern periphery of the Roman world, followers of Jesus Christ articulated an order where everyone was included and rulers served the people.[22] These revitalized ideals gradually spread through the Roman Empire and later its institutional ghost, the Roman Church.[23] As the Germanic tribes on the periphery converted to Christianity (in the 5th to 8th centuries), the principle that all persons are equal before God became part of their laws.[24] At the core of Early Medieval European society was the belief that human conscience is divinely inspired. In elections, *vox populi, vox dei*—the voice of the people is the voice of God—expressed the notion.[25] Free elections were sanctified, the soul being more sacred than the state.[26] The Free Elections Clause of the North Carolina Constitution is backlit by these ideas.[27]

In England, Magna Carta in 1215 was a significant step in resolving conflicts between the king and the nobility, but it was Simon De Montfort's Parliament of 1265 that expanded the principle of consent to include

22. *See* DARRIN M. MCMAHON, EQUALITY: THE HISTORY OF AN ELUSIVE IDEA 74 (2023) (noting the emergence in the first millennium B.C.E. of traditions that "demanded that rulers serve with righteousness"); *see also, e.g.*, *Isaiah* 49:23 (King James) ("And kings shall be thy nursing fathers, and their queens thy nursing mothers: they shall bow down to thee with their face toward the earth."); *Matthew* 20:27 (King James) ("And whosoever will be chief among you, let him be your servant.").

23. Consent of the people through elections was a doctrine of the early church. For example, Pope Leo I the Great (440–461), invoking *quod omnes tangit*, declared that bishops should be elected by the clergy and the people, without interference, and that a harmonious election is "the expression not only of man's choice, but of God's inspiration." Leo the Great, *The Letters and Sermons of Leo the Great*, *in* 12 A SELECT LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 11, 18, 51 (Philip Schaff & Henry Wace eds., Charles Lett Feltoe trans., 2d ed. 1895). Likewise, Pope Gregory I (590–604), who sent missionaries to convert the Anglo-Saxon kingdoms to Christianity, emphasized the importance of the consent of the people in the election of bishops, and the harm to the body of the Church and its souls of venality, patronage, or any other form of election interference. *Id.* at 106, 128–29, 173. The Roman maxim "what touches all as individuals must be approved by all" remains enshrined in canon law to this day. 1983 CODE c.119, § 3.

24. *See* BERMAN, *supra* note 14, at 64.

25. *Cf.* 1 *Peter* 4:10–11 (King James) ("As every man hath received the gift, . . . let him speak as the oracles of God."). The concept that a gathering of inherently imperfect mortals could possess the authority to express the will of the Holy Spirit is found in *Matthew* 18:20: "For where two or three are gathered together in my name, there am I in the midst of them." *Matthew* 18:20 (King James).

26. *See* JOHN ACTON, LECTURES ON MODERN HISTORY 32 (1906) (power needs to be confined so that it does not challenge the supremacy of that which is highest and best in man); Girouard v. United States, 328 U.S. 61, 68 (1946) ("[I]n the domain of conscience there is a moral power higher than the State.").

27. *See, e.g.*, N.C. CONST. art. I, § 1 ("[A]ll persons are created equal."); *id.* art. I, § 2 ("[A]ll government of right originated from the people, is founded upon their will only, and is instituted solely for the good of the whole."); *id.* art. I, § 13 ("[N]o human authority shall, in any case whatever, control or interfere with the rights of conscience.").

representatives of the common people.[28] De Montfort's Parliament is sometimes identified as the beginning of the institution of Parliament as the intercessor of democratic liberties in England.[29] Within ten years of De Montfort's Parliament, Edward I, whose reign was pivotal in England's transition from a feudal society to a more institutionally representative government, enacted protections against election interference.[30]

Edward held hearings throughout England in the first two years of his reign to reestablish an effective governing partnership between the people and the sovereign.[31] The culmination of these hearings was the First Statute of Westminster ("First Westminster"), enacted in 1275 at Edward's first great and general parliament, to check the misconduct of local government officials.[32] Edward's Model Parliament of 1295 established the summons, procedure, and allocation of voting powers in the Commons to two knights per shire and two burgesses for cities and boroughs.[33] These and other actions during the reign of Edward I institutionalized the inclusion of elected representatives of the citizenry, and prescribed electoral processes and measures to safeguard the exercise of the elective franchise.[34] They advanced the fundamental purposes of elections: political stability through consent and counsel of the people, and public welfare through responsive policymaking and constrained power.

Chapter Five of First Westminster is the ancestor of the North Carolina Free Elections Clause. Chapter Five ordained that "because Elections ought to be free, the King commandeth upon great Forfeiture, that no one—great Man

28. These were representatives from the localities of the lesser feudal estates: shires, cities, and boroughs. 2 WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 97 (1896) [hereinafter STUBBS, CONSTITUTIONAL HISTORY]. In contrast to modern parliaments and legislatures, early parliaments were not standing institutions, but occasional assemblies summoned and dissolved at the will of the monarch. *See id.* at 263.

29. J. R. MADDICOTT, SIMON DE MONTFORT, at xiii (1994).

30. The right to free elections in ecclesiastical elections was chartered sixty years earlier in the Freedom of Election Charter, issued on by King John on November 21, 1214, seven months before Magna Carta. *See* WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 282–84 (H.W.C. Davis ed., 9th ed. 1913). The close connection between free elections in secular and religious institutions highlights a shared concern with freedom of individual conscience. For a discussion of royal influence over ecclesiastical elections and the reasons for the grant of freedom of elections, see CHRISTOPHER R. CHENEY, POPE INNOCENT III AND ENGLAND 121, 168 (1976).

31. Helen M. Cam, *Studies in the Hundred Rolls: Some Aspects of Thirteenth-Century Administration*, *in* 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 9, 29–30 (Paul Vinogradoff ed., 1921).

32. *Id.* at 35–36.

33. 2 STUBBS, CONSTITUTIONAL HISTORY, *supra* note 28, at 134. The writ of election uses the *quod omnes tangit* formulation from the Code of Justinian discussed above. *See supra* notes 15–16, 23 and accompanying text.

34. F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 76 (1955). For the understanding of free elections in the contemporaneous Second Council of Lyons (1274), see generally *Second Council of Lyons—1274*, PAPAL ENCYCLICALS ONLINE, https://www.papalencyclicals.net/councils/ecum14.htm [https://perma.cc/BE33-VJP5] (last updated May 17, 2025).

or other—by Force of Arms, nor by Malice, or menacing, shall disturb any to make free Election."[35] Chapter Five remains the unamended law of England to the present day.[36] It is regarded as the oldest active provision in British constitutional history.[37]

Edward I also made England's judiciary independent and tasked them with defending the liberties of the realm.[38] Articuli Super Cartas of 1300 is particularly noteworthy, as it removed certain constitutional questions from all political actors and entrusted them to an independent panel.[39] In that instrument, Edward I established "a definite form and penalty" under the common law for anyone contravening the points of First Westminster.[40] Enforcement of the right was placed in the hands of a three-judge panel—"one knight or other upright and two wise and prudent men, to be sworn as justices"—independently chosen by the community of a county.[41]

Along with the Free Elections Clause, North Carolina jurisprudence inherited the postulates of legal thought at the time of First Westminster—public stewardship, the distinction between right and wrong, the idea that wrong must be redressed, and that acquired rights are inviolable.[42] The right to free election continued to be animated by intertwined political and religious imperatives. As conceived in Christian Europe during the thirteenth century, God's will is expressed in all conscious souls equally.[43] The pious monarch in

35. Statute of Westminster, The First 1275, 3 Edw. 1 c. 5. "Great man" encompasses barons with power to influence parliament to advance their special interests.

36. *Id.*

37. *See, e.g.*, Miller v. Bull [2009] EWHC (QB) 2640 (Eng.). And by extension it is the oldest active provision of the North Carolina Constitution. Its text and meaning remains essentially unaltered.

38. *See* W.R. Lederman, *The Independence of the Judiciary*, 34 CAN. BAR REV. 769, 774–78 (1956) (describing how Edward I's actions to interlink judges and the legal profession created "one of the important elements of judicial independence as we know it"). Edward I established legal education supervised by judges at the Inns of Court and the tradition of appointing judges from the Bar. Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429, 430 (1981). He formed a commission of inquiry into judicial corruption in 1289 that led to the removal of two out of the three judges of the Court of King's Bench and four out of the five on the Common Pleas. *See* Lederman, *supra*, at 775; Henry Brooke, *The History of Judicial Independence in England and Wales*, HENRY BROOKE: MUSINGS, MEMORIES, MISCELLANEA (Nov. 3, 2015), https://sirhenrybrooke.me/2015/11/03/the-history-of-judicial-independence-in-england-and-wales/ [https://perma.cc/Z6EU-PDCB].

39. *Articuli Super Cartas, 1300*, NAT'L ARCHIVES, https://www.nationalarchives.gov.uk/education/resources/magna-carta/articuli-super-cartas/ [https://perma.cc/TWB8-REFD]. This is an application of the ancient maxim that a person, even the king, cannot be the judge of his own trial.

40. *Id.*

41. *Id.*

42. *See* 4 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 289 (George E. Woodbine ed., Samuel E. Thorne trans., 1977) (c. 1235) ("[I]t is the king's duty to provide an adequate remedy to repress every wrong.").

43. *See* 2 *id.* at 32–33 (stating "'for there is no respect of persons with god,' for as to Him, 'he that is greatest, let him be as the smallest; and he that is chief as he that doth serve'").

whom their care is entrusted is obligated to represent God on earth, and to remedy any wrong; or else he violates the very reason for his institution.[44] While in certain matters the law bestows upon the king a distinct position encapsulated in the term "prerogative," neither he nor his officers are above the law, and he is not empowered to expand the scope of his prerogative.[45] The king holds his special royal rights as a *bonae fidei* possessor and loses them the instant he loses his integrity.[46] These concepts of inherent limitations on absolute power are continued in the common law and constitutional traditions of North Carolina.

The right of free elections continued to evolve so that by the fourteenth century in England, the balance between the king, the nobility, and the people had settled: the king did not have absolute power, but was instead bound by laws to which the people consented through their elected representatives.[47] Common people "were jealously on the watch against royal interference in their elections."[48] Interventions in the free conduct of elections, whether by the king or from partisan interests within the county electorate, were challenged on the basis that they violated the common law of the land, and enjoined by statutes that used forms of the legal term of art "elections ought to be free."[49] For example, in 1388, the Lords Appellant—political opponents of Richard II—countermanded his efforts to pack Parliament on the basis that it was "contrary to the form of election anciently customary[] and against the liberty of the lords and commons of the realm of England . . . hitherto maintained."[50] Richard II's

44. Ludwik Ehrlich, *Proceedings Against the Crown (1216–1377)*, *in* 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY, *supra* note 31, at 52–53 ("There was, too, the idea that every wrong ought to be redressed . . . the notion of acquired rights, whatever their object, was generally accepted, and that those rights were thought of as inviolable.").

45. *Id.* at 56 ("[L]egally the king was expected to act according to law, and while the acts of his officers were judged by the law, it is true that the law gave to the king a peculiar position . . . .").

46. *Id.* at 61–62, 139; *see id.* at 42 ("[T]he king, if he wished to use his power as vicar of God, was bound not to do wrong. A wrong would consist in the violation of any right.").

47. *See* 2 BRACTON, *supra* note 42, at 109 ("The king has a superior, namely, God. Also the law by which he is made king. Also his *curia*, namely, the earls and barons, because if he is without bridle, that is without law, they ought to put the bridle on him.").

48. 2 STUBBS, CONSTITUTIONAL HISTORY, *supra* note 28, at 246.

49. *See, e.g.*, 9 Edw. 2 ch. 14 (1315–16) ("[I]f any dignity be vacant, where election is to be made, it is moved that the electors may freely make their election without fear of any power temporal, and that all prayers and oppressions shall in this behalf cease. . . . They shall be made free according to the form of statutes and ordinances."); 25 Edw. 3 Stat. 4 (1351) (providing "the free elections of archbishops, bishops and all other dignities and benefices elective in England"); 13 Rich. 2 stat. 2, ch. 2 (1389–90) (reestablishing "the free elections of archbishops, bishops, and all other dignities and benefices elective in England"); 9 Hen. 4 ch.9 (1407) (providing that "all the elections of all archbishopricks, bishopricks, abbies, priories, deanries, [and other dignities or any other elections] be free" (alteration in original)).

50. J.S. Roskell, *Introductory Survey* to THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1386–1421, at 57 (J.S. Roskell, Linda Clark & Carole Rawcliffe eds., Alan Sutton Publ'g

accomplice, Chief Justice Robert Tresilian, a "vile and profligate villain," was impeached in 1388.[51] Rebellions in 1403 and 1405 alleged that Henry IV interfered in elections.[52] These and many other precedents[53] established that the right of free elections was the "law of the land," bound all political actors, covered all phases of the election process, and enjoined all tactics that subverted it.[54]

Under the Tudors (1485–1603), perhaps reflecting the humanist ethos of the Protestant Reformation,[55] interference in elections as a management tool appears to have been relatively restrained.[56] "[N]ot even [Thomas] Cromwell's careful management came anywhere near to packing; throughout the century, elections were essentially free—that is, influenced or even arranged by local powers."[57] The king's prerogatives were distinguished between absolute and ordinary; the latter, involving liberties such as free elections, were determined by law and judges.[58] Judges were to construe charters of liberties against the body politic and in favor of the individual.[59]

1993). Richard II sought to create a skewed parliament by instructing the sheriffs to return knights who could be "neutral in the present disputes" by which he meant partial to him. NIGEL SAUL, RICHARD II 173 (1997).

51. *See generally* JONATHAN SWIFT, VERSES ON THE DEATH OF DOCTOR SWIFT (1731) (detailing how Tresilian was executed and his associate justices banished to Ireland).

52. *See* Roskell, *supra* note 50, at 55–68.

53. The century and a half between 1350 and 1500 saw many attempts to interfere with free elections, including disqualifying candidates on various pretexts, skewing electoral procedures, meddling or "labouring" with the elections process, tampering with or falsifying results, returning results without elections, and other violations, but notably not physical intimidation. Various statutes imposed penalties and expanded the remedial powers of judges. From these experiences, a reasonably coherent legal framework of electoral practice evolved. *See id.*

54. The focus was on disenfranchising *effects* regardless of the method. The statutes granted an individual right of a free election that attached to and completed the grant of a voting franchise. The focus was on *whether* the grantee was deprived of a right, not *by what means* the divestiture is accomplished. *See, e.g.*, *supra* note 49 and accompanying text.

55. *See* John Fortescue, *Fortescue on Limited Monarchy (c. 1471/75)*, *in* SOURCES OF ENGLISH LEGAL HISTORY: PUBLIC LAW TO 1750, at 3, 3 (John Baker ed., 2024) (The "king may not rule his people by other laws than such as they assent to; and therefore he may set upon them no impositions without their own assent.").

56. *See* G.R. ELTON, *"The Body of the Whole Realm": Parliament and Representation in Medieval and Tudor England*, *in* JAMESTOWN ESSAYS ON REPRESENTATION 1, 10–11 (A.E. Dick Howard ed., 1969).

57. THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY 282–99 (G.R. Elton ed., 1960).

58. *See* Edward Coke, *Coke on the Prerogatives (1594, 1603)*, *in* SOURCES OF ENGLISH LEGAL HISTORY: PUBLIC LAW TO 1750, *supra* note 55, at 11, 11 (stating that ordinary prerogatives "ought to be determined by the law and by the judges . . . . Of this prerogative Bracton speaks in book I, c. 7: 'The king ought to be under God and the law, since it is the law which makes the king'").

59. *See* Richard Hesketh, *Richard Hesketh on Charters of Liberties (c. 1506)*, *in* SOURCES OF ENGLISH LEGAL HISTORY: PUBLIC LAW TO 1750, *supra* note 55, at 73, 74 (stating that a "royal charter which grants liberties to all subjects for their common weal shall be construed more strongly against the king and more beneficially for his subjects—in favour of liberty, as it were").

In sum, from the 13th century onward, the English constitution (a) chartered an individual right to a free election, (b) enjoined the body politic from subverting it in any manner, and (c) empowered the judiciary to vindicate it. These rights and remedies continued in the common law and judicial traditions inherited by North Carolina, and in her written Constitution.

### B. *English Declaration of Rights (1689)*

The meaning of the phrase "elections . . . ought to be free" in the North Carolina Constitution of 1776 is further illustrated by its reassertion, after the convulsions of the seventeenth century, in the English Declaration of Rights of 1688.[60] From 1603 to 1649, King James I, and later King Charles I, sought to implement what at the time seemed like a more effective and modern form of government—absolutism. This required disabling the checks of the ancient constitution—a freely elected parliament and an independent judiciary—but those checks proved vigorous, especially the right of free election, as illuminated by able jurists. In 1642, the absolutist threat was defeated on the battlefield by a broad coalition. That coalition sought to establish a republic based on the idea that all political power is vested in and derived from the people and expressed through free elections. But, by 1660, it had devolved to a despotic legislature, and a traditional monarchy checked by Parliament was restored. Soon, however, the Crown and its partisan allies again undermined the right of free elections through the functional equivalent of gerrymandering. This second threat to representative government was defeated in 1688, and, in 1689, a bipartisan convention established a new constitutional order that lasts in England to the present day based on the supremacy of parliament. With balance restored, the new constitutive documents—the English Declaration of Rights and the Bill of Rights of 1688—reasserted the fundamental right that elections "ought to be free."[61]

60. Understanding the sixteenth century is a prerequisite to understanding the North Carolina Constitution of 1776. *See generally* John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1765–66 (1992) [hereinafter Orth, *North Carolina Constitutional History*] ("American constitutionalism, as the Revolutionaries themselves loudly protested, was nothing new; rather, it was deeply rooted in English tradition."). The Declaration of Rights of 1688, a product of a constitutional convention, was enacted into law by the Bill of Rights of 1688. For ease of exposition, this Article will refer only to the Declaration of Rights unless otherwise indicated. Although adopted in 1689, it is dated 1688 by convention, reflecting the beginning of the parliamentary session. *See Bill of Rights [1688]*, https://www.legislation.gov.uk/aep/WillandMarSess2/1/2#commentary-c2144673 [https://perma.cc/Q5XH-4HCD] ("The Bill of Rights is assigned to the year 1688 on legislation.gov.uk . . . . This follows the practice adopted in *The Statutes of the Realm*, Vol. VI . . . .").

61. Bill of Rights 1689, 1 W. & M. c. 2.

These events were vividly immediate to the North Carolina founders.[62] The essence of the 1688 settlement is that the phrase "elections . . . ought to be free" eliminates electoral districting as an instrument to weaken the power of political rivals. When the North Carolina founders incorporated the same phrase in the Free Elections Clause of the North Carolina Constitution of 1776, they denied the Assembly the power to sculpt electoral districts for partisan advantage, and they obligated the judiciary to remedy transgressions.

### 1. First Stuart Kings (1603–1649)

When James VI of Scotland[63] became King James I of England in 1603, he faced powerful external enemies in France and Spain, rebellions in several parts of his three kingdoms, disunity in matters of religion, a significant national debt, and other existential threats.[64] To deal with these more effectively, James I sought autocratic powers equal to his continental rivals,[65] overriding traditional constitutional limitations, especially the requirement that the Commons appropriate finances.[66] James I asserted a supremacy grounded in the notion

62. The distance between 1776 and 1688 is about the same as we are (in 2025) from the Second World War. Essentially, it was the conflict that consumed their grandfathers' generation and shaped their world.

63. James VI of Scotland had ruled for over twenty years by effectively controlling the Scottish parliament and other Scottish institutions. DAVID HARRIS WILLSON, KING JAMES VI AND I, at 314 (1967) (noting how King James interfered with Scottish elections and controlled the election of representatives from Scottish burghs by nominating the burgh provosts).

64. *See generally id.* (describing the life and reign of King James VI and I).

65. *See* Francis Oakley, *Jacobean Political Theology: The Absolute and Ordinary Powers of the King*, 29 J. HIST. IDEAS 323, 327–28, 337 (1968) (discussing James I's assertions of absolute power in matters of state); HILLAY ZMORA, MONARCHY, ARISTOCRACY AND STATE IN EUROPE 1300–1800, at 76–94 (2000) (discussing the absolute power of continental European monarchs in seventeenth century Europe and contrasting it with the power of the English monarchy). The kings of France and Spain were absolute monarchs with largely ceremonial parliaments. *See id.* James I sought to avoid becoming a mere figurehead like the Doge of Venice, constrained by a republican government. *See* Alejandro Tamayo, Othello as a Political Commentary on the "Myth of Venice," 7–10 (2023) (M.A. thesis, University of Northern Illinois), https://huskiecommons.lib.niu.edu/cgi/viewcontent.cgi?article=8356&context=allgraduate-thesesdissertations [https://perma.cc/2T97-NBWD (staff-uploaded archive)].

66. *See* J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603–1689, at 34–42 (2d ed. 1937) (discussing James I's constitutional confrontations with Parliament with specific focus on Lord Coke's judicial interventions); *id.* at 42–50 (describing James I's confrontation with Parliament over finances and appropriation). James I also interfered with elections of bishops (a longstanding source of power over the populace) and heads of houses at Oxford and Cambridge. WILLSON, *supra* note 63, at 211, 293, 314. However, Parliament arguably was not properly fulfilling its obligations to finance the state. *See* TANNER, *supra*, at 42–50. Divided government requires a high degree of professionalism and knowledge of affairs by the legislature. This perhaps is the rationale for the dicta in *Stephenson I* noted below that incumbency protection can be taken into account in districting so long as it is nonpartisan. *See infra* Section II.C.2.

that the liberties of the realm derive from the king rather than from law and custom.[67]

In the first Parliament of his reign, James I sought to control a key element of free elections by specifying limitations on voter qualifications in writs of election.[68] James was rebuffed by the Commons, with one member recorded as saying, "by this course the free election of the country is taken away, and none shall be chosen but such as shall please the king and council."[69] James I was also denied the prerogative to have all ballots sent to his Chancellor to review, challenge, and adjudicate election irregularities.[70]

James I cemented political control over the Irish Parliament in 1613 elections by creating 39 new boroughs (19 of them in Protestant Ulster) and 2 seats for Trinity College Dublin (also Protestant), flipping an 85 to 61 Catholic advantage to a 123 to 95 advantage for James's Protestant allies.[71] When a delegation from Ireland complained, James told them that they must not expect the Kingdom of Ireland to resemble the kingdom of heaven.[72] James I's second English parliament in 1614 was marred with allegations that he had improperly attempted to pack it with allies, a serious breach of the right to free elections.[73] Initially, James refused criticism from the English parliament for gerrymandering the Irish elections, stating: "What is it to you whether I make many or few boroughs? . . . [W]hat if I had made . . . 400 borough? The more the merrier."[74] However, James was obligated at the opening of the English session to disavow any interference in English elections, stating: "I never directly or indirectly did prompt or hinder any man in the free election."[75]

67. *See* KING JAMES VI & I, THE TRUE LAW OF FREE MONARCHIES AND BASILIKON DORON 51 (Daniel Fischlin & Mark Fortier eds., 1998). James I claimed divine right to rule autocratically as a way to address state threats, mirroring modern distrust or frustration with consensual processes. *See id.*

68. 1 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND 1003 (1806).

69. *Id.*

70. *See* WILLSON, *supra* note 63, at 247–49 (describing the famous case of *Goodwin v. Fortescue*); *see also Apology of the House of Commons, 20 June 1604*, *in* SOURCES OF ENGLISH LEGAL HISTORY: PUBLIC LAW TO 1750, *supra* note 55, at 139, 140 ("[W]e were and still are of a clear opinion that the freedom of election was in that action extremely injured; that by the same right it might be at all times in a lord chancellor's power to reverse, defeat, to reject and substitute all the elections and persons elected over all the realm.").

71. *See* WILLSON, *supra* note 63, at 328 (describing it as a "monstrous abuse of prerogative" and noting that James I permitted a rumor to circulate that members would be required to take the oath of supremacy, an oath no Catholic could make).

72. *Id.* at 329.

73. These included promises of office and other allegations of tampering with elections. *Id.* at 346–47. *See generally* Clayton Roberts & Owen Duncan, *The Parliamentary Undertaking of 1614*, 93 ENG. HIST. REV. 481 (1978) (providing an overview of the parliamentary overtaking of 1714).

74. JAMES HAMILTON, THE HAMILTON MANUSCRIPTS: CONTAINING SOME ACCOUNTS OF THE SETTLEMENT OF THE UPPER CLANDEBOYE, GREAT ARDES, AND DUFFERIN, IN THE COUNTY OF DOWN 60 (T.K. Lowry ed., 1867); *see* ANDREW THRUSH, THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS, 1604–1629, at 393 (2010).

75. 1 COBBETT, *supra* note 68, at 1155.

On the death of James I in 1625, Charles I acceded to the throne of the Three Kingdoms.[76] Like his father, he asserted the divine right of kings and expected a subservient parliament.[77] But, also like his father, his authoritarian policies (especially in religious and foreign matters) and methods (disregard for law and custom, harsh suppression of critics) were resisted.[78] After a disastrous first English parliament, Charles attempted to manage the 1626 English parliamentary elections by appointing his leading opponents as sheriffs for the election, rendering them ineligible to be members of the Commons.[79] Charles was nevertheless forced to abruptly dissolve the 1626 parliament before he could secure required funds for war.[80] Desperate for funding, Charles called a third parliament in 1628 and consented to the Petition of Right, which reasserted fundamental restraints on the monarchy.[81] Charles I's idea that he could unilaterally act against the will of the nation, even if he was right and the nation wrong, had been revolutionary and against the spirit of the ancient constitution.[82] But rather than honor the promise he made in the Petition of Right, Charles I did not call a Parliament between 1629 and 1640, and ruled unilaterally.[83]

In this period of intense contest between prerogative and representative government, several important judgments foundational to the North Carolina right of free elections were delivered by Lord Chief Justice Sir Edward Coke, the drafter of the Petition of Right and the most learned jurist of his day. Lord Coke's influential 1629 treatise explains that the free elections clause of First

76. 5 SAMUEL R. GARDINER, HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR 1603–1642, at 314–16 (1896) [hereinafter GARDINER, HISTORY OF ENGLAND].

77. *See* RICHARD CUST, CHARLES I: A POLITICAL LIFE 133 (2005) (contrasting Elizabeth I's quasi-democratic "monarchical republic" with Charles I's views of the monarch and bishops as the principal guarantors of hierarchy and stability).

78. *See* Mark A. Kishlansky & John Morrill, *Charles I*, OXFORD DICTIONARY NAT'L BIOGRAPHY, https://www.oxforddnb.com/display/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-5143 [https://perma.cc/F3C5-5UMV (staff-uploaded, dark archive)] (last updated Oct. 4, 2008).

79. CUST, *supra* note 77, at 51–52.

80. 6 GARDINER, HISTORY OF ENGLAND, *supra* note 76, at 121 (marking this as the moment set England on a course of civil war and ultimately parliamentary supremacy).

81. *Id.* at 311 ("The Petition of Right has justly been deemed by constitutional historians as second in importance only to the Great Charter . . . . Like the Great Charter, too, the Petition of Right was the beginning, not the end, of a revolution."). The Petition of Right is regarded as a foundation of the liberties of North Carolina. *See* BENJAMIN F. LONG, THE LAW LECTURES OF THE LATE CHIEF JUSTICE RICHMOND M. PEARSON 17–36 (1879).

82. *See* 6 GARDINER, HISTORY OF ENGLAND, *supra* note 76, at 314–15.

83. *See* CUST, *supra* note 77, at 104–96. James II did not call a parliament except for an aborted one in 1685. LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 32 (1981). Coke considered the right to frequent elections to be contained in the right to "free" elections. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 168–69 (1681) [hereinafter COKE, SECOND INSTITUTES].

Westminster "briefly rehearseth the old rule of the common law" and thereunder

> the king bindeth himself not to disturb any electors to make free election . . . and this act extends to all elections, as well by those that at the making of this act had power to make them, as by those whose power was raised, or created since this act.[84]

In other words, 350 years after it was first asserted in English law, the right of free election remained: (a) a textual constitutional and common law right that prohibited all forms of manipulation that diminish a voter's franchise (any action that would "disturb any electors to make free election"),[85] (b) superior to prerogatives of the executive ("the king bindeth himself") or the legislature ("those whose power was raised or created since [1275]") or anyone else with power over an election, and (c) a matter for the judiciary to adjudicate and remedy.[86]

2. The Long Parliament and the English Republic (1640–1660)

The parliament Charles I was forced to call in 1640 (the "Long Parliament") ultimately ended the contest with absolute monarchy on the

84. COKE, SECOND INSTITUTES, *supra* note 83, at 169.

85. To "disturb" a right is to diminish its value, regardless of how that is accomplished. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *236–53 (illustrating circumvention and many other noncoercive *manu longa* contrivances that impair a right); *see also* EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 223, at 149 (Garland Publ'g Inc. 1979) (1628) [hereinafter COKE, FIRST INSTITUTES] (applying the maxim that when anything is prohibited directly, it is also prohibited indirectly). Under the common law principles recorded by Coke, the Assembly can "neither directly nor indirectly, by art, or cunning invention" take a vote from partisan rival A and give it to partisan ally B—it is unreasonable to suppose that the people would have entrusted the legislature with that power. *See id.* § 4a, at 12 (applying the anti-circumvention maxim to a usury statute); JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 33 (2003) [hereinafter ORTH, DUE PROCESS] (examining the grounding in reason and precedent of individual rights). The concept of being "disturbed" in a liberty right was equated with being "disseized" of a property right. *See* Francis Ashley, *On Magna Carta, c. 29 (1616)*, *in* SOURCES OF ENGLISH LEGAL HISTORY: PUBLIC LAW TO 1750, *supra* note 55, at 79 ("[E]very impeachment from enjoying the benefit [of a liberty] is a disseisin, just as well as where the freehold is ousted.").

86. "When the law doth give any thing to one, it giveth impliedly whatsoever is necessary [sic], for the taking and enjoying the same." COKE, FIRST INSTITUTES, *supra* note 85, § 69, at 56. *Dr. Bonham's Case* held that "when an Act of Parliament is against Common right and reason, or repugnant . . . the Common Law will control it, and adjudge such Act to be void." Edward Coke, *Dr. Bonham's Case*, *reprinted in* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 264, 275 (Steve Sheppard ed., 2003). The legislature itself cannot be the body who decides the scope of its powers and whether it has violated constitutional limitations on its election prerogatives, because it cannot be the judge of its own cause. *See* ORTH, DUE PROCESS, *supra* note 85, at 15. "With the help of the Scottish Covenanters, the junto [the core of the parliamentary leadership] had staged a coup against Charles that had brought down the Personal Rule and forced him to call the Long Parliament." David Scott, *Party Politics in the Long Parliament*, *1640–8*, *in* REVOLUTIONARY ENGLAND, C. 1630–C. 1660, at 32, 35 (George Southcombe & Grant Tapsell eds., 2017).

battlefield. Together with the armies of the Scottish parliament, they defeated Charles I in 1645 and beheaded him in 1649.[87] To North Carolina's founding generation, the turbulent tenure of the Long Parliament, which lasted until 1660,[88] served as a stark warning about the dangers of unchecked legislative power, illustrating that kings are not the only tyrants—legislators and party grandees also can become severe oppressors when they are no longer accountable to those they serve.[89]

A written constitution therefore was required. With the removal of the monarch, "[t]he despotism of Parliament was the chief danger to be feared, and there was no possibility of averting this by Acts of the Parliament itself. Naturally, therefore, arose the idea of a written Constitution, which the Parliament itself would be incompetent to violate."[90]

87. Charles' attempts to impose Anglican rites on the Scottish kirk led to the rebellion in 1639 by Scottish Covenanters, and, in 1641, the Irish rebelled to end suppression of Catholics and to establish greater home rule. *See* DAVID STEVENSON, THE SCOTTISH REVOLUTION, 1637–1644: THE TRIUMPH OF THE COVENANTERS 42–47 (1974); EAMON DARCY, THE IRISH REBELLION OF 1641 AND THE WARS OF THE THREE KINGDOMS 171–72 (2013).

88. More precisely, the Long Parliament sat from 1640 to 1653, followed by the Nominated or "Barebones" Parliament of 1653 (not elected but appointed under patronage of Oliver Cromwell), three Cromwellian Parliaments of 1654, 1656 to 1658, and 1659, and the "Rump" Parliament (1659 to 1660). *See* Paul Pattison, *The English Civil Wars: Origins, Events, and Legacy*, ENG. HERITAGE, https://www.english-heritage.org.uk/learn/histories/the-english-civil-wars-history-and-stories/the-english-civil-wars/ [https://perma.cc/2RL6-RDZD]; *The End of the Protectorate*, U.K. PARLIAMENT (2024), https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/civilwar/overview/end-of-the-protectorate/ [https://perma.cc/XG5E-S7KY (staff-uploaded archive)]. The *North Carolina Gazette* regarded them all as the Long Parliament. *See* James Wilson, *Considerations of Nature and Extent of the Legislative Authority of British Parliament*, *reprinted in* N.C. GAZETTE, Dec. 16, 1774, at 1. This Article will use that simplification for ease of exposition.

89. *See* Wilson, *supra* note 88, at 2 (tracing how, initially, the Long Parliament secured the liberties of the people and curbed the royal prerogative, but once they could not be removed, they were unaccountable to either the king or the people and ruled oppressively). The Long Parliament entrenched themselves by passing an act preventing the king from dissolving Parliament without their consent. THOMAS HOBBES, BEHEMOTH; OR, THE LONG PARLIAMENT 74 (Ferdinand Tonnies ed., 1889) (1681). They executed the king's chief minister, the Earl of Strafford, by act of Parliament (a bill of attainder), and then the Archbishop of Canterbury. *Id.* at 72. They took control of the military. *Id.* at 80, 98–102. To some contemporaries, "the true meaning of the Parliament was, that not the King, but they themselves, should have the absolute government." *Id.* at 68. Commentary in the late 1640s "sought to expose the tyranny of England's new parliamentary state and its unaccountable grandee masters." Scott, *supra* note 86, at 33. A 1648 writer was dismayed to see "a pulling down of one Tyrant, to set up another, and instead of Liberty, heaping upon ourselves a greater slavery than that we fought against." *Id.* (quoting WILLIAM WALWYN, *The Bloody Project; or a Discovery of the New Design* (1694), *reprinted in* WRITINGS OF WILLIAM WALWYN 294, 301 (Jack R. McMichael & Barbara Taft eds., 1989)). Importantly, unaccountable party grandees were at the center: "[T]he vast majority of Parliament-men, even after the exodus of royalist members during the spring and summer of 1642, were excluded from the junto's private counsels and could not be relied upon to back its policies in the absence of careful management and skillful persuasion." *Id.* at 36.

90. THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660, at i (Samuel Rawson Gardiner ed., 3d ed. 1906) [hereinafter CONSTITUTIONAL DOCUMENTS].

Three written constitutional documents were developed by the army, which in many respects was more representative of the people than the Long Parliament. The army included ordinary men from a broad range of religious traditions who had earned their positions of power by risking their lives for their "birthright and privileges as Englishmen."[91] The three draft constitutions were *The Heads of the Proposals* proposed in August 1647,[92] *The Agreement of the People* debated by the army in the October 1647 Putney Debates,[93] and another document also known as *The Agreement of the People* circulated by the Council of the Army on January 15, 1649.[94] Their goal was not to "establish a Parliamentary despotism upon the ruins of the despotism of the King . . . but to lessen the power of Parliament by making it more amenable to the constituencies, and by restricting the powers of the State over the liberty of individuals."[95]

These are the early prototypes for the content and structure of the North Carolina Constitution of 1776. The constitutional proposals are premised on the original and supreme power of the people.[96] Their power is conditionally delegated to a representative body intended to reflect the composition of the country.[97] Suffrage was vested in electors whose consent would legitimize

91. 3 SAMUEL R. GARDINER, HISTORY OF THE GREAT CIVIL WAR 1642–1649, at 389 (1905) [hereinafter GARDINER, HISTORY OF THE GREAT CIVIL WAR]. The soldiers may be analogized to African American veterans demanding a voice in government after their service in the world wars of the twentieth century. *See* HOBBES, *supra* note 89, at 2–4 (identifying seven principal popular forces driving England at the start of the Long Parliament—Presbyterians; Catholics; Dissenters; university-educated, urban merchants; the marginalized underclass; anti-government libertarians—and, implicitly, royalists (the author himself)).

92. John Rushworth, *The Heads of the Proposals Offered by the Army* (1647), *reprinted in* CONSTITUTIONAL DOCUMENTS, *supra* note 90, at 316, 316–26 [hereinafter Rushworth, *Heads of the Proposals*] (noting that John Rushworth is the historian who recorded the proceeding at which they were proposed).

93. *The Agreement of the People, as Presented to the Council of the Army* (1647), *reprinted in* CONSTITUTIONAL DOCUMENTS, *supra* note 90, at 333, 333–35.

94. This document, also known as *The Agreement of the People*, was a modified edition of the document by the same name debated at the Putney Debates. John Rushworth, *The Agreement of the People*, *reprinted in* CONSTITUTIONAL DOCUMENTS, *supra* note 90, at 359, 359–71 [hereinafter Rushworth, *Agreement of the People*].

95. CONSTITUTIONAL DOCUMENTS, *supra* note 90, at ix, xlvi; *accord* Sarah Mortimer, *Henry Ireton and the Limits of Radicalism, 1647–9*, *in* REVOLUTIONARY ENGLAND, *supra* note 86, at 55, 70 (noting that Henry Ireton, a leading thinker and Cromwell's son-in-law, "hoped to alleviate the potential for parliamentarian tyranny through regular elections, a fairer franchise system and, perhaps, through an Agreement of the People sponsored by Parliament itself").

96. JOHN REES, THE LEVELLER REVOLUTION 285 (2016). Scotland had been carrying out similar reforms during the Covenanting Revolution of 1640–41. TIM HARRIS, REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685–1720, at 395 (2007) [hereinafter HARRIS, REVOLUTION].

97. A core objective is representation "according to some rule of equality or proportion . . . to render the House of Commons (as near as may be) an equal representative of the whole." Rushworth, *Heads of the Proposals*, *supra* note 92, at 317.

laws.[98] The delegation of power did not extend to certain fundamental reserved powers.[99] The legislature was to act as an agent, implementing the people's counsel.[100] Judges were to adjudicate the laws in favor of liberty.[101] The shot heard round the world in 1775 was test-fired in 1647.

In structure, *The Agreement of the People* debated in October 1647 is a close ancestor of the North Carolina Constitution.[102] *The Agreement of the People* was definitively in the form of a new written constitution, above the power of the legislature to alter, to be ratified directly by the people.[103] It established popular sovereignty with equal representation,[104] limited the delegated powers of its legislative agents,[105] and reserved inviolably the expressed and implied rights of the people.[106] Its extended version distinguished "fundamental" rights from matters of convenience.[107] It expressed as a fundamental right: "the equal or proportionable distribution of the number of the representers to be elected."[108] And it declared "freedom in elections . . . to be fundamental to our common right, liberty, and safety."[109]

98. In the Putney Debates, the soldier Thomas Rainsborough declared: "I think that the poorest He that is in England hath a life to live, as the greatest He; and therefore truly, Sir, I think it's clear, that every man that is to live under a government ought first by his own consent to put himself under that government." *Putney Debates of the General Council of the Army* (1647), *reprinted in* SOURCES AND DEBATES IN ENGLISH HISTORY, 1485–1714, at 208, 208 (Newton Key & Robert Bucholz eds., 2004). Rainsborough's regiment was officered by returning North Americans schooled in its independent religious beliefs. REES, *supra* note 96, at 199. This explicit rationale for universal suffrage anticipates North Carolina's eventual removal of voting qualifications based on property, race, and gender, and contradicts vote dilution based on party affiliation.

99. These ideas were expressed by Henry Parker in 1642 in response to Charles I's defense of his powers near the end of his reign. *See* HENRY PARKER, OBSERVATIONS UPON SOME OF HIS MAJESTIES LATE ANSWERS AND EXPRESSES 4 (1642).

100. *See id.* at 9.

101. *Id.*

102. *See* 3 GARDINER, HISTORY OF THE GREAT CIVIL WAR, *supra* note 91, at 387 ("The Agreement of the People was the first example of that system which now universally prevails in the State Governments of the American Republic."). For a discussion of the origins of the 1647 *Agreement of the People*, see generally Elliot Vernon & Philip Baker, *What Was the First* Agreement of the People*?*, 53 HIST. J. 39 (2010).

103. *See The Agreement of the People, as Presented to the Council of the Army* (1647), *supra* note 93, at 333–35.

104. *Id.* at 333 ("[T]he people of England, being at this day very unequally distributed . . . ought to be more indifferently proportioned according to the number of inhabitants.").

105. *See id.* at 334 (declaring that the power of the legislature "is inferior only to those who choose them").

106. *Id.* at 334–35 (protecting the rights of conscience and ensuring equal protection by declaring "[t]hat in all laws made or to be made every person may be bound alike" and "[t]hat all the laws ought to be equal, so they must be good").

107. Rushworth, *Agreement of the People*, *supra* note 94, at 371.

108. *Id.* at 370–71.

109. *Id.* at 371; *accord* Rushworth, *Heads of the Proposals*, *supra* note 92, at 317 (insisting that "effectual provision be made for future freedom of elections").

As the Long Parliament became more entrenched, the idea of a supreme legislature became even more unpopular than an absolute monarchy, and a functioning constitutional republic in England became less likely. With the backing of the army, Oliver Cromwell replaced the parliament, and assumed the title of "Lord Protector" under a written instrument that established a commonwealth in 1653.[110] When he summoned a parliament at all, he dealt with them much like his authoritarian predecessors.[111] As the country neared anarchy, its efforts to tether a powerful legislature to republican forms of government was ended. But the core ideas would soon after be revived and perfected in the North Carolina Constitution of 1776.

### 3. The Restoration of the Monarchy and the Rise of Political Parties (1660–1688)

This section discusses the period that most clearly evidences that the historical usage of the legal phrase "elections . . . ought to be free" prohibits the Assembly from shaping electoral districts for partisan advantage. From 1660 to 1688, Charles II and then James II asserted the prerogative to pack Parliament with political allies by manipulating the charters of electoral precincts—the equivalent of gerrymandering. In the Revolution of 1688, this prerogative was categorically extinguished by the phrase "elections . . . ought to be free." In the North Carolina Constitution of 1776, the founders denied the Assembly that prerogative with the same words.

Cromwell's death in 1658 opened the way to what was, by then, a popular restoration of a monarchy to balance parliament.[112] In 1660, General George Monck, Duke of Albemarle, who would become a founding proprietor of Carolina three years later, orchestrated the transition to a "free and full parliament" that shared power with Charles I's son, Charles II.[113] However, the nebulous terms under which the monarch was restored had not settled the old

110. AUSTIN WOOLRYCH, BRITAIN IN REVOLUTION, 1625–1660, at 563 (2002). The inability of the Long Parliament to reform itself to be more representative was a driver. *See* MARK KISHLANSKY, A MONARCHY TRANSFORMED: BRITAIN 1603–1714, at 187–88 (1996). The army suspected the Long Parliament of wanting to perpetuate themselves forever. A "parliamentary supremacy [proved] even more unpopular than Charles's rule, and the restoration or recreation of a 'monarchical principle' was being canvassed by Cromwell." Mortimer, *supra* note 95, at 70.

111. *See* KISHLANSKY, *supra* note 110, at 211 ("To avoid a repetition of the fiasco in 1654, when members had had to be expelled, the Council used its power of judging elections to exclude republicans and other opponents of the regime at the beginning.").

112. TIM HARRIS, POLITICS UNDER THE LATER STUARTS 27 (2013) [hereinafter HARRIS, LATER STUARTS].

113. WOOLRYCH, *supra* note 110, at 757. Monck responded to a popular demand for a "free and full parliament" by holding elections that were widely acknowledged to be free and representative. *See* Blair Worden, *The Demand for a Free Parliament, 1659–60*, *in* REVOLUTIONARY ENGLAND, *supra* note 86, at 176, 176–77, 194. The parliament peacefully restored Charles II and brought an end to the civil wars. *Id.*

constitutional questions, and by the 1670s, new issues of religion were layered on the contest.[114]

Two political factions emerged: the Tories and the Whigs. The Tories aligned with a strong monarchy committed to deliver order and good government[115] with strict conformity to the High Anglican state church.[116] The Whigs advocated for constitutional protections for individual liberties[117] and for tolerance of religious dissidents. Thus, from the beginning, party affiliation intertwined political values with religious values.[118]

To advance their political and religious agendas over their Whig rivals, Charles II and his brother James, heir to the throne, sought to circumvent opposition in Parliament by redefining electoral districts in favor of their Tory allies. Charles II asserted a royal prerogative over the charters of the boroughs and municipal corporations that sent members to Parliament.[119] He defended his actions on the basis of a state interest: eliminating party competition was necessary for good order.[120] Through gerrymandering—then known as "borough remodeling" and "garbling corporations"—Charles II achieved near total triumph for the Tories,[121] destroying the power of the Whigs.[122]

114. Religious toleration had flourished in the interregnum and would not easily be repressed. HARRIS, LATER STUARTS, *supra* note 112, at 8, 46.

115. ACTON, *supra* note 26, at 216. Tories "firmly adhered to the king, profited from his favor, and participated in implementing repressive policies from 1681 to 1685." SCHWOERER, *supra* note 83, at 33.

116. Charles II reconstituted the Church of England, expected Presbyterians to worship there, outlawed public worship by nonconformists such as Quakers and Baptists, and sought to enable Catholics to worship freely. *See* HARRIS, LATER STUARTS, *supra* note 112, at 40–46.

117. ACTON, *supra* note 26, at 216 (identifying commerce as another fault line: Tories aligned with agricultural estates and Whigs with trade and finance).

118. The division between parties "has always been barely the Church and the Dissenter, and there it continues to this Day." DANIEL DEFOE, A NEW TEST OF THE CHURCH OF ENGLAND'S LOYALTY: OR WHIGGISH LOYALTY AND CHURCH LOYALTY COMPAR'D 4 (1702); *see also* Frank Newport, *Religion Remains a Strong Marker of Political Identity in U.S.*, GALLUP (July 28, 2014), https://news.gallup.com/poll/174134/religion-remains-strong-marker-political-identity.aspx [https://perma.cc/3KF2-J5NP].

119. *See* John Miller, *The Crown and the Borough Charters in the Reign of Charles II*, 100 ENG. HIST. REV. 53, 54–55 (1985); M. Dorothy George, *Elections and Electioneering, 1679–81*, 45 ENG. HIST. REV. 552, 577 (1930).

120. Charles II argued that free elections countenanced elections that

> stickled to choose the most disaffected into offices. . . . It was high time to put a stop to this growing evil. This made it necessary for his Majesty to inquire into their abuse of franchises, that it might be in his power to make a regulation sufficient to restore the city [of London] to its former good government. It was not for punishment, but merely for the good of the city that he took this course.

*Petition of the City of London to Charles II in Defense of Their Charter, and the King's Reply, 1683*, *reprinted in* 8 ENGLISH HISTORICAL DOCUMENTS 188, 189 (David Douglas & Andrew Browning eds., 1953).

121. J.R. JONES, THE REVOLUTION OF 1688 IN ENGLAND 129 (1972).

122. PAUL D. HALLIDAY, DISMEMBERING THE BODY POLITIC: PARTISAN POLITICS IN ENGLAND'S TOWNS, 1650–1730, at 195 (1998).

Importantly, this maneuver toward absolutism was executed peacefully and in partnership with the judiciary, often by the issue of writs of *quo warranto* (literally "by what right do you hold that office?") to remove and replace officeholders.[123]

When James II came to the throne and sought a parliament of Tory allies, he continued the tactics perfected by his brother.[124] They produced impressive electoral results for James II in 1685[125] but had immediate economic and persecutory effects.

> [Elected] gentlemen used their influence to promote their own interests at the direct expense of the townsmen, and in most of these remodeled towns there had been a sharp increase in municipal taxation. Equally unpopular was the increased influence and freedom of action which the new charters and the appointed magistrates gave to the clergy, which led to a more continuous and effective period of repression in 1681–5 than at any time since the early 1660s. . . . [V]ery few boroughs returned townsmen or even men with general commercial connections; the vast majority of MPs were country gentlemen with interests that were either remote from, or even diametrically opposed to, those of their constituents.[126]

So long as Charles II and James II applied their innovative strategies to consolidate the monopoly position of the Tories, they went unchecked, if not unopposed.[127] However, when James II attempted to pack Parliament in an "arbitrary" way, his use of this power was perceived as a constitutional threat by Tories and Whigs alike.[128] Tories and Whigs united to support a Protestant

123. George Henry Artley, Law and Politics Under the Later Stuarts: Sir John Holt, the Courts, and the Constitutional Crisis of 1688, at 41–42 (2019) (Ph.D. dissertation, University of Oxford) (on file with the North Carolina Law Review). Charles secured control over the judiciary by changing their tenure from on good behavior to at pleasure. Free elections are also behind securing quo warranto writs and surrenders and mandates in the thirteenth article of the 1688 Declaration of Rights. *See* SCHWOERER, *supra* note 83, at 79.

124. Carolyn A. Edie, *Charles II, the Commons and the Newark Charter Dispute: The Crown's Last Attempt to Enfranchise a Borough*, 10 J. BRIT. STUD. 49, 67 (1970).

125. Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 ALA. L. REV. 221, 275 (2021); *see also* JONES, *supra* note 121, at 46–47; SCHWOERER, *supra* note 83, at 80 ("Of 513 men, 400 were new to Westminster, and no more than 40 were thought to be unfriendly to the king.").

126. JONES, *supra* note 121, at 155–56.

127. W.A. SPECK, RELUCTANT REVOLUTIONARIES 9 (1989).

128. James was resisted "not because his rule was absolute, but because it was viewed as arbitrary, the fatal result of a perceived toxic intermingling of the Catholic doctrine of blind obedience to authority, and his possession of the legal tools necessary to enforce that authority without restraint." Artley, *supra* note 123, at 213. "The campaign was more efficient (and more resented) than previous attempts at control over local affairs by the central government, because it used paid agents who were

Dutch invasion to depose the King in 1688.[129] Electoral district manipulation was a significant contributing factor to a constitutional crisis, James II's abdication, and the ascension of William of Orange and Mary Stuart.[130]

*Harper III* acknowledged the districting abuses in this period but asserted that they were carried out solely through threats and intimidation, citing a paragraph in the Declaration of the Prince of Orange, October 10, 1688, that decries the use of physical force.[131] But from the text of the declaration, it is clear that force is just one way James II and the Tories prevented elections from being made "with an entire liberty."[132] The paragraphs before the one *Harper III* cited condemn district manipulation, test oaths, and other soft tactics.[133] Most significantly, the prince declared that his expedition to England "is intended for no other design, but to have a free and lawful Parliament assembled, as soon as possible; and that in order to this, all the [manipulated charters] . . . shall return again to their ancient prescriptions."[134] In other words, William of Orange asserted he was invading England to establish a legislature not distorted by partisan districting.

Eradicating districting abuses was a primary concern of the constitutional settlement and culminated in the declaration in the Bill of Rights of 1688 that "[e]lection of Members of Parliament ought to be free."[135] And when the phrase was incorporated in the North Carolina Constitution of 1776, it similarly functioned to enjoin any subversion of districting for partisan gain.

4. The Declaration of Rights of 1688 and Parliamentary Supremacy

The history of the constitutional settlement codified in the Bill of Rights of 1688 and its aftermath lays the groundwork for the Free Elections Clause in the North Carolina Constitution as a constraint on state power—a clear and

not themselves part of the local scene . . . and did not belong to the political nation themselves." JONES, *supra* note 121, at 130.

129. *See* JONES, *supra* note 121, at 264.

130. Lord Bolingbroke's 1735 analysis identified borough remodeling as "of the greatest consequence" because it "laid the ax to the root of all our liberties at once." HENRY ST. JOHN, LORD VISCOUNT BOLINGBROKE, A DISSERTATION UPON PARTIES; IN SEVERAL LETTERS TO CALEB D'ANVERS 5 (1735).

131. *Harper III*, 384 N.C. 292, 359–60, 886 S.E.2d 393, 436–37 (2023).

132. *Declaration of the Prince of Orange, October 10, 1688*, JACOBITE HERITAGE, http://www.jacobite.ca/documents/16881010.htm [https://perma.cc/H857-QDUE].

133. *Id.* ("They have also invaded the privileges and seized on the charters of most of those towns, that have a right to be represented by their burgesses in Parliament, and have procured surrenders to be made by them, by which the magistrates in them have delivered up all their rights and privileges to be disposed of at the pleasure of these evil counsellors, who have thereupon caused new magistrates in those towns, such as they can most entirely confide in; and in many of them they have popish magistrates, notwithstanding the incapacities under which the law has put them."); *see infra* notes 56265 and accompanying text.

134. *Id.*

135. Bill of Rights 1688, 1 W. & M. c. 2.

affirmative individual right that has a judicial remedy. The Convention Parliament, the first parliament elected without writs from the king, met on January 22, 1689, and represented a unity between Tories and Whigs.[136] Tracts from this period declared that free elections were the most important safeguard of freedom, denounced James II and his allies for returning compliant members to Parliament, decried *quo warranto* proceedings, and insisted on an intrepid and vigilant judiciary.[137]

The Declaration of Rights was issued on February 13, 1689.[138] In this document, the convention condemned the electoral tactics employed by James II and his "diverse evil counsellors, judges, and ministers."[139] The charge of interfering with elections was matched by an injunction against doing so. So that the people's "religion, laws, and liberties might not again be in danger of being subverted," they declared that elections "ought to be free."[140] The specific language "elections ought to be free" was intended to eliminate electoral districting as an instrument of arbitrary power.[141]

The bipartisan Convention Parliament offered the throne to William and Mary on the condition that they countersign the Declaration of Rights.[142] However, the unity of purpose between Tories and Whigs that enabled the Revolution of 1688 proved short-lived. By the mid-1690s, partisan conflicts in Parliament raged again, and they continued throughout the reigns of William and Mary, and later, Queen Anne.[143]

As Parliament became an institution with unchecked power capable of falling under the control of extreme partisans to the detriment of the public good, the judiciary provided counterbalances.[144] Building on Lord Coke's foundation, jurists (such as Lord Holt), administrators (such as John Locke), and statesmen (such as Lord Bolingbroke) emphasized that Parliament necessarily was subordinate to the constitution. Just as readily as the Crown,

136. *See* SCHWOERER, *supra* note 83, at 109. A free election was expressed as "truly and uprightly, without favour or affection to any person, or indirect practice or proceeding." *Id.* at 138.

137. *Id.* at 165–66. Judicial independence (especially the appointment and tenure of judges) was central. A contemporary puppet show depicted twelve dancing red robes saying anything they were told. *Id.* at 166.

138. *Id.* at 27.

139. 1 W. & M. c. 2.

140. *Id.*

141. *See* SCHWOERER, *supra* note 83, at 79 (recounting the districting and other elections abuses behind the clause, discussing their prominence in the Convention debates and contemporaneous pamphlets, and noting a companion clause prohibiting *quo warranto* writs).

142. *See id.* at 282–83. Although the condition was not necessarily an ultimatum, the political pressure was nonetheless strong enough for William and Mary to concur. *See id.*

143. HARRIS, REVOLUTION, *supra* note 96, at 313.

144. *See* HALLIDAY, *supra* note 122, at 291–303 (discussing how the Revolution of 1688 transformed the judiciary as well as the legislature and executive, and how in the subsequent decades the King's Bench partnered with Parliament to remedy and ameliorate the worst of the constitutional impacts of acute partisan politics).

Parliament could abuse the trust reposed in them by the people. Parliament must, therefore, be bound by the constitutional protections expressed in the common law right to free elections and the Bill of Rights.[145]

In a footnote, *Harper III* stated that

> [t]he historical context of the English Bill of Rights indicates that the English free elections clause was in no way intended to address gerrymandering in apportionment. . . . Rotten Boroughs at the time of the signing of the English Bill of Rights and their continued use thereafter suggests that the English people did not intend to address apportionment issues with their free elections clause.[146]

Some additional information might offer a clearer understanding of Rotten Boroughs. The early distribution of parliamentary boroughs corresponded roughly to the relative wealth of the counties, which at the time was primarily agricultural.[147] Few new boroughs were created after 1604, and none were aimed at partisan control.[148] The unequal distribution of representation came about from a change in conceptions of fair representation (wealth to population, paternalism to direct) and demographic changes (rural to urban, agriculture to industry).[149] The disproportionately high voting power of a borough that had become "rotten" stemmed from a failure to recalibrate it, not from the notion that the right to free elections allows partisans to hijack reapportionment by assigning voters to special-purpose electoral districts designed to diminish their voting power. Such a claim would be absurd, as it would undermine the very protections the Bill of Rights was intended to ensure.

145. *See* Phillip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in* City of London v. Wood, 94 COLUM. L. REV. 2091, 2091–2101 (1994). In 1701, Daniel Defoe invoked the 1688 Declaration of Rights and said, "Englishmen are no more to be slaves to Parliament than to a King." *Id.* (citing DANIEL DEFOE, MR. S----R., THE ENCLOSED MEMORIAL 4 (1701)). This interpretation would prevail throughout North America. *See, e.g.*, F. STIMSON, POPULAR LAW-MAKING: A STUDY OF THE ORIGIN, HISTORY, AND PRESENT TENDENCIES OF LAW-MAKING BY STATUTE 47 (1910) ("Elections shall be free and unimpeded, uncontrolled by any power, either by the crown, or Parliament, or any trespasser. That has been a great principle of English freedom ever since, and passed into our unwritten constitution over here, and of course has been re-enacted in many of our laws. That is the feeling which lay behind those statutes which we enacted after our slaves were freed, for the making of elections free in the South; for protecting negroes in the act of voting and preventing interference with them by the Ku Klux Klan.").

146. *Harper III*, 384 N.C. 292, 360 n.21, 886 S.E.2d 393, 437 n.21 (2023); *see also id.* at 361, 886 S.E.2d at 438 ("Given the historical context of the English Bill of Rights, our framers did not intend the adoption of the free elections clause to limit the General Assembly's redistricting authority or to address apportionment at all."). *But see infra* notes 562–63 and accompanying text.

147. A.M. CHAMBERS, A CONSTITUTIONAL HISTORY OF ENGLAND 201 (1909).

148. *Id.* at 202 ("[T]he creation of rotten boroughs ceased with the Tudors . . . Charles II enfranchised Newark and Durham, but the action was greeted with such a storm of opposition, he dared not repeat the experiment.").

149. *Id.*

Therefore, Rotten Boroughs do not support *Harper III*'s thesis because Rotten Boroughs have nothing to do with the right of free elections.

### 5. *Ashby v. White* (1704) and Judicial Intervention

The free election right and remedy (the core issues in the *Harper* cases) were addressed 320 years ago in the canonical case of *Ashby v. White*.[150] Chief Justice Lord Holt held in 1703 that the right to free elections is actionable in law and requires a judicial remedy.[151] Holt was a member of the Commons committee that drafted the Bill of Rights of 1688, and, therefore, his views on the meaning of "elections . . . ought to be free" carry great weight.[152] A model jurist in a time of intense partisan strife, Lord Holt transcendently merged his native Tory beliefs in tradition and the secular priesthood of the law with a Whig reverence for the individual spirit of conscience.[153]

Ashby was a poor cobbler in Aylesbury regarded by the Tories as under the sway of a Whig lord. Aylesbury inclined Whig, and the Commons were controlled by Tories.[154] The Commons diminished the voting power of Whigs in Aylesbury by targeting Ashby, residents of an alms house, and certain other Whig-leaning voters on the pretext of the "compelling state interest" (to use a modern term) that financially destitute voters are more vulnerable to influence by others and so should be excluded.[155] Ashby was denied his vote, not by force, but by an election regulation that seemed to be within the prerogative of the Commons.[156] The Commons asserted jurisdiction to decide the complaint (to be the judge of their own trial) and dismissed it for partisan reasons.[157] Ashby appealed to the King's Bench but lost, with Lord Holt writing in dissent. On

150. Ashby v. White, (1703) 92 Eng. Rep. 126, 137 (QB) (Holt, C.J., dissenting), *rev'd*, Ashby v. White, (1703) 1 Eng. Rep. 417 (HL) (appeal taken from Eng.). Chief Justice Lord Holt of the Queen's Bench wrote in dissent. His reasoning was adopted on appeal by the House of Lords on January 14, 1703. Eveline Cruickshanks, Ashby v. White*: The Case of the Men of Aylesbury, 1701–4*, *in* PARTY AND MANAGEMENT IN PARLIAMENT, 1660–1784, at 87, 94–95, 98–99 (1984).

151. *Ashby*, 92 Eng. Rep. at 137.

152. *See* SCHWOERER, *supra* note 83, at 270; *accord* Eldred v. Ashcroft, 537 U.S. 186, 213 (2003) ("[T]his Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given [the Constitution's] provisions." (quoting Myers v. United States, 272 U.S. 52, 175 (1926))).

153. Artley, *supra* note 123, at 3–4, 12. Holt declared an enslaved person free the moment he touches English soil. Holly Brewer, *Creating a Common Law of Slavery for England and Its New World Empire*, 39 LAW & HIST. REV. 765, 821 (2021) (citing Smith v. Browne & Cooper, Holt, K.B. 495, 90 Eng. Rep. 1172 (1701)). Holt's view on an Elizabethan statue specifying where to worship further embodies his reverence for the individual spirit of conscience: "Parishes were instituted for the benefit of the people, not of the parson." Britton v. Standish (1705) 87 Eng. Rep. 943, 944, 6 Mod. 188, 190.

154. *See* Cruickshanks, *supra* note 150, at 89.

155. *See id.* at 88–91.

156. *See id.*

157. *See id.* at 88–95.

appeal, the House of Lords (acting as the supreme court) reversed under Lord Holt's reasoning.[158]

*Ashby* sets out a syllogism which remains foundational to judicial review of voting rights and property protections[159]: (1) individuals have a common law and constitutional right to representation, (2) intentional interference with free elections by the legislature denies this right, (3) every right has an actionable remedy, (4) the remedy cannot be found in a self-interested legislature, and therefore, (5) the remedy is to be found in the independent judiciary.[160]

*Ashby* addresses each key element of the right of free elections. First, the right of free elections is a fundamental individual right, bound up with fair representation, consent of the governed, and the legitimacy of law.

> [T]he plaintiff hath a right to vote, and that in consequence thereof the law gives him a remedy, if he is obstructed . . . . By the common law of England, every commoner hath a right not be subjected to laws, made without their consent . . . and the grievance here is, that the party not being allowed his vote, is not represented.[161]

Second, the right of free elections is actionable and justiciable[162]:

> It is a vain thing to imagine, there should be right without a remedy . . . . Would it not look very strange . . . [if] the person injured shall have no remedy, though the injury be done to such a right, upon the security

158. *See id.* at 88–103.

159. The United States Supreme Court has held that actions for damages may be maintained for wrongful deprivations of the right to vote. *See* Carey v. Piphus, 435 U.S. 247, 264 n.22 (1978) (citing Ashby v. White (1703) 92 Eng. Rep. 126, 137 (QB) (Holt, C.J., dissenting)). *Ashby v. White* is also the foundation of corporate law in America; the idea that the legislature, as successor to the king, cannot abridge rights once granted derives from *Ashby*. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 572 (1819) ("Consequences of the utmost magnitude may sometimes depend on the exercise of the right of suffrage by one or a few electors. Nobody was ever yet heard to contend, however, that on that account the public might take away the right or impair it. This notion appears to be borrowed from no better source than the repudiated doctrine of the three judges in [Ashby v. White].").

160. *Cf.* THE JUDGEMENTS DELIVERED BY THE LORD CHIEF JUSTICE HOLT IN THE CASE OF *ASHBY V. WHITE* AND OTHERS, AND IN THE CASE OF JOHN PATY AND OTHERS 2–3 (London, Saunders & Benning 1837) [hereinafter THE JUDGEMENTS DELIVERED] ("I lay down these three positions: 1. That the plaintiff, as a burgess of this borough, hath a legal right to give his vote for the election of parliament burgesses. 2. That as a necessary consequence thereof, and an incident inseparable to that right, he must have a remedy to assert, vindicate, and maintain it. 3. This is the proper remedy which the plaintiff hath pursued, being supported by the grounds, reasons, and principles of the ancient common laws of England.").

161. *Judgment of Chief Justice Holt in* Ashby v. White*, 1704*, *reprinted in* 8 ENGLISH HISTORICAL DOCUMENTS, *supra* note 120, at 172. The law treats all electors equally. "The law hath no respect to person. He is (though a cobbler) a free man of England, and to be represented in Parliament." THE JUDGEMENTS DELIVERED, *supra* note 160, at 29.

162. Gray v. Sanders, 372 U.S. 368, 375 n.7 (1963) (noting that *Ashby v. White* supports the principle that any person whose right to vote is impaired by gerrymandering has standing to sue).

> whereof the lives, liberty, and property, of all the people of England so much depend? . . . [T]o deny this action is to deny the benefit of the law in a matter of the most tender concern to an Englishman.[163]

Electoral manipulation by the legislature harms an individual right. "Where the privilege of election is used by particular persons, it is a particular right vested in each particular man."[164] "[I]f the law do not allow an action to the party injured, it tolerates injury, which is absurd to say is tolerable in any government, for any one subject to be permitted to do to another with impunity."[165] In the words that have resonated through the centuries: "There is no such notion in the law as a right without a remedy."[166]

Third, adjudicating the right and remedy is a constitutional matter to be decided by the judiciary—the legislature cannot judge its own case.[167] The judiciary is bound to the elector to give effect to the right without being deterred by the legislature.[168] The adjudication of the right is not a political question but a question of the constitutionality of a legislative act.[169] Like

163. 17 HL JOUR. 526–34 (1830) (Mar. 27, 1704), https://www.british-history.ac.uk/lords-jrnl/vol17/pp526-536 [https://perma.cc/7ABJ-ZGMG]; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("'[I]t is a settled and invariable principles of the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.' The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *109)); N.C. CONST. art. I, § 18 ("[E]very person for an injury done him . . . shall have remedy by due course of law . . . ."); Corum v. Univ. of N.C. *ex rel.* Bd. of Governors, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (acknowledging "the common law, which provides a remedy for every wrong").

164. *Dartmouth College*, 17 U.S. (4 Wheat.) at 583 (quoting *Ashby*, 92 Eng. Rep. at 135).

165. THE JUDGEMENTS DELIVERED, *supra* note 160, at 10–11.

166. *Id.* at 9.

167. *See* Tenney v. Brandhove, 341 U.S. 367, 376–77 (1951) (stating that legislature's "claim of power to establish the limits of its privilege has been little more than a pretense, since *Ashby v. White*"); *see also* ORTH, DUE PROCESS, *supra* note 85, at 15–32 ("Can a law make a man a judge in his own case? The question seems almost to answer itself."). Lord Holt dismissed the idea that the legislature has reserved this power to itself, "it is a very odd term or phrase, but it is but *gratis dictum*, without the least appearance of authority or reason, for sure the Constitution of England is not derived from the House of Commons, but the House of Commons is a part of it." THE JUDGEMENTS DELIVERED, *supra* note 160, at 23.

168. *See* THE JUDGEMENTS DELIVERED, *supra* note 160, at 26–27; N.C. CONST. art. I, § 18 ("[R]ight and justice shall be administered without favor, denial, or delay.").

169. *See* Nixon v. Herndon, 273 U.S. 536, 540 (1927) ("The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage [denial of the right to vote]. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White* and has been recognized by this Court." (citation omitted)). Lord Holt respected the great importance of the Legislature in the safety and defense of the realm; he knew that although elections concern the lives and liberties of the subjects of England, because the law provides for the freedom of elections, "it is to be pursued in the ordinary and common methods of justice, without giving them so much trouble to the interruption of their greater affairs." THE JUDGEMENTS DELIVERED, *supra* note 160, at 26.

property, the right of free election cannot be abridged by the legislature.[170] Lord Holt's reasoning makes these points clear:

> [T]here can be no petition in this case to the Parliament, nor can they judge of this injury, or give damages to the plaintiff. Although this matter relates to the Parliament, yet it is an injury precedaneous to the Parliament; and where Parliamentary matters come before us, as incident to a cause of action concerning the property of the subject, which we in duty must determine, though the incident matter be Parliamentary, we must not be deterred, but are bound by our oaths to determine it. . . . *And though the House of Commons have right to decide elections, yet they cannot judge of the charter originally*, . . . they have nothing to do: and we are to exert and vindicate the Queen's jurisdiction, and not to be frighted because it may come in question in Parliament; and I know nothing to hinder us from judging of matters depending on charter or prescription.[171]

Fourth, the phrase "elections . . . ought to be free" prohibits any authority regulating the manner of elections, including the legislature, from either directly or indirectly hindering the will of the elector.

> [T]he Statute of Westminster 1. cap. 5, enacts that elections shall be free. If he that hath a right to vote be hindered by him that is to receive his vote or to manage the election, that election is not free, but such an impediment is a manifest violation of that statute and an injury to the party whose vote is refused.[172]

Any intentional disturbance of the elector's right is proscribed. Significantly, it is not limited to physical force, menace, or fraud.

> Indeed I do not find that the defendants did by force of arms drive the plaintiff away from the election, nor by menaces deter him, but I find they did maliciously hinder him; and so it is charged by the plaintiff in the declaration, and so found by the jury, that they did it by fraud and

170. *See* THE JUDGEMENTS DELIVERED, *supra* note 160, at 6–7, 9 (claiming that the franchise and privilege is an outright grant).

171. Ashby v. White (1703) 90 Eng. Rep. 1188, 1189.

172. *Id.* at 11.

> malice, and so the defendants are offenders within the very words of the Statute of Westminster 1.[173]

"Hinder," here refers to a disadvantage imposed by law, not merely a physical obstacle. The focus of the inquiry is on the result—the hindrance or disturbance of the will of the elector—not the method.[174]

Fifth, judicial enforcement of the right to free elections is an essential check on arbitrary government. Abrogating free elections is not a prerogative of the Legislature: "That certainly can never be esteemed a privilege of Parliament which is incompatible with the rights of the people."[175] Failure to enforce free elections undermines legislative accountability and opens the door to increasing corruption.[176] "Deterring electors from prosecuting actions in the ordinary course of law . . . is a manifest assuming a power to control the law, to hinder the course of justice, and subject the property of Englishmen to the arbitrary votes of the House of Commons."[177]

*Ashby v. White* is one of the most important constitutional law cases of the 18th century. Today, every lawyer knows its great principle, "[t]here is no such notion in the law as a right without a remedy."[178] It remains a foundational text

173. *Id.* at 12.

174. Lord Holt's brethren charged that that the defendant's allegation that he was hindered in the giving his vote is too general; it should have been said how, and what he did to hinder him, and Lord Holt answered that in

> all cases where a man is hindered of an incorporal right, as this is, it is sufficient to say in the declaration that he was hindered . . . without showing in what manner he was disturbed; besides, this is as certain as the Statute of Westminster 1. Ca. 5, which hath the same word in effect as is used here, viz. disturb to make free election.

*Id.* at 30.

175. *Id.* at 35.

176. *See* Baker v. Carr, 369 U.S. 186, 248 (1962) ("The same prophylactic effect [of redressing gerrymandering] will be produced here [by allowing a cause of action], as entrenched political regimes make other relief as illusory in this case as a petition to Parliament in *Ashby v. White* would have been."). Lord Holt warned that if a rule maker

> shall have a liberty to refuse men that have votes, he will easily have a majority to vote on his side: and then what will become of our elections? He will return him that is elected by his majority, which he hath made by excluding the votes of others which have a right. This will give an opportunity to officers to be partial and corrupt. . . .

THE JUDGEMENTS DELIVERED, *supra* note 160, at 17. Lord Holt rejected the idea that protecting election freedoms would be an inconvenience to the Legislature. "[N]o inconveniences can ensue, but rather the contrary. It will be a great security to the subject's right and property against the frauds and partialities of officers that are trusted in great measure with the rights of the people, to receive and allow their suffrages upon elections." *Id.* at 33.

177. Cruickshanks, *supra* note 150, at 95. The House of Lords cemented Lord Holt's reasoning in a long representation that passed unanimously on March 27, 1704, and was published throughout the realm. It declared the courts open to vindicate the right of free election and to provide a remedy. *Id.* at 94–95.

178. THE JUDGEMENTS DELIVERED, *supra* note 160, at 9.

for North Carolina law, broadly conceiving the freeholds, franchises, and property rights of individuals and protecting them against government appropriation. In 1805, its reasoning was applied in *Trustees of the University of North Carolina v. Foy*[179] to prohibit the legislature from interfering with the charter of the University of North Carolina.[180] In 1819, both *Ashby* and *Foy* were cited in the famous *Dartmouth College v. Woodward*[181] case, which is the basis of corporate law in America.[182] As in those cases, the right to a free election is incorporeal property irrevocably granted.[183] Even if districting is "textually committed" to the legislature, the legislature may not exercise that power in a manner that disseizes an individual.[184]

In sum, when the Bill of Rights of 1688 used the phrase "elections . . . ought to be free," it specifically extinguished the idea that the most powerful political actor, the monarch, was vested with a prerogative to manipulate legislative districts. In that same revolution, Parliament became the most powerful political actor, and it too had no such prerogative—free elections remained an individual liberty. *Ashby v. White* clarified that the right applies against the legislature and has a judicial remedy. This understanding carried to the Palatinate of Carolina on the periphery of the British Atlantic world.

### C. *Pre-Revolution North Carolina (1663–1776)*

Although often overlooked, the century before North Carolina became independent is a separate constitutional chapter in which the Assembly was unchecked and supreme. North Carolina was governed by its own elected legislatures beginning at its inception in 1663. Three primary forces shaped a distinctive polity. First, the relentless imperial competition with France and other forces in the British Atlantic world accelerated the colonization of North Carolina in a distinctive pattern of small landholding yeomen. Second, conflicts over religion gave North Carolina its population of diverse dissident religions who sanctified freedom of conscience and abjured despotic ecclesiastical or

179. 5 N.C. (1 Mur.) 58 (1805).

180. *Id.* at 83–84.

181. 17 U.S. (4 Wheat.) 518 (1819).

182. *Id.* at 575, 704; *see* Alyssa Penick, *From Disestablishment to* Dartmouth College v. Woodward*: How Virginia's Fight over Religious Freedom Shaped the History of American Corporations*, 39 LAW & HIST. REV. 479, 479–80 (2021).

183. *Id.* at 704 ("Where the privilege of election is used by particular persons, it is a particular right vested in each particular man.").

184. *See* Van Bokkelen v. Canaday, 73 N.C. 198, 229 (1875) (Rodman, J., concurring) ("The right to vote is property, and no man can be deprived of it 'but by the law of the land.' (Bill of Rights, sec. 17)."); *see also id.* at 215–16 ("In electors is vested a high, and to freemen a sacred right of which they cannot be divested by any power but that which established it. The Legislature must prescribe necessary regulations as to the plans made, manner and whatever else may be required to insure its full and free exercise. But these regulations must be subordinate to the right the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destructive.").

political control. Third, the pursuit of economic opportunities, both locally and within a globalizing mercantilist trading network, gave North Carolina law experience with balancing competing private commercial and social interests. Much of this was worked out locally. North Carolina's legal status and the absence of a standing army in the province limited England's coercive power in the event of disagreements. The threat to North Carolinians' liberties mostly came from within—its own citizens misusing the power of the legislature to disadvantage rivals, unhindered by the local judiciary. Partisan legislatures are the home-grown threat addressed by the Free Elections Clause of the North Carolina Constitution of 1776.

### 1. Proprietary Palatinate of Carolina (1663–1729)

The constitutional autonomy of the people of North Carolina derived, in part, from the tenure that Charles II granted to eight of his allies in 1663 over the land named "Carolina."[185] The grant was defined by reference to the quasi-regal palatinate of the Bishop of Durham,[186] the highest entitlement available under English feudal law apart from a kingdom.[187] This largely shielded the Lords Proprietors and, in turn, their freeholders in Carolina, from interference by the king or parliament. It also empowered the Proprietors to grant Carolinians expanded liberties and rights,[188] including self-government through elected representation in local assemblies.[189] Carolinians also were entitled to judicial review over "the true sense or understanding" of the founding charter.[190] The constitution of Carolina was effectively a form of popular sovereignty[191] because the Palatine Lords had little philosophical inclination,[192] economic

185. THE FIRST CHARTER GRANTED BY KING CHARLES THE SECOND, TO THE LORDS PROPRIETORS OF CAROLINA (1663) [hereinafter FIRST CHARTER], *reprinted in* 1 COLONIAL AND STATE RECORDS OF NORTH CAROLINA 20, 22 (1886).

186. *Id.*

187. *See* GAILLARD THOMAS LAPSLEY, THE COUNTY PALATINE OF DURHAM 2 (1900).

188. *See* FIRST CHARTER, *supra* note 185, at 22. Freemen were granted "all liberties, franchises and privileges of this our kingdom of England." *Id.* The chief advisor to the proprietors was John Locke. David Armitage, *John Locke, Carolina, and the* Two Treatises of Government, 32 POL. THEORY 602, 603 (2004).

189. *See* FIRST CHARTER, *supra* note 185, at 23 (declaring that all laws required the "assent and approbation" of freemen).

190. *Id.* at 33. Settlers could appeal to the local Governor and Council and could seek redress ultimately from the Lords themselves. *Id.*

191. *See* LINDLEY S. BUTLER, A HISTORY OF NORTH CAROLINA IN THE PROPRIETARY ERA, 1629–1729, at 199–200 (2022).

192. Each of the proprietors was a leading figure in enlightened leadership, and their ideologies spanned the range from royalist, Tory, or high-Anglican to parliamentarian, Whig, or antitrinitarian. *Id.* at 53–62.

incentive,[193] or practical means[194] to abridge fundamental rights or to depart significantly from the will of the people.

The threat to the liberties of Carolinians therefore came not from England, but from their fellow citizens wielding the powers of the Assembly. The same contests of religion and constitution in the Three Kingdoms ran through Carolina partisan politics. Even though Carolinians possessed chartered rights to liberty of conscience and free elections, they lacked effective remedies. The partisan conflicts in the Albemarle and in Berkeley County described below illustrate the problem. The injured could in theory appeal to their oppressors in the Assembly, but this would be futile, and the incumbents placed change through fresh elections out of reach. The Palatine Lords and the governors they appointed had limited leverage, and the legal authority of Parliament and the Crown over the palatinate charter was clouded. The province's judiciary had not yet fully developed the authority to restrain its legislature. This left armed revolt, with its high cost and uncertain outcome, as a problematic last resort.

The northeast Albemarle region, the first settled, was in the 1660s a haven for republican nonconformists, but in 1675, royalist churchmen gained control of the Assembly and disabled its checks—free elections, judicial independence, and palatinate oversight—producing a series of conflicts known as Culpepper's Rebellion.[195] In 1701, through "a great deal of care and management," "churchmen secured an Assembly which passed an act to make the Church of England the established church of the colony,"[196] but Quakers regained control in 1703 and repealed it.[197] In 1710, the same party fissures provoked a conflict known as Cary's Rebellion.[198]

193. Carolina was a private commercial enterprise, not a royal project, whose success depended on attracting settlers. *Id.*

194. The Lords did not maintain an army in the province. WAYNE E. LEE, CROWDS AND SOLDIERS IN REVOLUTIONARY NORTH CAROLINA: THE CULTURE OF VIOLENCE IN RIOT AND WAR 60 (2001) ("[T]he only significant force available to the state for use against the populace was the populace itself.").

195. *See generally* Mattie Erma E. Parker, *Legal Aspects Of "Culpeper's Rebellion*," 45 N.C. HIST. REV. 111, 111–27 (1968) (explaining the legal and historical context of Culpepper's Rebellion). The term "nonconformist" or "dissident" refers to religious groups that did not practice in accordance with Anglican (or Catholic) rites. "Churchmen" describes advocates of an Anglican or Presbyterian state church. The terms "republican" and "loyalist" correspond roughly to the parliamentarian and royalist factions in the Wars of the Three Kingdoms, and to nascent Tories and Whigs.

196. STEPHEN BEAUREGARD WEEKS, THE RELIGIOUS DEVELOPMENT IN THE PROVINCE OF NORTH CAROLINA, 10 JOHNS HOPKINS U. STUD. HIST. & POL. SCI. 1, 274 (1892).

197. *Id.* at 37.

198. Jonathan Edward Barth, *"The Sinke of America": Society in the Albemarle Borderlands of North Carolina, 1663–1729*, 87 N.C. HIST. REV. 1, 25 (2010). Nonconformist Quakers and their allies (Whig merchants alarmed by a powerful Assembly controlled by affluent plantation owners) opposed an Anglican-dominated Assembly from establishing the Anglican church as the official tax-supported church of the colony. *Id.*

The direct experience of John Ashe, the grandfather of Justice Samuel Ashe (a drafter of the North Carolina Declaration of Rights and Constitution of 1776, and author of *Bayard v. Singleton*[199]), epitomized the importance of the right to free elections to restrain the Assembly. In 1701, Dissenters asserted that French Protestants allied with Tory Anglicans to manipulate the election outcome in Berkeley County (now part of South Carolina).[200] John Ashe lodged a complaint with the Lords Proprietors, stating that "it is one of the fundamental rights and unquestionable privileges belonging to Englishmen, that all elections of their representatives to serve in parliament, ought to be free."[201] Daniel Defoe, engaged by the Dissenters to petition the British Parliament, described the actions of the legislature as "party tyranny."[202] Defoe asserted that abridging the right of free election violated a condition of the Charter and that Parliament, in its judicial capacity, had an obligation to vindicate those rights.[203] Defoe wrote in 1705, "without doubt those able heads that settled [the Constitution of Carolina], did not forget, that even those representative assemblies might . . . be modelled and influenced in matters of parties to oppress and injure the people they acted for."[204] The House of Lords, in its judicial role as the supreme court, invalidated the acts in 1706, finding them "not warranted by the Charter granted to the Proprietors of that Colony, as being not consonant to Reason, [and] repugnant to the Laws of this Realm."[205]

The proprietary period demonstrates the historical autonomy of the North Carolina Assembly, that it was constrained by the well-established right of free elections, but that its remedy in the palatinate of Carolina was intermittent because of the absence of either an executive or a judicial check on the legislature.

199. *See* 1 N.C. 5, 8, 1 Mart. 48, 51 (1787).

200. *See* JONATHAN MERCANTINI, ORIGINS OF A SOUTHERN MOSAIC: STUDIES OF EARLY CAROLINA AND GEORGIA 19–20 (1975); WEEKS, *supra* note 196, at 43, 43 n.3 (noting the Assembly was chosen with "very great partiality and injustice" and then passed "test acts" to deprive Quakers of their votes).

201. DANIEL DEFOE, PARTY-TYRANNY: OR AN OCCASIONAL BILL IN MINIATURE (1705) (quoting Representation of the Inhabitants to the Lords and Proprietors of the Province of Carolinas (June 26, 1705)), *reprinted in* 2 THE COLONIAL RECORDS OF NORTH CAROLINA 891, 903 (William L. Saunders ed., 1886) [hereinafter COLONIAL RECORDS].

202. *Id.*

203. *Id.*

204. *Id.* at 892.

205. 18 HL JOUR. 151 (Mar. 12, 1706) (Eng.), https://www.british-history.ac.uk/lords-jrnl/vol18/pp150-152 [https://perma.cc/9R7H-HGAB]. Earlier, the Board of Trade had suggested to the Palatine lords that they would forfeit Carolina if they did not vindicate the liberties granted to the inhabitants. *See* Address of the Lords Spiritual and Temporal in Parliament to Her Majesty (Mar. 13, 1705), *in* 1 COLONIAL RECORDS, *supra* note 201, at 634, 636–37 (House of Lords finding the Act "founded upon falsity" and "repugnant to the Laws of England"); WEEKS, *supra* note 196, at 45–46 (describing the House of Lords disposition of the case).

### 2. Royal Province of North Carolina (1729–1775)

The constitutional deficiency in enforcing the right of free elections continued when North Carolina transitioned from a palatinate to a royal province, and it was not repaired until the North Carolina Constitution of 1776. The North Carolina Assembly's power was not materially diminished when, in 1729, seven of the eight Palatine Lords sold their interest in Carolina to the Crown.[206] As a legal matter, the Crown was bound by the legal principle that the privilege of self-government, once granted by the Crown, is irrevocable.[207] As a military matter, the Crown did not deploy troops in North Carolina.[208] Accordingly, during this period, the Anglican establishment in the Assembly retained an upper hand over royal governors and solidified its position internally.[209] Royal governors attempted to maneuver around oligarchies in the legislature to expand popular representation by creating new counties in the interest of civil peace and commercial development.[210] Ultimately, the failure to establish a more representative Assembly erupted into civil violence in the 1771 War of Regulation.[211] Thus, the 1776 North Carolina founders had before them the cycle of (1) the legislature captured by unrepresentative partisans, (2) inadequate local executive or judicial remedies, (3) ineffective intervention by the superintending power (first the proprietors, now the crown), resulting in (4) civil violence. The North Carolina Constitution of 1776 was designed to break that cycle by restraining the Assembly and empowering the judiciary.

Giving substance to the right of free elections continued to be a concern under a supreme British Parliament. In England in 1733, Lord Bolingbroke published an analysis of the Revolution of 1688 (a veiled critique of the self-perpetuating Whig legislature in his own day) that was read widely in the 1776 founding period of North Carolina.[212] Bolingbroke analogized gerrymandering to a fatal poison in drinking water, or a gangrene in a body, and equated it with bribery.[213] Bolingbroke placed responsibility on the "zeal" of partisan

206. *See* Barth, *supra* note 198, at 27; 3 COLONIAL RECORDS, *supra* note 201, at xxii.

207. 3 COLONIAL RECORDS, *supra* note 201, at xii. This precedent had been established in the struggle between the crown and the assembly of Jamaica between 1678 and 1680. AGNES M. WHITSON, CONSTITUTIONAL DEVELOPMENT OF JAMAICA 34 (1929). It was reaffirmed for North Carolina in the attorney general opinion of February 27, 1738. *See infra* note 227 and accompanying text.

208. LEE, *supra* note 194, at 60.

209. Barth, *supra* note 198, at 26. The concentration of wealth from large scale agriculture based on slave labor strengthened the political power of the Eastern Counties. HUGH T. LEFLER & WILLIAM S. POWELL, COLONIAL NORTH CAROLINA: A HISTORY 217–18 (1973).

210. LEFLER & POWELL, *supra* note 209, at 218–19.

211. *See id.* at 231–39.

212. Jefferson extensively transcribed Bolingbroke in his commonplace. *See* Jefferson's Literary Commonplace Book (c. 1758), *in* 2 THE PAPERS OF THOMAS JEFFERSON 1, 233 (Douglas L. Wilson ed., 1989) (indexing the multiple transcriptions of Bolingbroke by Jefferson).

213. BOLINGBROKE, *supra* note 130, at 84, 154, 162.

legislators[214] and condemned partisan judges who, "for the sake of their own vile interest," legitimized gerrymandering in law.[215] The right to free elections exists to restrict the legislature from breaching its trust. Disagreeing with Francis Bacon's maxim that "there is nothing which a parliament cannot do," Bolingbroke stated, "[a] Parliament cannot annul the Constitution . . . . The legislative is . . . [not] an arbitrary power. It is limited to the public good of the society. It . . . can never have a right to destroy, enslave, or designedly to impoverish the subjects . . . ."[216] Liberty is not secure "unless the *Freedom of Elections* and the *Frequency, Integrity,* and *Independency* of Parliaments, were sufficiently provided for. . . . The Claim of Right declares, indeed, that *elections ought to be free* . . . . But such declarations . . . are nothing better than pompous trifles, if they stand alone, productive of no good."[217]

The right of free elections was asserted against partisan districting in North Carolina in 1732. John Batista Ashe brought charges before the Lords of Trade[218] that Governor Burrington, the first royal governor of North Carolina, violated the right to free elections.[219] Having alienated the Assembly, Burrington in council assumed the power to lay off districts to his advantage.[220] He established the precincts of Edgecombe, Onslow, and Bladen, the latter containing "not three freeholders nor thirty families."[221] Nathaniel Rice and John Batista Ashe petitioned the Board of Trade for redress against Burrington for dividing old precincts, creating unnecessary new ones, and preventing the Assembly from erecting necessary new precincts, "whereby his arts he has endeavored to prepossess people in a future election according to his desire, his

214. *Id.* at 84 ("[A]mong all the excesses, into which the Tories ran, in favor of the crown, and in hopes of fixing dominion in their own Party, their zeal to support the methods of garbling corporations [gerrymandering] . . . threatened public liberty the most.").

215. *Id.* ("The others abetted, . . . under the pretense at least of Law, a power which gave the Crown too much influence in the elections of members to the House of Commons; but these men, if there are any such, have been engaged in a practice, for the sake of their own vile interest . . . .").

216. *Id.* at 270–71.

217. *Id.* at 163 (emphasis added).

218. The Lords Commissioners for Trade and Plantations (also known as the Board of Trade) was an agency created by King William III to exercise the powers of the king in British colonial matters. *See* ARTHUR HERBERT BASYE, THE LORDS COMMISSIONERS OF TRADE AND PLANTATIONS 1 (1925). For a discussion of the Board's intricate relations with parliamentary powers, see Philip Haffenden, *Colonial Appointments and Patronage Under the Duke of Newcastle, 1724–1739*, 78 ENG. HIST. REV. 417, 418–21 (1963).

219. Memorandum from Nathanial Rice, John Baptista Ashe & John Montgomery to the Lords Commissioners for Trade & Plantations (Nov. 17, 1732), *in* 3 COLONIAL RECORDS, *supra* note 201, at 375.

220. 3 COLONIAL RECORDS, *supra* note 201, at v.

221. 1 SAMUEL A'COURT ASHE, HISTORY OF NORTH CAROLINA 234 (1925).

designs herein being . . . to get a majority of his creatures in the Lower House."[222]

> Does it not savour of absurdity to say that the People have a part in making their Laws, for that their Representatives are to advise, assent and approve of them before they are made, but that the Governor and Council are entirely of themselves to say and direct what shall be the Representatives to give and declare such advice, assent and approbation; as if they may divide old & erect new Precincts at their pleasure, in effect they will do. Will such be the Delegates of the People? Will the People have any part in enacting such laws?[223]

In 1733, the Board replaced Burrington with Gabriel Johnston.[224] In this case, the violation of the right of free elections was vindicated through the superintending power of the Crown.

Governor Gabriel Johnston attempted to place further guardrails around the Assembly using the power of the Crown, but failed. When he arrived in November 1734, he quickly assessed his lack of influence over the Albemarle-dominated Assembly at Edenton.[225] He requested the Crown to send troops under his command and to repeal the laws which granted North Carolina self-governance.[226] No troops were sent, and Johnston's legal plans were ended by an opinion from the Attorney General and the Solicitor General dated February 27, 1738, that "as to Old Laws which have been in use amongst the people and acquiesced in by the Proprietors we are of opinion they are not void or now repealable by the Crown."[227]

222. Memorandum from Rice et al. to the Lords Commissioners, *supra* note 219, at 380. This episode was noted by Justice Antonin Scalia in *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004).

223. Letter from Nathaniel Rice & John Baptista Ashe to Governor Burrington, *in* 3 COLONIAL RECORDS, *supra* note 201, at 449, 456; *see also* Governor Burrington's Paper in Relation to the Erecting of Precincts (Dec. 26, 1732), *in* 3 COLONIAL RECORDS, *supra* note 201, at 442, 448 (explaining the "precincts lately erected" and "refuting [Nathaniel Rice's and John Baptista Ashe's] pretended reasons and objections"); Memorandum by Nathaniel Rice & John Baptista Ashe to His Majesty's Council Against the Dividing of Precincts, *in* 3 COLONIAL RECORDS, *supra* note 201, at 440, 440–42.

224. 3 COLONIAL RECORDS, *supra* note 201, at iii.

225. Letter from Governor Johnston to the Lords of the Board of the Trade (Apr. 30, 1737), *in* 4 COLONIAL RECORDS, *supra* note 201, at 249, 250 (1886). The Assembly in North Carolina in 1746 was composed of fifty-four members, with the northeastern counties proximate to Edenton and the Albemarle Sound having the majority due to unequal representation, entitled to send five delegates compared to two by the others. *Id.*

226. *See id.* at 249–51. Governor Johnston advised the Crown officers that unless the old laws which granted the province self-governance were annulled, "His Majesty will have very little to do in this Province, for they have taken effectual care to make themselves independent both of the King and the Lords Proprietors." *Id.* at 250.

227. Opinion of the Attorney General Dudley Ryder and Solicitor General Sir John Strange (Feb. 27, 1738), *in* 4 COLONIAL RECORDS, *supra* note 201, at 286, 291.

Johnston's next attempt to limit the Assembly—remedial redistricting—also failed. The growing importance and diverging interests of the Cape Fear area (called the Clarendon counties) required a rebalancing of legislative power, which the Albemarle-dominated assembly would not support.[228] Governor Johnston and the Clarendon magnates then artfully summoned an assembly to meet in November of 1746 at Wilmington, a time and place inconvenient for the Albemarle members, and—in their absence—equalized representation by granting each county two representatives.[229] The Albemarle precincts petitioned the King, and the opinion of the Crown lawyers dated July 20, 1753, determined that "though it had passed deliberately in a full assembly," the act was invalid because it "appear[ed] to have been passed by *management*."[230] Albemarle was entitled to their established representation, even if they would use it to deprive Clarendon. To resolve this conundrum, the law officers advised the Crown to remove from the Assembly the power to establish counties and vest it in the Crown.[231] Incoming Governor Arthur Dobbs implemented this recommendation.[232] To actualize the right of free elections, districting power in North Carolina was transferred out of the hands of the self-interested legislature.

Concurrently, North Carolinians labored under an unrepresentative legislature in the British Parliament. Great Britain's institutions can be credited with creating the legal conditions for individual liberties to flourish in North Carolina, but in economic policy, the mercantilist system was in several aspects imbalanced. When the Seven Years War removed the external threat of France in 1764, the structural disadvantages for North Carolina within the British imperial system became a catalyst for independence. The Stamp Act, enacted

228. 1 ASHE, *supra* note 221, at 274.

229. *Laws of North Carolina: 1746*, *in* 23 THE STATE RECORDS OF NORTH CAROLINA 251, 251 (Walter Clark ed., 1904). The Albemarle representatives boycotted, intending to cause a failed quorum, but they miscalculated. *Id.* at 251–52.

230. Representation of the Lords of Trade to the King (Mar. 14, 1754), *in* 5 COLONIAL RECORDS, *supra* note 201, at 81, 108; At the Court at St. James's the 28th Day of March 1754, *in* 5 COLONIAL RECORDS, *supra* note 201, at 115, 115. The term "management" through much of English history is often used pejoratively, suggesting improper manipulation. *See Management*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/management_n?tab=meaning_and_use#38366929 [https://perma.cc/S9NZ-75PX (staff-uploaded, dark archive)] (last updated Dec. 2024) (defining "management," as commonly used from 1667 to 1888, as "[c]unning, manipulation, trickery; the use of scheming, intrigue, prudence, etc., to achieve something").

231. Representation of the Lords of Trade to the King (Mar. 14, 1754), *in* 5 COLONIAL RECORDS, *supra* note 201, at 81, 108. The case reviewed by the attorney and solicitor general in 1753 has a helpful chronology of the voting districts from 1696 to 1746. *See* Dudley Ryder & William Murray, The Opinion of the Attorney and Solicitor-General on the Right of the Crown to Enable Particular Towns to Send Delegates to the Assembly (Apr. 29, 1755), *in* 1 OPINIONS OF EMINENT LAWYERS, ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE: CHIEFLY CONCERNING THE COLONIES, FISHERIES, AND COMMERCE OF GREAT BRITAIN 276, 282–90 (George Chalmers ed., 1814).

232. 5 COLONIAL RECORDS, *supra* note 201, at vi.

by Parliament to fund the enormous war debt, represented an unmistakable constitutional danger: Parliament asserted the right to legislate to deprive North Carolinians of property through taxation without their consent by representation.[233] In response to the argument that North Carolinians were "virtually" represented in Parliament, North Carolinian Maurice Moore[234] proposed that Parliament be redistricted to include actual seats for the governed.[235] Resistance to the Stamp Act formed around the Sons of Liberty, and the threat unified, temporarily at least, the divisions among the three regions of North Carolina: Albemarle, Cape Fear, and the Piedmont.[236] Parliament withdrew the Stamp Act but did not concede its plenary powers to legislate.[237] The threat to individual liberties that led North Carolina to enter the American War of Independence in 1776 was not from the King, but from an unrepresentative Parliament.[238]

Lack of adequate representation either in the Assembly or Parliament ultimately produced fratricidal conflict. The population of the Piedmont had exploded since the 1750s, and it was comprised for the most part of nonconformist yeoman farmers. Yet control of the Assembly remained in the hands of a primarily Anglican, slave-owning Eastern establishment (Albemarle and Clarendon allied).[239] The imbalance manifested itself in three principal ways: (a) uncertainty of property rights, especially within the Granville

233. The Stamp Act, 5 Geo. 3 c. 12 (1765) (Eng.), https://statutes.org.uk/site/the-statutes/eighteenth-century/1765-5-george-3-c-12-the-stamp-act/ [https://perma.cc/F4CJ-YSUJ].

234. Maurice Moore was a scion of the prominent Moore family of Clarendon, father of United States Supreme Court Justice Alfred Moore. *See Maurice Moore (1735-1777)*, N.C. HIST. PROJECT, https://northcarolinahistory.org/encyclopedia/maurice-moore-1735-1777/ [https://perma.cc/BW7X-RNX3].

235. MAURICE MOORE, THE JUSTICE AND POLICY OF TAXING THE AMERICAN COLONIES 7–12 (1765).

236. 1 ASHE, *supra* note 221, at 314, 316; *see also* 7 COLONIAL RECORDS, *supra* note 201, at xxi, n.* ("The name of the Sons of Liberty was . . . borrowed. Colonel Barré having, in a speech in the British Parliament, referred to the Americans who were opposing the Stamp Act as 'sons of liberty,' they straightway adopted it, and under that name proceeded to organize themselves into associations throughout the Colonies that became, in time, the active machinery for opposing British oppression.").

237. American Colonies Act, 6 Geo. 3 c. 12 (1766) (Eng.), https://statutes.org.uk/site/the-statutes/eighteenth-century/1766-6-george-3-c-12-securing-america/ [https://perma.cc/AV8P-R46S].

238. *See, e.g.*, WILLIAM MEREDITH, THE QUESTION STATED, WHETHER THE FREEHOLDERS OF MIDDLESEX LOST THEIR RIGHT, BY VOTING FOR MR. WILKES AT THE LAST ELECTION? 60 (1769) (claiming that Parliament will make "ill use of . . . this precedent to *destroy the Freedom of Election*; and on its ruins build up a government, *not affecting to stand upon any other basis but that of despotism, supported by corruption*"); *id.* at 70 ("I feel myself *diminished*, as an Englishman, in the possibility of seeing an House of Commons, *not elected by the People.*"); *id.* at 71–72 ("[S]acred are the privileges of Parliament . . . but sacred above all things are the *Rights of the People* . . . . [T]he Constitution . . . ought to be immortal, if any thing human can be made so; and the *main pillar* which sustains that Constitution is the *Right* and *Freedom of Election*.").

239. *See* MARJOLEINE KARS, BREAKING LOOSE TOGETHER: THE REGULATOR REBELLION IN PRE-REVOLUTIONARY NORTH CAROLINA 70 (2002).

district,[240] (b) economic and political pressures from the expansion of slavery,[241] and (c) the authoritarian danger of state-supported religion.[242] A movement to redress these concerns, the Piedmont Regulators,[243] warned of an unrestricted Assembly, even one lately filled with opposers of Parliament:

> For take this as a maxim that while men are men though you should see all those Sons of Liberty (who have just now redeemed us from tyranny) set in Offices and vested with power, they would soon corrupt again and oppress if they were not called upon to give an account of their Stewardship.[244]

Among the tools used to disenfranchise the Piedmont Regulators was the adverse redrawing of electoral districts.[245] In 1771, the exploitation of Piedmont settlers by local courthouse gangs, with the support of the Assembly and ultimately of Governor Tryon, led to a bloody war and grisly executions. The Piedmont was suppressed not by Great Britain, but by North Carolinians under the authority of the Eastern-dominated Assembly.[246] The Assembly passed the Johnston Riot Act that retroactively made an earlier uprising a capital offense[247] and called the militia to wage war on the Piedmont at the battle of Alamance.[248] Tryon's successor, Governor Josiah Martin, after touring the Piedmont and seeing firsthand the legitimacy of the Regulator cause, lamented that the Crown

240. *See* A. Roger Ekirch, *"A New Government of Liberty": Hermon Husband's Vision of Backcountry North Carolina, 1755*, 34 WM. & MARY Q. 632, 635 (1977). The Granville district was the area between the Virginia border and a parallel boundary roughly sixty miles south that was retained by Lord Granville, one of the original proprietors, when North Carolina was transferred to the Crown. This area was populous and fertile, but its maladministration by agents of Lord Granville was a major source of dissatisfaction. *Id.*

241. *Id.* at 636, 643. In 1756, Hermon Husband wrote Lord Granville that slavery "will one time or other be the exercise of the whole nation either in timely stopping such growing evil or when time is past in lamenting that which cannot be recalled." *Id.* at 643.

242. *Id.* at 635. The Piedmont yeomanry were primarily non-Anglicans. *See* THE CAROLINA BACKCOUNTRY ON THE EVE OF THE REVOLUTION: THE JOURNAL AND OTHER WRITINGS OF CHARLES WOODMASON, ANGLICAN ITINERANT 69, 76–81 (Richard J. Hooker ed., 1953) (c. 1768).

243. For a detailed history of the Regulator movement, see generally KARS, *supra* note 239.

244. Regulators' Advertisement No. 1 (Aug. 1766), *in* 7 COLONIAL RECORDS, *supra* note 201, at 249, 250.

245. *See, e.g.*, Letter from William Tryon to Wills Hill, Marquis of Downshire (Mar. 12, 1771), *in* 8 COLONIAL RECORDS, *supra* note 201, at 525, 527 ("The Acts for erecting four new counties seemed a measure highly necessary . . . . Guilford County out of Rowan and Orange Counties was in the distracted state of this country a truly political division, as it separated the main body of the Insurgents from Orange County and left them in Guilford.").

246. 8 COLONIAL RECORDS, *supra* note 201, at iii ("The most surprising thing [was that the Regulators were] so ruthlessly stamped out by North Carolina troops, especially that this was done by the people of the Eastern portion of the Province . . . .").

247. WILLIAM S. POWELL, THE WAR OF THE REGULATION AND THE BATTLE OF ALAMANCE, MAY 16, 1771, at 17 (1949).

248. *Id.*

had wrongly sided with the Assembly.[249] As late as March 1, 1773, the Piedmont continued to experience the enmity of an unrepresentative Assembly.[250]

During the Revolution, the Piedmont joined the East to fight the British forces, ultimately inflicting the mortal wound to the campaign of Lord Cornwallis at the Battle of Guilford Courthouse in 1781.[251] When the Albemarle, Cape Fear, and Piedmont leaders met to draft the Constitution of 1776, the Free Elections Clause was central to their political settlement.[252]

> Of the forty-seven sections of the State Constitution adopted in 1776, thirteen, more than one-fourth, are the embodiment of reforms sought by the Regulators. . . . The war of the Regulation ended not with the battle of Alamance in 1771, but with the adoption of the State Constitution in 1776.[253]

## II. THE RIGHT OF FREE ELECTIONS IN THE STATE OF NORTH CAROLINA

Having recalled the world into which independent North Carolina was born, this part traces the continuation and enhancement of the right of free elections from the North Carolina Constitution of 1776 to the modern *Harper* cases. Section II.A details how the English constitutional right of free elections was enshrined in writing using the established phrase "elections . . . ought to be free" in the North Carolina Constitution of 1776. The right was ordained in the Declaration of Rights to be a fundamental individual right the government could not disturb under any pretext whatsoever. The Form of Government arrayed the component powers of government to prevent the right from being subverted. The right of free elections was reaffirmed in each epoch of later North Carolina history: the aftermath of the Revolution, the adoption of the Federal Constitution (discussed in Section II.A), the reconstruction after the American Civil War (discussed in Section II.B), and the reconciliation after the Civil Rights Movement (discussed in Section II.C).

### A. *North Carolina Declaration of Rights (1776)*

The Free Elections Clause in the Constitution of 1776 addressed recurring internal schisms in North Carolina not dissimilar to those animating the

249. Letter from Josiah Martin to Wills Hill, Earl of Hillsborough (Aug. 30, 1772), *in* 9 COLONIAL RECORDS, *supra* note 201, at 329, 330–31.

250. *See, e.g.*, Legislative Journal of March 2, 1733, *in* 9 COLONIAL RECORDS, *supra* note 201, at 433, 433 (showing Eastern leaders rejecting Governor Martin's effort to have the Assembly pass an act for the pardon of all the Regulator leaders).

251. *See* LEE, *supra* note 194, at 60; *see also* JOHN BUCHANAN, THE ROAD TO GUILFORD COURTHOUSE: THE AMERICAN REVOLUTION IN THE CAROLINAS 372, 383 (1997).

252. *See* 1 ASHE, *supra* note 221, at 527.

253. 8 COLONIAL RECORDS, *supra* note 201, at xiv.

Revolution of 1688. A primary goal of the drafters of the North Carolina Constitution of 1776 was to disarm the Assembly, in whom they vested control over the executive and the judiciary, of the ability to wield discriminatory power as before. The Constitution of 1776 corrected two flaws in the prior constitutional order that had limited the effectiveness of the right of free elections. First, it incorporated the right in a written constitution that could not be altered by the legislature, only by the electors themselves. It elevated that right above all other provisions of the constitution by housing it in a structurally superior Declaration of Rights. Second, it established a body independent of the Assembly—the North Carolina judiciary—to vindicate the Free Elections Clause. As is clear from the Hillsborough Debates of 1788, when North Carolina ratified the federal constitution in 1789, it did so with the understanding that districting for federal elections would be subject to the right of free election and protected by the judiciary.

### 1. The Declaration of Rights of 1776

The North Carolina Constitution of 1776 is a civil settlement that prioritizes individual liberties over the prerogatives of the Assembly. Five years before the delegates met in convention, many had fought on opposite sides of the War of the Regulators of 1771.[254] Faced now with a wartime need for unity against a common enemy, they agreed at their first meeting in Halifax, in April 1776, that all power should be placed in an assembly representing the people,[255] including the power to appoint the governor and judges.[256] Their main challenge was how to limit the power of the assembly, vulnerable to faction as before,[257] but now vested in the first instance with the same "uncontrollable" authority of the oppressive Parliament they sought to overthrow.[258]

254. Every country was entitled to send an equal number of delegates, making the convention more representative than the Assembly. *See* 1 ASHE, *supra* note 221, at 531 ("[T]he members from each district selected two members.").

255. A highly democratic form of government was meant to attract support from Highlanders and Regulators. 1 ASHE, *supra* note 221, at 527. Scottish Highlanders who settled in North Carolina were an important cultural and military group. *Id.* at 226.

256. *Id.* at 527.

257. *See generally* LEFLER & POWELL, *supra* note 209, at 217–39 (1973) (discussing political parties in the founding era).

258. On November 16, 1774, the *North Carolina Gazette* published an extended essay on the danger to individual liberty of an uncontrolled parliament, and the importance of the constitutional right of free elections to check the legislature. *See* Wilson, *supra* note 88, at 1.

On April 20, 1776, Samuel Johnston,[259] the president of the Fourth Provincial Congress, wrote to his brother-in-law James Iredell, future United States Supreme Court justice:

> We have not yet been able to agree on a Constitution. . . . The great difficulty in our way is, how to establish a check on the Representatives of the people, to prevent their assuming more power than would be consistent with the liberties of the people. . . . After all, it appears to me that there can be no check on the Representatives of the people in a democracy, but the people themselves; and in order that the check may be more efficient I would have annual elections.[260]

Three means of limiting the power of the legislature are apparent in this first session: (a) supremacy of a written declaration of fundamental rights,[261] (b) judicial enforcement of it,[262] and (c) free and frequent elections.[263]

The April convention adjourned without resolution.[264] On August 9, 1776, the Council of Safety[265] resolved to hold an election on October 15, 1776, for each county to send five delegates to form a constitution for the independent state.[266] The elections returned delegates ranging from conservatives who advocated renewing the principles of the balanced government of Great Britain

259. Johnston was born in Scotland, attended Yale, and was the nephew of royal governor Gabriel Johnston. Wilson Angley, *Samuel Johnston*, NCPEDIA, https://www.ncpedia.org/johnston-samuel [https://perma.cc/VY9D-H5VU] (last updated Mar. 2023). Johnston was the sponsor of the notorious 1771 Riot Act under which the Regulators were executed. *See* Act of the North Carolina General Assembly Concerning Riots (Jan. 15, 1771), *reprinted in* 8 COLONIAL RECORDS, *supra* note 201, at 481, 486 (making the Hillsborough riots punishable by death retroactively).

260. Letter from Samuel Johnston to James Iredell (Apr. 20, 1776), *reprinted in* 10 COLONIAL RECORDS, *supra* note 201, at 498, 498–99.

261. Johnston referred to the Connecticut Declaration of Rights, which was viewed as inviolate. *See* Christopher Collier, *The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition*, 15 CONN. L. REV. 87, 94 (1982).

262. Johnston advocated for tenured judges to create sufficient independence to check the legislature from curtailing the liberties of the people. Letter from Samuel Johnston to James Iredell, *supra* note 260, at 498–99; *see also* John Adams, Thoughts on Government (Mar. 1776), *reprinted in* 11 COLONIAL RECORDS, *supra* note 201, at 321, 324 (advocating judicial power be separate from the legislative and executive branches of the government); Letter from William Hooper, Delegate from N.C. to the Provincial Cong. Of N.C., to the Congress at Halifax (Oct. 26, 1776), *reprinted in* 10 COLONIAL RECORDS, *supra* note 201, at 862–70. William Hooper believed that the people of England had lost sight of the notion that power derived from them, not the sovereign. *Id.*

263. Annual elections are implicitly predicated on free elections. Neither Johnston nor Iredell would have supposed liberty would be safeguarded by frequent *unfair* elections.

264. 1 ASHE, *supra* note 221, at 527–31.

265. The Council of Safety operated as the interim government of North Carolina. *Id.* at 530.

266. Journal of the Council of Safety, Begun and Held in the Town of Halifax (July 21, 1776), *reprinted in* 10 COLONIAL RECORDS, *supra* note 201, at 696. "[A]s it is the Corner Stone of all Law, so it ought to be fixed and Permanent, and that according as it is well or ill Ordered it must tend in the first degree to promote the happiness or Misery of the State." *Id.*

to "radical" advocates of a purer form of democracy.[267] The instructions from the Mecklenburg[268] and Orange[269] delegations presented a clear theory and structure of government:

> You are instructed:
>
> . . .
>
> 2. That you shall endeavor to establish a free government under the authority of the people of the State of North Carolina and that the Government be a simple Democracy or as near it as possible.
>
> 3. That in fixing the fundamental principles of Government you shall oppose everything that leans to aristocracy or power in the hands of the rich and chief men exercised to the oppression of the poor.
>
> 4. That you shall endeavor that *the form of Government shall set forth a bill of rights containing the rights of the people and of individuals which shall never be infringed in any future time by the law-making power or other derived powers in the State*.
>
> 5. That you shall endeavour that the following maxims be substantially acknowledged in the Bills of Rights (viz.):
>
> . . .
>
> 7th. That the *derived inferior power [of the legislature] can by no construction or pretence assume or exercise a power to subvert the principal supreme power [of the people]*.[270]

After specifying the rights of the people, the instructions specified a form of government that distributes power among three separate branches arrayed to serve and remain dependent on the people.[271] Importantly, the people should

267. 1 ASHE, *supra* note 221, at 556–57.

268. Instructions to the Delegates from Mecklenburg to the Provincial Congress at Halifax in November, 1776, *reprinted in* 10 COLONIAL RECORDS, *supra* note 201, at 870a, 870a–70f [hereinafter Mecklenburg Instructions]. According to the compiler of the Colonial Records, "The instrument is in the well-known sharp, angular handwriting of Colonel [Waightstill] Avery." *Id.* at 870a. Avery was a Presbyterian educated at Princeton. Isaac Thomas Avery, Jr., *Avery, Waightstill*, NCPEDIA (May 2023), https://www.ncpedia.org/biography/avery-waightstill [https://perma.cc/RHD4-6MEC].

269. Instructions to the Delegates from Orange in the Halifax Congress, to Be Held in November, 1776, *reprinted in* 10 COLONIAL RECORDS, *supra* note 201, at 870f, 870f–70h [hereinafter Orange Instructions]. These are "[e]ntirely in the hand[] of Governor Thomas Burke." *Id.* at 870f.

270. Mecklenburg Instructions, *supra* note 268, at 870a–70b (emphasis added).

271. *Id.* at 870b. Section 8 of the instructions contains structural directives to assure the separation of powers.

be "justly and equally" represented in the Assembly,[272] and their representatives should be "freely and equally" elected by the people.[273]

When they met in December of 1776, the convention agreed and ratified a Declaration of Rights which defined the boundary between individual rights and government prerogatives.[274] The following day, they adopted a Form of Government that defined the boundaries of the branches of government relative to each other, arraying them to deliver happiness and prosperity to the people without violating their rights.[275] The Declaration of Rights provided that elections "ought . . . to be free" and the Form of Government established a tenured judiciary to vindicate that right.[276]

*Chartered Fundamental Right of Free Election.* Section VI of the Declaration of Rights provides: "That elections of members, to serve as Representatives in General Assembly, ought to be free."[277] By adopting the time-honored phrase "elections . . . ought to be free," the drafters incorporated by reference 500 years

272. *Id.* at 870c. Section 11 provides that, so that the assembly remains dependent upon the people: "You shall endeavour that the good people of this State shall be *justly and equally* represented in the two Houses." *Id.* (emphasis added). This is consistent with the advice John Adams gave North Carolina. *See* Adams, *supra* note 262, at 323 (recommending that an assembly should be constituted so as to "be in miniature, an exact portrait of the people at large . . . an equal representation . . . . Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections."). These indicate that proportional representation was the desired outcome of the Constitution of 1776. The Constitution of 1868 also expresses the principle. *See* Van Bokkelen v. Canaday, 73 N.C. 198, 225 (1875) ("A fundamental principle in the State government is, that representation shall be *apportioned* to the popular vote *as near as may be*."). So does the Constitution of 1971. *See Stephenson I*, 355 N.C. 354, 382, 562 S.E.2d 377, 396 (2002) (upholding the principle of "substantially equal legislative representation"). Note that although the objective of proportional representation has remained constant, the means of achieving it has varied. Note also the important difference between a *goal* of proportional representation and *prescriptive means* such as partisan safe seats to achieve it. It is the difference between the *goal* of a fair coin toss (even 50% probability, with uncertain outcome) and *means* such as alternating heads and tails (100%/0% probability with certainty of outcome). A free election corresponds to the former, a proportionate-outcome system corresponds to the latter.

273. Mecklenburg Instructions, *supra* note 268, at 870c ("That the law making power shall be lodged in the hands of one General Assembly composed of Representatives annually chosen by the people *freely and equally* in every part of the State according to - - - - - -." (emphasis added)). The instructions leave blank the precise method of apportioning representation. *See id.*

274. 1 ASHE, *supra* note 221, at 565. *See generally* SOURCES OF ENGLISH LEGAL HISTORY: PUBLIC LAW TO 1750, *supra* note 55, at 48–81 (2024) (providing examples of charters and confirmations of liberties that outlined the boundaries between individual rights and the English kings' prerogatives).

275. The term "Form of Government" is used herein to refer to the second part of the constitution, which arrays the branches of government and sets out their operations. It is distinct from the "Declaration of Rights" which sets out the powers reserved by the people, not delegated to the government.

276. N.C. CONST. of 1776, Declaration of Rights § 6 (elections right); *id.* Form of Government § 12 (judiciary).

277. *Id.* Declaration of Rights § 6.

of jurisprudence.[278] The "simple, classical, precise, yet comprehensive language" in which the Free Elections Clause was couched leaves "little latitude for construction," particularly because its meaning was understood by classically educated justices and members of society.[279]

To the framers of the North Carolina Constitution of 1776, electoral district manipulation was an obvious tool of tyranny. They were as near in time to the constitutional crisis of 1688 as we are today to the beginning of the Second World War. Coke, First Westminster, the Bill of Rights of 1688, *Ashby v. White*, and the writings of Bolingbroke and Edmund Burke[280] were part of the basics of education and widely understood.[281] The panoply of subversive techniques—from vote dilution in the Roman Empire to religious test oaths in their immediate experience—was common knowledge to every politically conscious contemporary.[282] In the Form of Government, the founders apportioned representation by reference to counties and boroughs, denying the Assembly the opportunity to gerrymander.[283] In the Free Elections Clause, the framers established an overarching general anti-avoidance provision aimed at preventing any attempt to circumvent the people's control of the legislature.

278. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 320 (2012) ("A statute that uses a common-law term, without defining it, adopts its common-law meaning."). That common-law meaning does not change without a clear indication that the drafters expressly change it. *Id.* at 318 ("A statute will be construed to alter the common law only when that disposition is clear.").

279. *Cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 223 (1824) (Johnson, J., concurring) (referencing another right of English law origin in the Federal Constitution). The clause is so "manifestly conformable" to the words of the Bill of Rights of 1688 "that we are not to consider it as a newly invented phrase, first used by the makers of our constitution; but we are to look at it as the adoption of one of the great securities of private right, handed down to us as among the liberties and privileges which our ancestors enjoyed at the time of their emigration, and claimed to hold and retain as their birthright." Jones v. Robbins, 74 Mass. (8 Gray) 329, 342 (1857) (referring to a provision of the Massachusetts Declaration of Rights).

280. Edmund Burke regarded a legislature corrupt by "the setting up any claims adverse to the right of free election." EDMUND BURKE, THOUGHTS ON THE CAUSE OF THE PRESENT DISCONTENTS 36 (1770).

281. *See* Wilson, *supra* note 88, at 1.

282. John Adams, who advised on the North Carolina Constitution, closely studied Bolingbroke, and his copy of *Ashby v. White* survives in his library today. Adams wrote to John Penn that "some regulation for securing forever an equitable choice of representatives" was indispensable. *See* John Adams, Thoughts on Government, *reprinted in* 4 WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 189, 209 (Charles Francis Adams ed., 1851) (1776). The Founders' legal training, practical experience, and familiarity with the referenced source materials is well documented. *See generally* Earle H. Ketcham, *Sources of the North Carolina Constitution, of 1776*, 6 N.C. HIST. REV. 215 (1929) (discussing the political philosophers who influenced the Founders in their drafting of the North Carolina Constitution).

283. N.C. CONST. of 1776, §§ 2–3; *see* Mary Phlegar Smith, *Borough Representation in North Carolina*, 7 N.C. HIST. REV. 177, 177 (1930). During the three years following the adoption of the 1776 Constitution, the assembly created fifteen counties so that the disaffected backcountry would share power with the eastern elites. Thomas E. Jeffrey, *County Division: A Forgotten Issue in Antebellum North Carolina Politics*, 65 N.C. HIST. REV. 314, 315 n.4 (1988).

*Superordination over the Powers of Government.* The Declaration of Rights is a distillation of the fundamental individual liberties protected by the English constitution. However, because under the North Carolina Constitution "all political power is vested in and derived from the people only," chartered liberties of the people operate as retained powers, never delegated to the legislature in the first place.[284] The lawgiver, the legislature, is disempowered.[285]

The legislature is the only possible target of the Free Elections Clause. Under the Constitution of 1776, the Assembly appointed the executive, could remove the Governor at will, and had all the power over elections.[286] The threat to liberty the drafters faced—and North Carolinians had faced internally for the prior 110 years—was from a tyrannical legislature. In 1775, Alexander Hamilton stated, "[y]ou are mistaken, when you confine arbitrary government to a monarchy. . . . When any people are ruled by laws, in framing which, they have no part . . . the government with respect to them, is despotic."[287] The same sentiment was published on the front pages of the *North Carolina Gazette* sixteen months before the 1776 convention: legislatures will destroy the very purpose for which they were created—the happiness of society—unless checked by free elections.[288]

Control over the Assembly is accomplished by superordinating the right of free election to any legislative prerogative.[289] The Declaration of Rights is structurally superior to the Form of Government and the powers of the

284. N.C. CONST. of 1776, Declaration of Rights, §§ 1–2; *accord* PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA, CONVENED AT HILLSBOROUGH, ON MONDAY THE 21ST DAY OF JULY, 1788, at 174 (1789) [hereinafter HILLSBOROUGH DEBATES] (recording James Iredell's observation that in a general legislature with undefined powers like North Carolina, a bill of rights operates "as an exception to the legislative authority in such particulars"); Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. HIST. REV. 215, 218 (1929) (detailing the continuities with English law and noting the separateness of the Declaration of Rights); Orth, *North Carolina Constitutional History*, *supra* note 60, at 1762–68.

285. *See* Davidson v. New Orleans, 96 U.S. 97, 102 (1878) (finding that even acts originally not binding on the English parliament bind American legislatures). The Declaration of Rights transposes English constitutional positive law rights that restricted the body politic of the king and parliament, along with judicial canons of interpretation.

286. *See* Trs. of Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 88 (1805) (stating of an analogous provision that "[t]o suppose it applicable to the executive would be absurd on account of the limited powers conferred on that officer; . . . this clause is applicable to the Legislature alone, and was intended as a restraint on their acts (and to presume otherwise is to render this article a dead letter)").

287. Alexander Hamilton, *The Farmer Refuted: Or a More Impartial and Comprehensive View of the Dispute Between Great-Britain and the Colonies, Intended as a Further Vindication of the Congress* (1775), *reprinted in* 1 THE PAPERS OF ALEXANDER HAMILTON 81, 100 (H. Syrett ed., 1961); *accord* THE FEDERALIST NO. 78, *supra* note 6 (Alexander Hamilton) (identifying a strong legislature as the most dangerous branch).

288. Wilson, *supra* note 88, at 1.

289. *See* Orth, *North Carolina Constitutional History*, *supra* note 60, at 1762–68.

Assembly.[290] This means that the Free Elections Clause (and other rights enumerated in the Declaration of Rights) must prevail over conflicting actions of the legislature, even those taken pursuant to a specific authority granted in the Form of Government.[291]

Other sections of the Declaration of Rights also prevent the legislature from escaping the electoral control of the people: a mandate to provide frequent elections,[292] the separation of powers,[293] adherence to the law of the land,[294] and a prohibition on legislative acts that establish a superior political class.[295]

The Declaration of Rights also sets out two canons of interpretation that require acts relating to elections to be construed to favor the individual over the government. First, it admonishes "a frequent recurrence to fundamental principles is absolutely necessary, to preserve the blessings of liberty."[296] And second, it requires that the right of free election (and other chartered liberties) "ought never to be violated, on any pretense whatsoever."[297] Similar canons of construction contemporaneous with the drafting of the Constitution of 1776 also interpreted chartered liberties in favor of the individual.[298]

290. *Id.* The rights in the Declaration are supreme in the ranking of values (individual rights over government prerogatives), in their structural superordination in the text (the rights of the people above the form of government), and it the priority of their adoption (the Declaration was adopted before the remainder of Constitution). *See id.*

291. *Foy*, 5 N.C. at 83–84. For a detailed account of the formation of the 1776 Declaration of Rights, see HENRY G. CONNOR & JOSEPH B. CHESHIRE, JR., THE CONSTITUTION OF THE STATE OF NORTH CAROLINA ANNOTATED 2–109 (1911).

292. N.C. CONST. of 1776, Declaration of Rights, § 20. This addresses the Long Parliament that avoided popular accountability by continuing itself. *See supra* Section I.B.2 (discussing the despotism of the Long Parliament). Legislative entrenchment through gerrymandering undermines the effectiveness of "frequent" elections.

293. N.C. CONST. of 1776, Declaration of Rights § 4; *see also infra* note 299 and accompanying text (discussing separation of powers).

294. N.C. CONST. of 1776, Declaration of Rights § 12.

295. *Id.* § 23; *see* John V. Orth, *Unconstitutional Emoluments: The Emoluments Clauses of the North Carolina Constitution*, 97 N.C. L. REV. 1727, 1738 (2019) (discussing the clause's connection with the fundamental democratic principle of equal rights and opportunities for all, special privileges for none).

296. N.C. CONST. of 1776, Declaration of Rights § 21.

297. *Id.* § 44. This section follows the phrasing from the Mecklenburg and Orange instructions. *See* Mecklenburg Instructions, *supra* note 268, at 870a–70b; Orange Instructions, *supra* note 269, at 870h.

298. James Iredell warned about arguments that empty the meaning of broadly worded chartered liberties by applying flawed originalism and specious textual compliance with peripheral provisions. If a right is thus invaded,

> what would be the plausible answer of the government to such a complaint? Would they not naturally say, "We live at a great distance from the time when this Constitution was established. We can judge of it much better by the ideas of it entertained at the time, than by any ideas of our own. The bill of rights passed at that time, shewed that the people did not think every power retained which was not given, else this bill of rights was not only useless, but absurd. But we are not at liberty to charge an absurdity upon our ancestors, who have

*Powers Separated to Vindicate Rights.* To vindicate the fundamental liberties of the individual, the Declaration of Rights provides that "the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other."[299] A consequence of separation of powers is that the legislature, through election regulations, cannot abridge the voting rights of the individual.[300] Nor can they adjudge the scope of their own power to disenfranchise an individual.[301] Both are impermissible exercises of a legislative and a judicial power simultaneously by a single branch.[302] Conversely, the separation of powers does not prevent the judiciary from negating self-perpetuating districting actions of the Assembly.[303]

If the legislature violates the separation of powers and harms the individual, the judiciary is obligated to defend the individual.[304] James Iredell stressed the judiciary's constitutional role as active "guardians and protectors."[305] When a judge declares an act of the Assembly void, it "is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, they being judges for the benefit of the whole

> given such strong proofs of their good sense, as well as their attachment to liberty. So long as the rights enumerated in the bill of rights remain unviolated, you have no reason to complain. This is not one of them."

HILLSBOROUGH DEBATES, *supra* note 284, at 173.

299. N.C. CONST. of 1776, Declaration of Rights § 4. *See generally* John V. Orth, *Forever Separate and Distinct: Separation of Powers in North Carolina*, 62 N.C. L. REV. 1 (1983) [hereinafter Orth, *Separation of Powers*] ("The purpose of this separation is the better preservation of the liberty of the citizen."). Powers are separated to protect individual liberty. *Harper III*, 384 N.C. 292, 297, 886 S.E.2d 393, 399 (2023) ("Separation of powers protects individual freedoms.").

300. The right to vote is a property right. *See supra* Section I.B.5 (discussing *Ashby v. White*'s holding that the right to vote is a property right). Interfering with the right to vote disseizes an individual. *See* Ashley, *supra* note 85, at 78–79 ("[E]very impeachment from enjoying the benefit [of a liberty] is a disseisin, just as well as where the freehold is ousted."). Taking property from A and vesting it in B is a judicial act. Robinson v. Barfield, 6 N.C. (2 Mur.) 391, 420 (1818).

301. *See supra* Section I.B.5 (discussing *Ashby v. White*'s holdings on the separation of judicial and legislative powers).

302. The Orange Instructions state: "That no person shall be capable of acting in the exercise of any more than one of these branches at the same time lest they should fail of being the proper checks on each other and by their united influence become dangerous to any individual who might oppose the ambitious designs of the persons who might be employed in such power." Orange Instructions, *supra* note 269, at 870f–70h.

303. General William Richardson Davie explained that the separation of powers was essential for the neutral adjudication of controversies over whether the legislature exceeds its delegated authority. HILLSBOROUGH DEBATES, *supra* note 284, at 145. The principle of separation of powers does not license an uncontrolled legislature, it is meant to prevent one.

304. N.C. CONST. of 1776, Declaration of Rights, § 13. Judges held their offices during good behavior. *Id.* Form of Government § 13.

305. *See* Letter from James Iredell to Chowan Cnty. Representatives (1783), *in* 2 THE PAPERS OF JAMES IREDELL 446, 449 (Don Higgenbotham ed., 1976). Writing in 1783, Iredell stressed that a truly independent judiciary is critical "in a Republic where the Law is superior to any or all the Individuals, and the Constitution superior even to the Legislature, and of which the Judges are the guardians and protectors." *Id.*

people, not mere servants of the Assembly."[306] Iredell mocked the idea that the people's only recourse is "to request that [the Assembly] will be graciously pleased not to be our tyrants."[307]

In separating powers and rejecting the theory of an absolute legislature, the Constitution requires the judiciary to be cautious to not impair the legitimate functioning of the legislature,[308] but it does not obligate the judiciary to defer to the legislature in matters concerning fundamental rights.[309] There is no sense that the legislature is a superior, more responsive, or more trusted branch relative to the others.[310] The Assembly

> have no more right to obedience . . . than any different power on earth has a right to govern us; for we have as much agreed to be governed by the Turkish Divan as by our own General Assembly, otherwise than on the express terms prescribed [in the Constitution].[311]

306. 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 148 (1858). The obligation of judges to place the people above party is clear from this 1763 caveat of the works of Dr. Robert Brady (1627–1700), a defender of absolute royal power:

> It may not be improper, however, to observe of Brady, that though he discovers great learning and acuteness, yet he evidently wrote with the illiberal view of serving a Party, rather than of investigating Truth. As an Author, therefore, he ought to be read with Caution: And as a Man, capable of prostituting his Talents to explain away the Rights of the People, he ought to be remembered with Concern.

OWEN RUFFHEAD, 1 THE STATUTES AT LARGE FROM MAGNA CHARTA TO THE END OF THE LAST PARLIAMENT, 1761, at x, n.4 (1763). Ruffhead's work formed the basis of the 1821 compilation of North Carolina laws by its first Chief Justice at the request of the Assembly. *See generally* LAWS OF NORTH CAROLINA (1821).

307. 2 MCREE, *supra* note 306, at 147.

308. As Iredell recounted, the constitutional conventions of 1776 focused on how to impose restrictions on the legislature while still maintaining its functionality. Letter from James Iredell to Chowan Cnty. Representatives, *supra* note 305, at 449.

309. The experience with an omnipotent British Parliament made the founders wary of establishing a despotic power within North Carolina's own government. They rejected the theory of an absolute legislature, limited the power of the Assembly to the terms of the Constitution, and based its continued operation on the freely expressed voice of the people. *Id.* Separation of powers does not require the judiciary to "stay in their lane" and do nothing when the legislature does not "stay in their lane" and disseizes an individual. The Constitution arrays the branches in the service of the people, and if the legislature acts contrary to constitutional principles, the judiciary is tasked with correcting it. They cannot say "it is not my job."

310. The powerlessness of the individual under a despotic legislature was regarded as "slavery." *See* Rushworth, *The Agreement of the People*, *supra* note 94, at 359 (warning to avoid "the danger of returning into a slavish condition"); PERRY GAUCI, WILLIAM BECKFORD: FIRST PRIME MINISTER OF THE LONDON EMPIRE 83 (2013) (recording an admonishment by the Lord Mayor of London that slavery is marked not by lash-stripes, but by a whip in the hand of an uncontrolled master); N.C. CONST. of 1776, pmbl. (using the term "a state of abject slavery").

311. *See* 2 MCREE, *supra* note 306, 146 (1857).

In sum, the North Carolina Constitution of 1776 (a) incorporated as a textual constitutional right the English right of free elections to prohibit all forms of electoral manipulation, including partisan gerrymandering, (b) superordinated it to the prerogatives of the legislature, and (c) tasked an independent judiciary with vindicating it.

2. Judicial Enforcement of Limitations of the Assembly (1776–1794)

Judicial review as a check on the Assembly perpetuating itself was confirmed in *Bayard v. Singleton*, decided in November 1787.[312] The issue was whether the legislature could abrogate section IX of the Declaration of Rights, which guaranteed a jury trial.[313] In the process, the court addressed the right of elections:

> [I]f the members of the General Assembly could [take away the constitutional right to trial by jury], they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.[314]

The election rights in the Declaration of Rights thus bind the legislature, and abridgements are voidable by the judiciary. This interpretation is particularly weighty because Justice Samuel Ashe, the writer of *Bayard*, was also a drafter of the Declaration of Rights and the Constitution.[315]

Following the *Bayard* decision, Richard Dobbs Spaight wrote to James Iredell of his concerns about vesting the power of nullification in judges.[316] Iredell responded that judicial power was crucial to protect "the personal liberty of each citizen, which the citizens, when they formed the Constitution, chose to reserve as an unalienated right, and not to leave at the mercy of any Assembly whatever."[317] This is especially important for the politically disempowered: "The majority having the rule in their own hands, may take care of themselves; but in what condition are the minority, if the power of the other is without limit?"[318] Remedy by a dauntless and attentive judiciary therefore is an indispensable safeguard of freedom. "[W]hen an act is necessarily brought in

312. *See* 1 N.C. 5, 7, 1 Mart. 48, 49–50 (1787).

313. *See id.* at 7, 1 Mart. at 49–50.

314. *Id.* at 7, 1 Mart. at 49–50.

315. *See supra* note 152 and accompanying text (describing the value of close-in-time interpretation of text by those involved in its drafting).

316. Letter from Richard Spaight to James Iredell (Aug. 12, 1787), *reprinted in* 2 MCREE, *supra* note 306, at 168, 168–70.

317. Letter from James Iredell to Richard Spaight (Aug. 26, 1787), *reprinted in* 2 MCREE, *supra* note 306, at 172, 173.

318. *Id.*

judgment before [the judiciary], they must, unavoidably, determine one way or another. . . . [J]udges cannot willfully blind themselves."[319]

### 3. The Hillsborough Debates of 1788

The prohibition on the Assembly using districting to selectively disenfranchise rivals was clearly expressed in the Hillsborough Debates of 1788.[320] James Galloway, an Anti-Federalist, raised the question of whether a political faction representing seaport interests, for example, could pass self-serving election laws to perpetuate their tenure.[321] Federalist John Steele responded that, while the Assembly would divide the state into voting districts, the judicial power would prevent any deviation from their duties and ensure that the people retained their right to free elections:

> To say that they shall go from the sea-shore, and be able to perpetuate themselves, is a most extravagant idea. . . . The judicial power of that government is so well constructed as to be a check. . . . [I]n a country like this, where every man . . . has right of election, the violations of a Constitution will not be passively permitted.[322]

Thus, in the earliest discussions of the Assembly's power to define electoral districts (only twelve years after its founding), it was understood that

319. *Id.* at 173–74. *See generally* William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329 (1995) (explaining that Iredell "clearly viewed judicial review as a check against legislative abuse" and "expressly stated that the doctrine would protect against majoritarian oppression of a minority within the community"); Gerald Leonard, *Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review*, 81 CHI.-KENT L. REV. 867 (2006) (asserting that judicial review was a necessary doctrine to "shift" the relations between the legislative and judicial branches, and that Iredell envisioned judicial review as a mechanism for the judiciary to "intervene, as necessary, to protect the people's rights against legislative overreaching").

320. HILLSBOROUGH DEBATES, *supra* note 284, at 19. Delegates met in Hillsborough in July and August of 1788 to deliberate adopting the federal Constitution. John C. Cavanagh, *Convention of 1788*, NCPEDIA (2006), https://www.ncpedia.org/government/convention-1788 [https://perma.cc/KD4X-SWLE]. The Assembly first gained the authority to shape federal electoral districts upon North Carolina's adoption of the federal Constitution in 1789. *Id.* North Carolina's act of assembly for the Hillsborough Debates mandated a representative constitutional convention composed of delegates elected by counties and boroughs aiming to accurately reflect the sentiments of the people. *Id.* Each of the fifty-nine counties (including those that would later become part of Tennessee) elected five delegates and each of the seven boroughs elected one delegate, following the precedent that a constitutional convention must be insulated from the influence of a partisan legislature. *Id.* The voters elected twice the number of Anti-Federalists as Federalists, reflecting the interests of non-Anglican Piedmont and Western yeoman farmers, versus primarily Anglican Eastern slave-owning planters and associated merchants. *Id.*

321. *Id.* at 92 ("We send five Members to the House of Representatives in the general government. They will go no doubt from or near the sea-ports. In other states also, those near the sea will have more interest, and will go forward to Congress; and they can, without violating the Constitution, make a law continuing themselves, as they have control over the place, time and manner of elections.").

322. *Id.* at 92–93. Earlier in the debates, Representative Joseph McDowell Jr. stated: "The freedom of election is one of the greatest securities we have for our liberty and privileges." *Id.* at 78.

(a) the people were vested with a right to free elections, (b) the Assembly could not district in a partisan way, and (c) the judiciary was obligated to intercede.

4. Vindication of Individual Liberties (1789–1875)

From 1789 to 1875, North Carolina courts consistently upheld the superiority of the guarantees in the Declaration of Rights and their role as active vindicators of individual liberties.[323]

In 1794, the highest North Carolina court wrote that it is the duty of the judiciary to resist an unconstitutional act of the Assembly, and that a precedent to the contrary "prepares the way for the total overthrow of the Constitution."[324] Two years later, it held in *Hamilton v. Eaton*[325] that "of two constructions, the one be against the fundamental law and the other consistent with it, that which is repugnant to the fundamental law must be abandoned, and the other received."[326] In 1801, *Faris v. Simpson*[327] affirmed that the Declaration of Rights was paramount to acts of the Assembly and "should ever be held sacred and inviolable, as the best security of our civil rights, against the assumption of tyranny and despotism."[328] In 1802, in *Ogden v. Witherspoon*,[329] Justice John Marshall, then sitting as a circuit court judge, characterized a legislative act as an arrogation of judicial power in violation of the separation of powers in the Declaration.[330] In 1805, a North Carolina court again addressed the supremacy of the Declaration of Rights: "it may be necessary to premise that the people of North Carolina, when assembled in convention, were desirous of having some rights secured to them beyond the control of the Legislature, and these they have expressed in the Bill of Rights and the Constitution."[331] In 1818, the court held that separation of powers prevented the legislature from reallocating property rights[332] because "[t]he transfer of property from one individual, who

323. A deep grasp of classical and English law sources of individual rights and legal reasoning is evident throughout and well past the founding era. The law lectures of Chief Justice Richmond M. Pearson (1805–1878) exactingly root North Carolina law in English law and its antecedents. *See* LONG, *supra* note 81, at 17–36.

324. State v. Anonymous, 2 N.C. (1 Hayw.) 28, 29 (1794).

325. 1 N.C. 641, 2 Mart. 1, 39 (1796).

326. *Id.* at 680, 2 Mart. 1, 39; *see also* THE FEDERALIST No. 78, *supra* note 6, at 403 (Alexander Hamilton) ("[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid.").

327. 1 N.C. 381, Cam. & Nor. 178 (1801).

328. *Id.* at 384, Cam. & Nor. at 182–83.

329. 3 N.C. (2 Hayw.) 227 (1802).

330. *Id.* at 228.

331. Trs. of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 83 (1805).

332. The right to vote vests like a property right. *See supra* note 300 and accompanying text.

is the owner, to another individual, is a *Judicial* and not a *Legislative* act."[333] In 1819, Chief Justice Taylor held the Declaration of Rights "inviolate."[334]

In the age of Andrew Jackson, when courts were regarded as anti-democratic, the North Carolina judiciary deftly continued to defend individual liberties and property rights against legislative actions.[335] In *Hoke v. Henderson*,[336] Justice Thomas Ruffin Sr. emphasized that the legislature is an agent "necessarily subordinate to the superior authority of the Constitution, which emanated directly from the whole people."[337] Ruffin reasserted that "the preservation of the integrity of the Constitution is confided by the people, as a sacred deposit, to the Judiciary."[338] It is not for the legislature to judge the extent of its own powers.

Overrepresentation in the Assembly by Eastern slave-owning planters retarded the economic development of North Carolina by blocking railroads and other critical infrastructure projects.[339] The imbalance in representation was the product of unequal population growth within existing districts in the Piedmont and West, coupled with the reticence of the East to surrender power, not of affirmatively malicious malapportionment by the legislature that might be remedied in the courts. The convention of 1835 produced a more equal apportionment between Eastern and Western seats in the legislature.[340] It further constrained the legislature through a more independent judiciary and the popular election of the governor, but at the awful cost of abolishing, in a close sectional vote, the right of suffrage of free African American citizens.[341]

Like its Rotten Boroughs point, *Harper III* argues that the regional "malapportionment" that went unremedied in North Carolina until the 1835 Constitution is proof that the legislature was granted absolute power with

333. Robinson v. Barfield, 6 N.C. (2 Mur.) 391, 420 (1818) ("Miserable would be the condition of the people if the judiciary was bound to carry into execution every act of the Legislature, without regarding the paramount rule of the Constitution. This Government is founded on checks and balances. The Judiciary check the Legislature when it strays beyond its constitutional orbit, by refusing to enforce its acts.").

334. Dickinson v. Dickinson, 7 N.C. (3 Mur.) 327, 331 (1819).

335. Walter F. Pratt, Jr., *The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges*, 4 LAW & HIST. REV. 129, 139 (1986).

336. 15 N.C. (4 Dev.) 1 (1833), *overruled on other grounds by* Mial v. Ellington, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903).

337. *Id.* at 7; *see also* Pratt, *supra* note 335, at 129 (crediting Thomas Ruffin Sr. and William Gaston with increasing the independence of the North Carolina judiciary despite populist headwinds).

338. *Hoke*, 15 N.C. at 10.

339. HENRY GROVES CONNOR, THE CONVENTION OF 1835, at 5–6 (1908).

340. *See* Harold J. Counihan, *The North Carolina Constitutional Convention of 1835: A Study in Jacksonian Democracy*, 46 N.C. HIST. REV. 335, 348 (1969).

341. CONNOR, *supra* note 339, at 9, 12–14, 18–19 ("How little the wisest know of the operations of the industrial, political and social forces, and what disturbances they work in the 'nice adjustments' of human governments.").

regard to legislative districting.[342] And like the Rotten Boroughs point, the *Harper III* court: (a) confuses the right of free elections with proportional representation;[343] (b) misses the point of distinction that the representational imbalance was caused by population growth, not the legislature deliberately assigning voters to single-purpose electoral districts;[344] (c) does not acknowledge that under a then-prevailing theory that representation should correspond to tax contributions, the legislature was not malapportioned;[345] and (d) does not appreciate that county formation is not the same as electoral districting.[346] In fact, the imbalanced representation *was* asserted to be a violation of the individual rights expressed in the Declaration of Rights.[347]

The protections of the Declaration of Rights remained unchanged by the Constitution of 1835.[348] Three years after free African Americans lost their suffrage, Justice William Gaston, in *State v. Manuel*,[349] held that free African Americans were legally citizens of the state who could not be denied the rights guaranteed under the Constitution.[350] In 1854, Chief Justice Nash continued the practice of voiding legislation that conflicted with the Declaration of Rights,[351] and the following year he stated that "in North Carolina this duty is

342. *Harper III*, 384 N.C. 292, 328, 886 S.E.2d 393, 417; *see also supra* notes 147–50 and accompanying text.

343. *See supra* note 272 and accompanying text (distinguishing proportional representation from free election).

344. Jeffrey, *supra* note 283, at 316 (identifying uneven population growth as the cause of disproportionate legislative apportionment).

345. *See* Counihan, *supra* note 340, at 341–42 (discussing debates on the proper theory of apportionment in the 1835 constitutional convention).

346. Jeffrey, *supra* note 283, at 317 (discussing how the resolution of the 1835 convention allowed the many additional economic considerations in county formation to be separated from electoral districting). The 1835 changes cut the connection; therefore, no inference can be drawn from county formation on the electoral districting powers of the legislature.

347. 1 PAPERS OF WILLIAM ALEXANDER GRAHAM 285 (J.G. de Roulhac Hamilton ed., 1957) (writing application for reform "was made under the additional sanction of your Bill of Rights").

348. *Compare* N.C. CONST. of 1776, *with* N.C. CONST. of 1835 (leaving unchanged the Declaration of Rights).

349. 20 N.C. (3 & 4 Dev. & Bat.) 144 (1838).

350. *Id.* at 152 (tracing with care the thread of English liberty to North Carolina and extending it to all citizens). Contrast the decision of a similar question under the federal constitution in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV ("In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.").

351. *See* State v. Moss, 47 N.C. (2 Jones) 66, 68 (1854) ("These principles are dear to every freeman; they are his shield and buckler against wrong and oppression, and lie at the foundation of civil liberty; they are declared to be *rights* of the citizens of North Carolina, and ought to be vigilantly guarded.").

imperative."[352] On the eve of the American Civil War, the judiciary firmly overruled "arbitrary" and "despotic" acts of the legislature.[353] And remarkably, during the Civil War, the Supreme Court of North Carolina voided wartime acts of the Assembly on the basis of the supremacy of the Declaration of Rights.[354] Quoting the Magna Carta, Chief Justice Richmond Mumford Pearson stated that, regardless of the exigencies, everyone "may take his remedy by the course of the law, and have justice and right for the injury done to him."[355] The idea that the legislature can indirectly redefine the right to free election is antithetical to Pearson's conviction that the legislature is a creation of the people, and so "it is absurd to suppose that the intention was to make a grant of powers which would enable the creature to destroy the creator."[356]

### B. *Constitution of 1868*

Acts of an Assembly skewed in favor of slaveholding interests drove North Carolina into the devastating American Civil War.[357] In 1868, the people of North Carolina revised their Constitution to address its failures of representation. The Declaration of Rights was amended to enshrine the principle of equality in its opening words,[358] reiterate that enumerated rights do not preclude others,[359] and clarify that all powers not expressly delegated remain with the people.[360] The Free Elections Clause guarantee was extended to *all* elections instead of merely elections for the Assembly.[361] The Constitution provided for universal male suffrage, abolishing all property qualifications for both voting and office holding.[362] The Constitution restricted the legislature in other significant ways: the executive and judiciary were made more

352. Stanmire v. Taylor, 48 N.C. (3 Jones) 207, 211, 214 (1855) ("[T]he Court would be unmindful of its high station, and of its solemn obligation, if it shrunk from declaring the truth. . . . [If a justice] turn[s] aside from his duty, . . . he is unfaithful to his trust, and does an act injurious to those whose interests and rights he is bound to protect, and which is offensive to God. . . . It does not become us to look into the motives of the Legislature . . . . Its effect and operation we are at liberty to declare.").

353. *See* State v. Glen, 52 N.C. (7 Jones) 321, 331 (1859).

354. *See* Barnes v. Barnes, 53 N.C. (8 Jones) 366, 372 (1861).

355. *Id.* at 374; *see also id.* at 369 ("Whether in the present condition of the country the statute be expedient, is a question of which we have no right to judge. Our province is to give judgment on the question of the constitutional power of the Legislature to pass the statute.").

356. JEFFREY J. CROW & ROBERT F. DURDEN, MAVERICK REPUBLICAN IN THE OLD NORTH STATE: A POLITICAL BIOGRAPHY OF DANIEL L. RUSSELL 8–9 (1977).

357. The majority of North Carolina voters were nonslaveholding yeoman farmers who on February 28, 1861, rejected secession. DANIEL W. CROFTS, RELUCTANT CONFEDERATES: UPPER SOUTH UNIONISTS IN THE SECESSION CRISIS 145–47, 373, 375 (1989).

358. N.C. CONST. of 1868, art. I, § 1.

359. *Id.* art. I, § 37.

360. *Id.*

361. *Id.* art. I, § 10.

362. *Id.* art. I, § 22.

independent and more responsive to the people via popular elections.[363] For the first time, the Form of Government assigned the Senate a districting task, subject to the principles of the Declaration of Rights and to specific districting guidelines meant to ensure equality of representation without manipulation.[364]

### 1. *Van Bokkelen v. Canaday* (1875)

The principle of equality in the Constitution of 1868 was antithetical to the Conservative-Democrats,[365] and they relentlessly fought to reestablish supremacy in North Carolina. They unleashed the terror of their paramilitary wing, the Ku Klux Klan, captured control of the legislature in 1870, impeached the Republican governor the following year,[366] and dismantled electoral protections.[367] By 1874, they controlled both houses of the Assembly.[368] In a sudden blow from the same beak James II's Tories had used, the Conservative-Democrat Assembly remodeled Wilmington's charter in 1875 to assure a partisan victory in new elections, and they removed their adversaries through *quo warranto* writs issued by an allied judge.[369] Whether the checks placed by the Founders in the Declaration of Rights, adapted from the Bill of Rights of 1688, and recently reinforced in the Constitution of 1868, would be effective against a fresh partisan-gerrymandering assault was the question presented to the Supreme Court of North Carolina—the last counterforce to authoritarian government standing in 1875—in the case of *Van Bokkelen v. Canaday*.[370]

363. *See Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges*, 70 N.C. L. REV. 1825, 1837–45, 1850–51 (1993). The wisdom of this choice would become obvious quickly, as the court operated as a bulwark against the Assembly after the withdrawal of federal power.

364. *See* N.C. CONST. of 1868, art. II, § 5 (providing that the General Assembly would redefine fifty senate districts (a) every ten years after an enumeration, (b) containing roughly an equal number of inhabitants, (c) consisting of contiguous territory, (d) without dividing a county, unless the county so divided was entitled to two or more senators).

365. The Conservative Party was a coalition of Democrats and former Whigs who opposed racial equality and the "radical" Republican reconstruction policies. *See* Douglass C. Dailey, *The Elections of 1872 in North Carolina*, 40 N.C. HIST. REV. 338, 339 (1963). They denounced efforts to suppress the Ku Klux Klan and supported a constitutional convention that would overturn the 1868 Constitution and replace it with one with "terms as that the plainest mind may understand it, and as to leave as little as possible to inference and legislative and judicial construction." *See Democratic-Conservative Party (N.C.) Central Executive Committee, Address of the Central Executive Committee*, DOCUMENTING AM. S. (2002), https://docsouth.unc.edu/nc/demconserv/demconserv.html [https://perma.cc/C7F5-JXNN].

366. Jim D. Brisson, *"Civil Government Was Crumbling Around Me": The Kirk-Holden War of 1870*, 88 N.C. HIST. REV. 123, 126 (2011).

367. William Alexander Mabry, *Negro Suffrage and Fusion Rule in North Carolina*, 12 N.C. HIST. REV. 79, 86–87 (1935).

368. *Id.* at 80–81.

369. The image is from "Leda and the Swan" by W.B. Yeats, in which the divine, law by analogy, assaults the mortal. *See* W.B. YEATS, *Leda and the Swan*, *in* THE POEMS OF W.B. YEATS 214 (Richard J. Finneran ed., 1983).

370. 73 N.C. 198 (1875).

*Van Bokkelen* began in 1873, when Wilmington—then the most populous city in the state and sixty percent African American[371]—elected a majority-Republican board of aldermen led by mayor William P. Canaday, a man excoriated in the Conservative-Democratic *Wilmington Journal* for, among other things, practicing "social equality by eating and drinking together [with African-Americans] at the same time and at the same table."[372] Targeting the elimination of Republican voting power in major eastern cities, in February 1875, the Assembly in Raleigh overhauled the Wilmington charter to pack Republican citizens into one voting district that could be outvoted by two Conservative-Democratic districts.[373] They also enacted repressive residency requirements and registration processes.[374] To oust the incumbents, the legislation required new elections in five weeks, on March 11, 1875, and made it a crime to fail to surrender office.[375] The citizens petitioned the federal Fourth Circuit to enjoin the gerrymandered election, but Judge Hugh Lennox Bond determined that the federal and state constitutional remedies were better pursued after the election.[376]

The election was held on schedule, despite a boycott by over eighty percent of the electorate,[377] and resulted in Conservative-Democratic control of the board of aldermen and the election of mayor A.H. Van Bokkelen.[378] The incumbent board refused to surrender their offices,[379] so, to compel them to vacate, the Van Bokkelen board-elect brought a *quo warranto* action in the Superior Court for the Seventh District.[380] Judge John Kerr, Jr., ruled for Van Bokkelen on three bases: (a) that the city's Republican majority did not have the unqualified right to govern, (b) the will of the Democratic legislature must

371. *See* JAMES SPRUNT, INFORMATION AND STATISTICS RESPECTING WILMINGTON, NORTH CAROLINA 50 (1883).

372. *Does This Mean Social Negro Equality?*, WILMINGTON J., July 31, 1874, at 2.

373. An Act to Amend the Charter of the City of Wilmington, ch. 43, § 4, 1874–75 N.C. Sess. Laws 462, 463.

374. *Id.* § 10, 1874–75 N.C. Sess. Laws at 466–67 (imposing more stringent voter qualifications than those mandated by the constitution, requiring residency for ninety continuous days in the lot, block, and ward). This was effective to disqualify many African American residents because they more frequently rented or moved for work. *See id.* §§ 11–12, 1874–75 N.C. Sess. Laws at 467 (authorizing any elector to challenge another's registration or vote, an avenue for intimidation).

375. *See id.* §§ 7, 22, 1874–75 N.C. Sess. Laws at 465, 470. Specifically, section 22 provided that any Alderman not surrendering his office was guilty of a misdemeanor punishable by a fine of not less than $2,000 and at least two years imprisonment. *Id.* § 22, 1874–75 N.C. Sess. Laws at 470.

376. *Power of a (Federal) Court of Equity to Enjoin the Holding of a Municipal Election*, 2 CENT. L.J. 197, 197 (1875).

377. *The Injunction—Our City Election*, WILMINGTON J., Mar. 12, 1875, at 1. ("The poor negros, and their miserable white allies, . . . [do] not even trouble themselves to register, and thus have given the entire control of the election into the hands of the substantial white citizens.").

378. *See The Election Yesterday*, N.C. GAZETTE (FAYETTEVILLE), Mar. 18, 1875, at 2.

379. *Infamous Gerrymandering*, NAT'L REPUBLICAN (D.C.), Feb. 10, 1875, at 1.

380. *Quo Warranto*, MORNING STAR (WILMINGTON), Apr. 29, 1875, at 1.

be respected, and (c) it would be impracticable for the courts to alter the division of wards.[381]

The Supreme Court of North Carolina heard the appeal in June 1875.[382] The bench, led by Chief Justice Richmond M. Pearson, was as distinguished as any in North Carolina's history, and the advocates preeminent. Ex-judge Daniel L. Russell, a future governor of North Carolina, argued on behalf of the incumbent board that the act

> [was] an attempt to invest the control of the city in a few citizens, ignoring the rights of the great majority. The right to vote is a distinct and different matter from the right to deposit a ballot in the box. The right to vote is the right to have an equal voice in the election—equal with every other elector. Each elector must have the same electoral power.[383]

Russell argued that the act diluted the voting power of a Third Ward elector by seven-eighths, and was therefore unconstitutional.[384] He cited the Free Elections Clause and the principles of the Declaration of Rights,[385] precedents from sister states, and treatises by the great contemporary jurist Thomas Cooley.[386]

For the Van Bokkelen board-elect, ex-Confederate Attorney General George Davis[387] and his co-counsel Colonel Robert Strange emphasized the Constitution's textual assignment to the Legislature of the plenary power to organize cities, that the inequality of the wards was not a matter the courts could control, and that all political parties gerrymander.[388] Ex-judge Daniel Gould Fowle—another future governor—countered on behalf of the incumbent board that the North Carolina Constitution established manhood suffrage as a right, not a privilege that could be abrogated by legislative act.[389]

381. *Id.*

382. *Synopsis of the Argument of Counsel*, DAILY J. (WILMINGTON), June 18, 1875, at 4.

383. *Id.*

384. *Id.*

385. People *ex rel.* Van Bokkelen v. Canaday, 73 N.C. 198, 216 (1875) ("*Bill of Rights*, sec. 10 [the Free Elections Clause]. How can an election be free when a part of the voters are driven from the polls by a Legislative exclusion?").

386. *See Synopsis of the Argument–Thursday's Proceedings in the City Case*, DAILY J. (WILMINGTON), June 19, 1875, at 4.

387. "[M]y ambition went down with the banner of the South, and, like it, never rose again." C. Alphonso Smith, *George Davis*, *in* 3 LIBRARY OF SOUTHERN LITERATURE 1225, 1227 (Edwin Anderson Alderman, Joel Chandler Harris & Charles William Kent eds., 1909).

388. *See Synopsis of the Argument–Thursday's Proceedings in the City Case*, *supra* note 386, at 4.

389. *The Argument Continued–Friday's Proceedings*, DAILY J. (WILMINGTON), June 19, 1875, at 4. The closing arguments were reported on the next day as well. *The City Case*, DAILY J. (WILMINGTON), June 20, 1875, at 4.

The Pearson court ruled unanimously in favor of the incumbent board, voided the gerrymandering act, and nullified the election.[390] The legislative task of establishing electoral districts did not convey the power to alter the scope or voting power of the electorate through gerrymandering or other means.[391] Writing for the court, Justice Edwin Godwin Reade's[392] opening lines were: "Our government is founded on the will of the people. Their will is expressed by the ballot."[393]

Analyzing first the registration portions of the act, Justice Reade wrote, "the General Assembly cannot in any way change the qualifications of voters."[394] The court identified the absurdity that would follow if the General Assembly had the power to so disenfranchise—they could place political control in the hands of whatever demographic they wished—the old, the young, the landed, political allies, the white race.[395] The Assembly had "no power to put any portion of the people of the State under such a government."[396] Addressing the Constitution's textual commitment of the responsibility to provide for voter registration to the General Assembly, the court held that the power was limited: "It is to facilitate the exercise of the right of the ballot; and not to defeat it."[397] The General Assembly had the power and the duty to protect the ballot from fraud, but not to the extent it became "a practical denial of the right to register to vote."[398]

Analyzing next the districting portions of the act, the court ruled that "a fundamental principle in the state government is that representation shall be *apportioned* to the popular vote *as near as may be* . . . so that not only every man may vote, but his vote shall count in the representative body."[399] The act

390. *Van Bokkelen*, 73 N.C. at 220.

391. *Id.*

392. In 1865, Justice Edwin Godwin Reade was elected associate justice of the Supreme Court of North Carolina. *Edwin G. Reade*, N.C. DEP'T NAT. & CULTURAL RES. (Dec. 19, 2023), https://www.dncr.nc.gov/blog/2023/12/19/edwin-g-reade-g-51 [https://perma.cc/ZY3M-WJDW]. Although a Republican, both parties elected him to the same position in 1868 and continued to reelect him until 1879. *Id.* Reade earlier served in the U.S. House of Representatives and witnessed the savage caning of anti-slavery Senator Charles Sumner in 1856. *Id.* Reade was the only Southerner who voted to censure Representative Keitt of South Carolina, who had prevented others from stopping the assault. Reade presided over the 1865 State Reconstruction convention to universal acclaim. *Id.* "Fellow citizens, we are going home," he told the war-weary delegates. Thomas M. Pittman, *William Woods Holden*, *in* 3 BIOGRAPHICAL HISTORY OF NORTH CAROLINA 184, 195 (Samuel A. Ashe ed., 1905).

393. *Van Bokkelen*, 73 N.C. at 220.

394. *Id.* at 222.

395. *Id.*

396. *Id.* at 223 ("In vain we look in the Constitution for any such qualification [limiting the right to vote]. The General Assembly has disenfranchised him.").

397. *Id.* The task is administrative only. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 622–24 (1871).

398. *Van Bokkelen*, 73 N.C. at 224.

399. *Id.*

apportioned districts such that one vote of a partisan ally counts as much as seven votes of an adversary. "That this is a plain violation of fundamental principles, the apportionment of representation, is too plain for argument."[400]

The court discredited the various legislative objectives ("compelling state interests") proffered as legitimate prerogatives—protection of property, racial segregation, preference for educated and intelligent voters, or promoting better government.[401] The court held that the subjective motives of the legislature are not exculpatory—it is the objective disenfranchising and vote-diluting effects that are dispositive. The court explained:

> Without questioning the intent of the legislature, we see that the effect of this act is to violate the fundamental principles of the constitution and their own cherished and declared purpose to maintain free manhood suffrage . . . . [I]t is the *effect* of the act and not the *intention of the Legislature*, which renders it void.[402]

In this watershed period, *Van Bokkelen* decided a fundamental constitutive question: should North Carolina evolve into a one-party authoritarian state or remain true to its ancient ideals? *Van Bokkelen* reasserted the birthright of North Carolinians to self-determination through representative government, and it wielded the protections of the Constitution and the power of the judiciary to deny the General Assembly the prerogative to subvert that right by any means, including by fashioning extremely partisan electoral districts. *Van Bokkelen* remains, undiminished, a seminal case in North Carolina constitutional history.

*Van Bokkelen* clarifies many important technical legal details of the functioning of the republican form of government established by the Constitution.

First, a qualified voter's right of free election is fundamental and essential to the proper functioning of representative government. It is established by a legal term of art predating the Constitution. It is not bounded by its formal expression in the Declaration of Rights, nor by the supplementary requirements in the Form of Government.[403]

400. *Id.* at 225.

401. *Id.*

402. *Id.* at 225–26; *see also* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

403. The unbounded protections of the Free Elections Clause share a *corpus juris* with the Declaration of Rights protections against discrimination in jury selection, *see* Jackson v. Hous. Auth., 321 N.C. 584, 584–85, 364 S.E.2d 416, 416 (1988); State v. Cofield, 320 N.C. 297, 299, 357 S.E.2d 622, 623 (1987), unreasonable searches and seizures, *see* State v. Carter, 322 N.C. 709, 710, 370 S.E.2d 553, 554 (1988), freedom of speech, *see* Corum v. Univ. of N.C. *ex rel.* Bd. of Governors, 330 N.C. 761, 766, 413 S.E.2d 276, 280 (1992), and freedom of religion, *see* Harry C. Martin, *The State as a "Font of*

Second, the right is superior to any legislative prerogative. Neither the general grant of legislative power to the Assembly nor the election-related tasks assigned to it in the Form of Government justify the abridgement of the individual's right of free election. The task of legislating elections regulations is to *facilitate* the clear reflection of the will of the whole people, for the purpose of apportioning legislative power as nearly as possible according to the interests of the electorate. It is a ministerial task that does not confer on the agent the authority to allocate power to serve its own interests.[404]

Third, if an elections regulation has the *effect* of diminishing the *voting power* of a class of voters, the court must nullify it, regardless of whether the form is direct or subtle,[405] and regardless of the declared intention. Because government is instituted to serve the people, the court must construe individual rights broadly and legislative prerogatives narrowly. Reality, as opposed to a specious form of civic pantomime, is the mandate. The court must adjudicate the substantive merits and not absent itself on procedure, justiciability, separation of powers, political question, or other grounds. The court has a constitutionally assigned duty to protect the right to free election and the adjacent liberties of frequent elections, speech, assembly, conscience, equal protection, law of the land, and recurrence to fundamental principles. No other actor under the Constitution backstops the court—there is no executive veto or plebiscite opportunity—if the court fails, the remaining options are civil uprising or federal intervention.

The power of the Pearson court's decision is intensified by the anarchy and terror into which it looked. Blasting the *Van Bokkelen* decision the week after it was announced, the front page of the July 17, 1875, *Wilmington Journal* urged conservative patriots to put an end to the court's "tyranny," suggesting a lynching: "We rather think these negro-made judges are a stench in the nostrils of the true people of North Carolina."[406] The court stood above a menacing fate to lift the life of the "poorest He" in North Carolina—it did not throw away his shield and chain him to a legislature in which he had no voice. The court's virtue was embodied by the Chief Justice Pearson himself, "a lover of liberty as defined

*Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1752 (1992) (noting the greater protection to individual liberties enshrined in the North Carolina Constitution).

404. In *Cloud v. Wilson*, 72 N.C. 155 (1875), Reade wrote, "The Legislature itself ought not to exercise a doubtful power . . . . Every *doubt* in everything, is solved in favor of popular rights; to this there is no exception." *Id.* at 166–67.

405. The *Van Bokkelen* court did not offer a narrow interpretation of the scope of the individual right to vote. It covered facially neutral legislation enacted with a partisan purpose, open-ended grants of discretion to voter registrars that create opportunity for partisan discrimination in administration, residency requirements, and other tactics with similar effects.

406. *The Military vs. the Judiciary: How Radicalism Lives*, WILMINGTON J., July 16, 1875, at 1.

by the common law and Magna Charta, and too much of a lawyer to be capable of being a selfish politician."[407]

2. Disenfranchisement of Black and Republican Voters (1875–1964)

Having failed to subdue the court, the Conservative-Democrats sought to amend the Constitution.[408] A weak mandate in 1875 prevented them from implementing more sweeping constitutional reforms and, ironically, their disenfranchisement efforts resulted in a Fusionist coalition of Populist and Republican voters winning the legislature in 1894 and retaining it in 1896.[409] In another example of judicial rectitude, *State v. Lattimore*,[410] the court reviewed a range of election irregularities, addressing the sanctity of free elections under extreme duress from the fatal politics of the era.[411] It wrote: "This is a government of the people, by the people and for the people, founded upon the will of the people, and in which the will of the people legally expressed must control."[412] Justice David Furches[413] held that in construing the Constitution,

407. *Ex parte* Moore, 65 N.C. 267, 269 (1871).

408. *See generally* AMENDMENTS TO THE CONSTITUTION OF NORTH CAROLINA PROPOSED BY THE CONSTITUTIONAL CONVENTION OF 1875, AND THE CONSTITUTION AS IT WILL READ AS PROPOSED TO BE AMENDED (Johnstone Jones & John Reilly eds., 1875) (the amendments sought by the Conservative-Democrats).

409. MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908, at 31 (2001).

410. 120 N.C. 426, 26 S.E. 638 (1897).

411. *Id.* at 638.

412. *Id. See generally* M.T. Van Hecke, *Legislative Power in North Carolina*, 1 N.C. L. REV. 172, 181 (1923) [hereinafter Van Hecke, *Legislative Power*] (analogizing the Constitution to the grant of a limited power of attorney by the people to the government, with the courts more attuned to give due effect to the special function of each clause). An influential treatise of this period, cited in *Hill v. Skinner*, 169 N.C. 405, 409, 85 S.E. 351, 353 (1915), noted:

> § 6. While the Legislature cannot add to, abridge or alter the constitutional qualifications of voters, it may, and should, prescribe proper and necessary rules for the orderly exercise of the right resulting from these qualifications. The Legislature must prescribe the necessary regulations as to place, mode, manner, &c. But such regulations are to be subordinated to the enjoyment of the right itself.
>
> . . .
>
> § 8. But it is manifest, that under color of regulating the mode of exercising the elective franchise, it is quite possible to subvert or injuriously restrain the right itself. And a statute which clearly does either of these things, must of course be held invalid, on the ground that it seeks to deprive the citizen of his constitutional right.

GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS 10–11 (1875).

413. Justice David Furches was a student of Chief Justice Richmond Mumford Pearson and trained in the traditions of the ancient rights of Englishmen and North Carolinians. *See generally* Thomas P. Davis, *School Days: The Supreme Court of North Carolina and the Moral Science of the Law, 1819–1931*, 96 N.C. HIST. REV. 373 (2019) (discussing the roles that early Justices of the Supreme Court of North Carolina, including Furches, played in the development of North Carolina common law).

"all acts providing for elections should be liberally construed, that tend to promote a fair election or expression of this popular will."[414]

However, again with bestial violence, the Democratic Party recaptured the legislature in 1898[415] and sponsored further constitutional amendments designed to disenfranchise African American voters by imposing a poll tax and a literacy test with a grandfather clause effectively exempting illiterate whites.[416] These restrictions purported to be race neutral to comply with the Fifteenth Amendment to the United States Constitution.[417] Adopted in 1900 and acquiesced to by the federal judiciary, the changes to the state constitution effectively disenfranchised most African American voters for sixty years. To eliminate resistance from the state supreme court, the Democrat-controlled House of Representatives voted along party lines to impeach Chief Justice Furches and Justice Douglas in 1901.[418] Although the move failed in the Senate, it had a chilling effect on judicial independence until the Civil Rights era. Between 1901 and 1964, "any state litigation challenging the electoral structure in state court would have been inconceivable because partisan elected judges would ratify decisions of the legislature disadvantageous to political opponents of the existing order."[419] Finally triumphant in breaking the walls of the Constitution and its defenders in the Supreme Court, Democratic Governor Charles Brantley Aycock boasted in 1903 that "we have solved the negro

414. *Quinn*, 120 N.C. at 426, 26 S.E. at 638.

415. The closing stages of the 1898 Democratic campaign relied on threats of violence. "Red Shirts," openly brandishing weapons, marched menacingly through neighborhoods to frighten Republican voters. HELEN EDMONDS, THE NEGRO AND FUSION POLITICS IN NORTH CAROLINA, 1894–1901, at 185 (1951). In Wilmington, the movement resulted in a bloody coup. *Id.* at 210. *See generally* DAVID ZUCCHINO, WILMINGTON'S LIE: THE MURDEROUS COUP OF 1898 AND THE RISE OF WHITE SUPREMACY (2020) (historical accounting of the 1898 white supremacist Wilmington riot and coup).

416. *See* N.C. CONST. of 1868, art. VI, § 4 (1898) (voter registration requires literacy test and payment of poll taxes); *id.* art. VI, § 5 (persons who could legally vote in 1867 and their descendants are exempted from section 4). Such grandfather clauses were found in *Guinn v. United States*, 238 U.S. 347 (1915), and *Myers v. Anderson*, 238 U.S. 368 (1915), to violate the Fifteenth Amendment of the United States Constitution. *Guinn*, 238 U.S. at 368; *Myers*, 238 U.S. at 383. The poll tax was repealed in 1920, but the literacy test remained in effect until 1965, when the Voting Rights Act became law. *Primary Source: The Suffrage Amendment*, NCPEDIA (2009), https://www.ncpedia.org/anchor/primary-source-suffrage [https://perma.cc/6SKN-9ESF].

417. Charles Brantley Aycock, Governor, N.C., Speech to the North Carolina Society in Baltimore (Dec. 18, 1903), *in* THE LIFE AND SPEECHES OF CHARLES BRANTLEY AYCOCK 161–63 (R.D.W. Connor & Clarence Poe eds., 1912).

418. Robert N. Hunter, Jr., *Do Nonpartisan, Publicly Financed Judicial Elections Enhance Relative Judicial Independence?*, 93 N.C. L. REV. 1825, 1838 (2015).

419. *Id.* at 1843 (arguing that this gave "undue deference to legislative decisions, presuming constitutionality of measures where political rights are concerned, leaving insular minorities to seek relief from federal instead of state courts. In a system where state constitutions recognize rights not acknowledged in the federal constitution, this presumption erodes the power of constitutional judicial review").

problem . . . [by] first, as far as possible under the Fifteenth Amendment, to disfranchise him . . . ."[420]

3. Attempts at Reform and Federal Intervention (1900–1971)

Although the state's democratic processes remained captured from 1900 until federal intervention in 1964, the right to free election began to be reasserted by the 1930s.

In a significant effort to revise the North Carolina Constitution, a Constitutional Commission in 1932 included a proposal to clarify the Free Elections Clause so that it would read "elections ought to be free, *and so safeguarded and protected by law as to guarantee the complete and free expression of the public will*."[421] The clarification used the language of the precedents discussed herein to reaffirm that the legislature's power to determine electoral districts remained restricted by the Free Elections Clause.[422] The draft constitution was approved by the General Assembly in 1933, but due to a technicality raised by an advisory opinion of the state supreme court, the proposed Constitution never reached the people for approval.[423]

The Free Elections Clause was vindicated in the general election held in November 1936. In *Swaringen v. Poplin*,[424] plaintiffs alleged that the Wilkes County elections board, with malicious intent, reduced by 100 votes the tally of

420. Aycock, *supra* note 417, at 162.

421. *Report of the North Carolina Constitutional Commission*, 11 N.C. L. REV. 5, 13 (1932) (emphasis added).

422. The draft clarified that legislative power was "full and complete" except as to matters enumerated in the Bill of Rights. M.T. Van Hecke, *A New Constitution for North Carolina*, 12 N.C. L. REV. 193, 210 (1934). The North Carolina Constitution declared that government of right "is founded on their [the people's] will only." N.C. CONST. of 1868, art. I, § 2. Many precedents were expressed in terms of the "will of the people." *See, e.g.*, People *ex rel.* Van Bokkelen v. Canaday, 73 N.C. 198, 220 (1875) ("Our government is founded on the will of the people."); State v. Lattimore, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897) ("[W]e should keep in mind that this is a government of the people, in which the will of the people,—the majority,—legally expressed, must govern . . . ." (citing N.C. CONST. of 1868, art. I, § 2)); Hill v. Skinner, 169 N.C. 405, 415, 86 S.E. 351, 356 (1915) ("We think the object of all elections is to ascertain, fairly and truthfully, the will of the people—the qualified voters." (quoting Wilmington, O. & E.C.R. Co. v. Onslow Cnty. Comm'rs, 116 N.C. 563, 568, 21 S.E. 205, 207 (1895))); Bickett v. Knight, 169 N.C. 333, 352, 85 S.E. 418, 427 (1915) (stating that the judiciary must "sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people").

423. N.C. STATE CONST. STUDY COMM'N, REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION 144 (1968) [hereinafter CONSTITUTION COMM'N REPORT], https://www.ncleg.gov/Files/Library/studies/1968/st12308.pdf [https://perma.cc/42VJ-WZ4N].

424. 211 N.C. 700, 191 S.E. 746 (1937).

the Republican candidates for county commissioner and state senate.[425] The court held:

> The courts are open to decide this issue in the present action. In Art. I, sec. 10, of the Const. of North Carolina, we find it written: "All elections ought to be free." Our government is founded on the consent of the governed. A free ballot and a fair count must be held inviolable to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot.[426]

The point of invoking the Free Elections Clause in the ruling was not to make a prosaic observation about an accurate count (that was already required by statute), but to reassert in an era of rising fascism around the world that government officials may not subvert elections for partisan control.[427]

The clause was next addressed in *Clark v. Meyland*,[428] which applied the Free Elections Clause to nullify an oath of party loyalty.[429] The plaintiff, a registered Democrat who wanted to change his party affiliation to Republican, refused to swear the oath mandated by the applicable statute that he support his new party's nominees until "in good faith" he changed his party affiliation again.[430] The court struck down the oath requirement because it "violate[d] the principle of freedom of conscience. It denie[d] a free ballot—one that is cast according to the dictates of the voter's judgment."[431] The court declared that "the Legislature is without power to shackle a voter's conscience."[432] This is a significant decision in that it highlights again the inseparability of freedom of elections from freedom of conscience.

Federal power ultimately restored election liberties in North Carolina closer to their historic roots. In 1884, in *Ex Parte Yarbrough*,[433] the United States Supreme Court noted the threat to democracy posed by elections subverted by state legislatures and suggested the federal Constitution contained the power

425. *Id.* at 700, 191 S.E. at 746.

426. *Id.* at 702, 191 S.E. at 747.

427. At the time it was warned that fascism in Europe would come to America "wrapped up in the American flag and heralded as a plea for liberty and preservation of the constitution." Sarah Churchwell, *American Fascism: It Has Happened Here*, N.Y. REV. BOOKS (June 22, 2020), https://www.nybooks.com/online/2020/06/22/american-fascism-it-has-happened-here/ [https://perma.cc/SLU9-ECXJ].

428. 261 N.C. 140, 134 S.E.2d 168 (1964).

429. *Id.* at 143, 134 S.E.2d at 170.

430. *Id.* at 142, 134 S.E.2d at 170.

431. *Id.*

432. *Id.* Both *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937), and *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964), are specific applications of the Free Elections Clause. They do not define its limits. *See supra* note 214.

433. 110 U.S. 651 (1884).

"to provide against these evils."[434] Yet, for decades, federal courts largely declined to redress election wrongs.[435]

However, starting in 1962, the United States Supreme Court issued a series of epochal rulings that fundamentally restored the framework of representative government across the United States. *Baker v. Carr*[436] held that Tennessee's malapportioned districts violated the principle of "one person, one vote" under the federal Equal Protection Clause.[437] The issue of legislative apportionment was justiciable and within its authority to remedy. Essentially, the Court found elements of the ancient right of free elections, and the obligation of the judiciary to vindicate it, in the Equal Protection Clause of the federal Constitution.[438] From 1962 onward, federal law became the focus of efforts to break both racial and partisan disfranchisement through both the constitution and the Voting Rights Act of 1965.[439] *Drum v. Seawell*,[440] a federal district court decision issued in 1965, noted the relative powerlessness of the people of North Carolina to reform an entrenched legislature.[441] *Drum* nullified the provisions of the North Carolina Constitution requiring that each county be afforded at least one representative regardless of its population, precipitating a constitutional amendment in 1968.[442] The referendum on the ballot in North Carolina on November 5, 1968, was to implement representative voting districts, not to preempt the Free Elections Clause.

434. *Id.* at 667.

435. *See, e.g.*, Giles v. Harris, 189 U.S. 475, 488 (1903) (declining to compel boards of registrars to enroll African Americans on voting lists); Colegrove v. Green, 328 U.S. 549, 552 (1946) (declining to declare that Illinois congressional districts unconstitutionally violated principles of fair apportionment).

436. 369 U.S. 186 (1962).

437. *Id.* at 207–08.

438. The Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.), which followed likewise, can be seen as a codification of the right to free elections in the context of race. Interestingly, the jurisprudence evolving at the federal level had been articulated by *Van Bokkelen* almost 100 years earlier.

439. Pub. L. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

440. 249 F. Supp. 877 (M.D.N.C. 1965).

441. *Id.* at 880 ("North Carolina has no provisions for initiative and referendum; its Governor has no veto power, thus the people of the State have no practical means by which to rectify an imbalance of representation in one of the most powerful legislative bodies in America.").

442. *See* N.C. LEGIS. RSCH. COMM'N, REP. ON THE GEN. ASSEMBLY OF N.C. 14 (1967).

## C. *Constitution of 1971*

### 1. The Constitutional Renewal of Individual Liberties

In the constitutional reform of 1971,[443] the wording of the Free Elections Clause was updated from "ought to be free" to the more modern form of a command, "shall be free."[444]

To implement the voter protections won in the Civil Rights Era, North Carolina placed further limitations on the Assembly.[445] The supplementary districting requirements in article II were restated as (1) equal numbers of inhabitants as nearly as practical, (2) contiguous territory, (3) no division of counties, and (4) no alterations until the next decennial census.[446] These were

443. The 1971 Constitution was a "good-government measure, long-matured and carefully crafted by the state's leading lawyers and politicians, designed to consolidate and conserve the best features of the past, not to break with it." Orth, *North Carolina Constitutional History*, *supra* note 60, at 1790.

444. "In order to make it clear that the rights secured to the people by the Declaration of Rights are commands and not merely admonitions to proper conduct on the part of the government, the words 'should' and 'ought' have been changed to read 'shall' throughout the Declaration." *See* CONSTITUTION COMM'N REPORT, *supra* note 423, at 74–75. Prior usage of the term "ought" carried a greater imperative than it later did. Etymologically, the word derives from "ahte" in Old English, which means "to owe," but as an auxiliary verb it expresses "duty or moral obligation," dating from around the twelfth century, the appropriate time for the First Statute of Westminster in 1275. *See Ought (v.)*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/ought [https://perma.cc/SYQ7-6X82]. Using "ought" is stronger than using "should" because it "express[es] especially obligations of duty." *Id.* (citing CENTURY DICTIONARY (1895)). This meaning carried through to the founding period and the drafting of the North Carolina Constitution of 1776 as well. *See Ought*, A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johnson ed., 10th ed. 1792) (meaning both "[o]wed; was bound to pay; have been indebted" and "[t]o be obliged by duty"); *Ought*, A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johnson ed., 3d ed. 1768) (same); *Ought*, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Nathan Bailey ed., 1726) ("Owed").

445. The 1971 Constitution added an equal protection clause to the Declaration of Rights that further limits the General Assembly's districting powers. N.C. CONST. art. I, § 19. The North Carolina equal protection clause essentially incorporates the principles of representation and justiciability of *Baker v. Carr*, 369 U.S. 186 (1962), as it was understood in 1971. *See* SCALIA & GARNER, *supra* note 278, at 78 (fixed meaning canon). However, the mathematical simplicity of *Baker*'s original formulation must be refined to realize (and not undercut) the fundamental purpose of the constitution. Federal equal protection jurisprudence at the time of its incorporation in the North Carolina Constitution parallels the holdings of *Van Bokkelen* that: (1) it is not the subjective *intent* of the legislature, but the objective *effects* on the electorate that matters, (2) in view of the infinite ingenuity of partisans, it functions as a general anti-abuse rule to prohibit both direct (for example, voter registration and registrar discretion) and indirect (for example, malapportionment) actions, (3) it is justiciable and the remedy is in law, and (4) the guarantee is not over a specious act of casting a ballot, but the subduction of "the principles of substantially equal voting power and substantially equal legislative representation" under any other value, *Stephenson I*, 355 N.C. 354, 382, 562 S.E.2d 377, 396. The exercise of power without any reasonable justification in the service of a legitimate governmental objective is prohibited. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986) ("[T]he Due Process Clause, like its forebear . . . was intended to secure the individual from the arbitrary exercise of the powers of government."); *accord* Republican Party of N.C. v. Martin, 980 F.2d 943, 952–53 (4th Cir. 1992) (equal protection requires impartial, fair, and effective representation for all citizens).

446. N.C. CONST. art. II, §§ 3, 5.

housed in the Form of Government and textually subordinated to the Free Elections Clause and the remainder of the Declaration of Rights.[447] As when they were first adopted, there was no suggestion that they functioned to limit the individual right of free elections.

The 1971 Constitution strengthened the independence of the judiciary from the legislature. This passage from *Corum v. University of North Carolina*[448] in 1992 summarizes the role of the judiciary under the 1971 North Carolina Constitution:

> The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the state.
>
> . . .
>
> It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State. Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens.[449] We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.[450]

### 2. *Stephenson v. Bartlett (Stephenson I)* (2002)

For the forty years after the North Carolina Constitution of 1971, the right to free elections continued to be primarily contested under federal law. Following the 1970 census, the General Assembly drew congressional and state legislative districts (without splitting counties) which were unchallenged.[451] However, the redistricting following the 1980 census was remarkable for its

447. *See supra* notes 289–91 and accompanying text (discussing the structural superiority of the Declaration of Rights).

448. 330 N.C. 761, 413 S.E.2d 276 (1992).

449. The same can be said of the North Carolina Constitution as the Pennsylvania Supreme Court said of its own: "The people of this Commonwealth should never lose sight of the fact that, in its protection of essential rights, our founding document is the ancestor, not the offspring, of the federal Constitution." League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018).

450. *Corum*, 330 N.C. at 783, 413 S.E.2d at 290 (first citing State v. Manuel, 20 N.C. 144 (3 & 4 Dev. & Bat.) 149–50 (1838), then citing King v. S. Jersey Nat. Bank, 330 A.2d 1, 9 (N.J. 1974), then citing Lamb v. Wedgewood S. Corp., 308 N.C. 419, 433, 302 S.E.2d 868, 876 (1983), and then citing State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 866 (1940)); *see also* State v. Petersilie, 334 N.C. 169, 184, 432 S.E.2d 832, 841–42 (1993).

451. J. MICHAEL BITZER, REDISTRICTING AND GERRYMANDERING IN NORTH CAROLINA: BATTLELINES IN THE TAR HEEL STATE 35 (2021).

sculpting by Democrats to disadvantage Republicans.[452] Redress was sought primarily under federal law—the Voting Rights Act of 1965, which was strengthened in 1982[453]—culminating in victory in 1986 in the landmark case of *Thornburg v. Gingles*.[454] Undeterred, Democrats sought again to craft districts that diluted partisan opposition after the 1990 and 2000 censuses, but shifted the justification to the pretext of advancing minority rights and legitimate political considerations.[455] They were challenged under the federal Equal Protection Clause, but federal courts struggled to disentangle the protected rights of individuals from proper legislative prerogatives.[456]

The State Constitution still played a role during this period. The North Carolina Constitution's defenses against gerrymandering, particularly the sections that prohibited division of counties ("whole county provisions" or "WCP"),[457] were frequently breached on the basis that federal law required it.[458] Reviewing the 2001 redistricting plans, in *Stephenson I*,[459] the Supreme Court of North Carolina significantly curtailed the Assembly.[460]

First, the court reasserted the fundamental right of North Carolinians to be represented substantially equally.[461]

Second, on the basis of the superiority of the Declaration of Rights' Equal Protection Clause, the court applied a strict scrutiny standard to evaluate whether the encroachment was permissible.[462] The court held that the

452. *Id.*

453. These amendments changed the statute's focus from discriminatory *intent* to discriminatory *effects*, which are more readily provable. *See* Allen v. Milligan, 143 S. Ct. 1487, 1507–08 (2023).

454. 478 U.S. 30, 58–60 (1986). Judge Phillips' reasoning in *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), is enduring. In the same year, the United States Supreme Court in *Davis v. Bandemer*, 478 U.S. 109 (1986), suggested that partisan gerrymandering might violate the Equal Protection Clause. *Id.* at 109–10; *see also* Republican Party of N.C. v. Martin, 980 F.2d 943, 947 (4th Cir. 1992).

455. *See generally* Easley v. Cromartie, 532 U.S. 234 (2001) (holding that appellees did not adequately attack the legislatively drawn boundaries because they failed to prove that districting alternatives would have brough about greater racial balance).

456. *See* Shaw v. Reno, 509 U.S. 630, 653–57 (1993).

457. N.C. CONST. art. II, §§ 3(3), 5(3).

458. Indeed, in 1983, a federal district court in *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983), held that the Whole-County Provision was unenforceable anywhere in the state. *Id.* at 181–82.

459. 355 N.C. 354, 358, 562 S.E.2d 377, 381 (2002).

460. *See id.* at 373–75, 562 S.E.2d at 390–91.

461. *Id.* at 379, 562 S.E.2d at 394 ("[T]he people have mandated in their Constitution that all North Carolinians enjoy substantially equal voting power."); *accord* State *ex rel.* Martin v. Preston, 325 N.C. 438, 454, 385 S.E.2d 473, 481 (1989) ("[O]nce the right to vote is conferred, the *equal* right to vote is a fundamental right."). The right to vote is a fundamental right, preservative of all other rights. *See* Blankenship v. Bartlett, 363 N.C. 518, 522, 681 S.E.2d 759, 762–63 (2009). *Stephenson I* seems to support proportional representation. It allows partisan advantage in districting so long as it does not discriminate. Only proportional representation satisfies both conditions.

462. *Stephenson I*, 355 N.C. at 378, 562 S.E.2d at 393 ("It is well settled in this State that 'the right to vote on equal terms is a fundamental right' . . . thus strict scrutiny is the applicable standard."). Under strict scrutiny, a governmental action is unconstitutional if the state "cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Id.* at 377, 562 S.E.2d at 393.

requirements of "Article II are not affirmative constitutional mandates and do not authorize . . . districts in a manner violative of the fundamental right of each North Carolinian to substantially equal voting power."[463] The court enjoined the use of multi-member districts, a significant instrument of vote dilution that is not proscribed in the enumerated districting rules of article II.[464] The court held that the legislature could not violate the WCP for reasons unrelated to compliance with federal law.[465] Importantly, the court required that "an application of the WCP that abrogates the equal right to vote, a fundamental right under the State Constitution, must be avoided in order to uphold the principles of substantially equal voting power and substantially equal legislative representation."[466]

Third, it established the remedial powers of the court and the protocol for managing the preparation of alternative maps in the event of failure by the legislature.[467] The legislature validated the court's determination about rights and remedies by enacting a complementary statutory scheme.[468]

* * *

In sum, the founders used the ancient words "elections . . . ought to be free" in the North Carolina Constitution of 1776 to incorporate the English constitutional law injunction against election interference and the subversion of electoral processes for partisan gain. The Constitutions of 1868 and 1971 carried this foundational principle to the present. The founders enshrined the right to free elections in the structurally superior Declaration of Rights. North Carolina courts from *Bayard* onward unfailingly vindicated the rights of individuals against the prerogatives of government, specifically invalidating partisan gerrymandering in *Van Bokkelen* and *Stephenson I*. But *Harper III* lost touch with law and history in important ways.

463. *Id.* at 379, 562 S.E.2d at 394.

464. *Id.* at 378–81, 562 S.E.2d at 393–96 (emphasizing "the right to vote on equal terms is a fundamental right" and holding that "use of *both* single-member and multi-member districts within the same redistricting plan violates the Equal Protection Clause of the State Constitution").

465. *Id.* at 363, 562 S.E.2d at 384–85. Somewhat dubiously, the court ruled that the General Assembly may consider partisan advantage and incumbency protection, but it clarified they are subordinate to the constitutional requirement to produce "substantially equal voting power." *Id.* at 379, 562 S.E.2d at 392–93.

466. *Id.* at 382, 562 S.E.2d at 396.

467. Specifically, the court established a procedure for drawing court-supervised remedial maps. *See* Stephenson v. Bartlett (*Stephenson II*), 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003).

468. An Act to Establish House Districts, Establish Senatorial Districts, and Make Changes to the Election Laws and to Other Laws Related to Redistricting, ch. 434, 2003 N.C. Sess. Laws 1313 (codified as amended in scattered sections of N.C. GEN. STAT. chapters 1 and 120).

## III. REFINEMENT OF THE RIGHT OF FREE ELECTIONS IN NORTH CAROLINA

North Carolina's original plan of balanced government came under assault from a new incarnation of legislative supremacy beginning in 2023. Section III.A of this part describes how, after *Rucho v. Common Cause* withdrew federal relief in 2019, the Supreme Court of North Carolina in *Harper I* and *Harper II* applied the Free Elections Clause to nullify gerrymandering. They reinvigorated the original blueprint. But they made two mistakes: (a) they did not implement a sufficiently robust remedial process, and (b) they strayed into the contested area of outcome-focused proportional representation.

To the dissenting justices, the entire holding was a judicial usurpation, and when they became a majority in 2023, they purged it. Section III.B.1 analyzes the syllogism that led to *Harper III*'s surprising conclusion that the people gave the legislature the power to selectively disenfranchise them. As discussed in Section III.B.2, the court's reasoning notably alters the functioning of the Constitution, vesting a near-unlimited power in the legislature.

But *Harper III* is not constitutionally empowered to erase individual liberties and their safeguards, nor to restore the parliamentary supremacy the founding generation fought to overthrow. Reason and precedent limit the legitimate scope of *Harper III*'s holding to the narrow proposition that the Constitution does not mandate the kind of judicially managed proportional representation challenged at the rehearing. Section III.C outlines ways to restore the right to free elections and its limits on government power, and to complete it with effective remedies that operate within the accepted bounds of judicial authority.

### A. *Vindication of the Right*—Lewis, Harper I *and* Harper II *(2019–2022)*

Another round of gerrymandering in North Carolina began on November 2, 2010, when Democrats lost both the state house and state senate, giving Republicans full control of the General Assembly for the first time in more than a century.[469] Like their predecessors, Republicans used gerrymandering to engineer victories in the 2012 to 2016 elections.[470] After federal courts found

469. Gary D. Robertson & Mike Baker, *Republicans Control N.C. General Assembly in Historic Shakeup*, WILMINGTON STARNEWS (Nov. 3, 2010, 9:29 AM), https://www.starnewsonline.com/story/news/2010/11/03/republicans-control-nc-general-assembly-in-historic-shakeup/30844967007/ [https://perma.cc/R7RN-S4HF].

470. In 2012, Republicans won 9 of 13 (69%) of the congressional seats with only 49% of the votes; in 2014, 10 of 13 seats (77%) on 54% of the votes; and in 2016, 10 of 13 seats (77%) on 57% of the votes. *See* Common Cause v. Rucho, 318 F. Supp. 3d 777, 804 (M.D.N.C. 2018).

their maps to be impermissibly race-driven,[471] Republican strategists tacked to "partisan" justifications instead.[472]

*Withdrawal of Federal Power*. In *Common Cause v. Rucho*,[473] the Middle District of North Carolina held that political gerrymandering of North Carolina congressional districts was impermissible under the federal Constitution and subject to judicial review.[474] The hope of that judgement was short lived. On appeal, the United States Supreme Court, in *Rucho v. Common Cause*,[475] agreed that the North Carolina maps were "highly partisan, by any measure," and "blatant examples of partisanship driving districting decisions."[476] But vexed by the inability to articulate a standard that squared with the federal constitution, the Court held that partisan gerrymandering is beyond the authority of federal courts to resolve.[477] The majority reaffirmed that partisan gerrymanders are "incompatible with democratic principles,"[478] and stressed that their "conclusion does not condone excessive partisan gerrymandering," nor does it "condemn complaints about districting to echo into a void."[479] Moreover, the Court emphasized that state courts are not similarly constrained because they operate under a different constitutional framework, one that is not limited by federalism considerations and may contain more explicit voter protections, such as the Free Elections Clause.[480]

*Reassertion of State Protections*. *Rucho*'s invitation to seek relief in state courts initiated a new era of North Carolina Free Elections Clause

471. In *Dickson v. Rucho* (*Dickson I*), 367 N.C. 542, 766 S.E.2d 238 (2014), the Supreme Court of North Carolina ratified the districts. *Id.* at 575, 766 S.E.2d at 260. The court subordinated the whole-county provision to other criteria and held that the "Good of the Whole" clause of article I, section 2 of the North Carolina Constitution was a nonjusticiable standard satisfied by the General Assembly's presumption of good faith. *Id.* In *Dickson v. Rucho* (*Dickson II*), 368 N.C. 481, 781 S.E.2d 404 (2015), the case was reconsidered with similar result. *Id.* at 486–87, 781 S.E.2d. at 410–11. Federal courts noted the racial considerations in *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016). *Id.* at 616; *see also* Covington v. North Carolina, 316 F.R.D. 117, 124 (M.D.N.C. 2016) ("[R]ace was the predominant factor motivating the drawing of all challenged districts."). In May 2017, the United States Supreme Court vacated the Supreme Court of North Carolina's 2015 decision in *Dickson II*. *See* Cooper v. Harris, 581 U.S. 285, 291 (2017) ("The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans.").

472. BITZER, *supra* note 451, at 99–100, 118.

473. 318 F. Supp. 3d 777 (M.D.N.C. 2018).

474. *Id.* at 844–52.

475. 588 U.S. 684 (2019).

476. *Id.* at 691, 714.

477. *Id.* at 689, 720–21.

478. *Id.* at 716–17. The dissent echoed the same: "The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections." *Id.* at 751 (Kagan, J., dissenting).

479. *Id.* at 719 (majority opinion).

480. *See id. Rucho* approved of state constitutional restrictions on gerrymandering such as the Florida Constitution's Fair Districts Amendment, the content of which corresponds to the Free Elections Clause. *See id.*

jurisprudence, which opened promisingly. In *Common Cause v. Lewis*,[481] the first districting case after *Rucho*, a North Carolina Superior Court found that the 2017 districting plans violated the North Carolina Constitution's Free Elections Clause.[482] The 2017 plans were very similar to the plans *Rucho* judged to be highly partisan and incompatible with democratic principles.[483] The court distilled the pedigree of the right,[484] reasoning with the spare precision of a mathematical proof: the text of the Constitution must be construed by reference to its fundamental principle[485] that representation must reflect the will of the people.[486] The court concluded:

> [E]xtreme partisan gerrymandering—namely redistricting plans that entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens compared to others—is contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people. Extreme partisan gerrymandering does not fairly and truthfully ascertain the will of the people.[487]

This judgment was never appealed.

The next court challenge went a different direction, finding partisan gerrymandering constitutional.[488] On January 11, 2022, a three-judge panel of the Wake County Superior Court ("Shirley Panel") ruled that the electoral maps ratified by the General Assembly in November 2021 for use in the 2022

481. Common Cause v. Lewis (*Ridgeway Court*), No. 18 CVS 014001 (N.C. Super. Ct. Sept. 3, 2019).

482. *Id.* slip op. at 298–306. The court also found that the plans violated the North Carolina Constitution's equal protection, freedom of speech, and freedom of assembly clauses. *Id.* at 307–30.

483. *Id.* at 298–99.

484. *Id.* at 303–05.

485. *Id.* (citing Quinn v. Lattimore, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897)).

486. *Id.* at 300 (citing People *ex rel.* Van Bokkelen v. Canaday, 73 N.C. 198, 225 (1875) ("A fundamental principle in the State government is, that representation shall be *apportioned* to the popular vote *as near as may be*.")).

487. *Id.* at 302.

488. The 2020 election produced a new Republican Chief Justice. Danielle Battaglia & Charlie Innis, *Paul Newby Wins NC Chief Justice Race as Incumbent Cheri Beasley Concedes*, RALEIGH NEWS & OBSERVER, https://www.newsobserver.com/news/politics-government/election/article247781960.html [https://perma.cc/N67N-XBWW (staff-uploaded, dark archive)] (last updated Dec. 13, 2020, 2:06 PM). The new Chief Justice selected two Republicans, A. Graham Shirley and Nathaniel J. Poovey, and one Democrat, Dawn M. Layton, for this court. *See Unanimous Three-Judge Panel Upholds N.C. Election Maps, Appeal Likely*, CAROLINA J. (Jan. 11, 2022), https://www.carolinajournal.com/unanimous-three-judge-panel-upholds-n-c-election-maps-appeal-likely/ [https://perma.cc/X6F2-W9UE].

elections[489] resulted from "intentional, pro-Republican partisan redistricting."[490] However, the court concluded that the Free Elections Clause was inoperative, and that General Assembly was bound only by the administrative requirements enumerated in article II, sections 3 and 5 of the North Carolina Constitution.[491] It did not explain why that would be a reasonable construction. Nor did its rendering of the history of the Free Elections Clause make much sense. The court suggested that because the founders were not alive in 1688, they could not have known what the words meant,[492] and that the founders naïvely believed that *unfair* elections are no problem so long as they are *frequent*.[493] The court interpreted the clause as limiting the districting powers of the executive, but not the legislature, even though in 1776, the governor had no such powers, was appointed by the legislature, and served at their will.[494] Despite finding that the legislature drew the districts for partisan gain, the panel legitimized the action based on misconceptions of the Free Elections Clause and the operation of the Constitution.

*Vindication of the Right of Free Election:* Harper I. Finding a legislative power to disenfranchise citizens in a constitution premised on popular sovereignty is fundamentally contradictory.[495] One month later, the Supreme Court of North Carolina reversed the Shirley Panel in *Harper I*.[496] The decision rests on three established pillars of constitutional law. First, the Free Elections Clause and other protections expressed in the text of the Declaration of Rights are positive law that prohibit the legislature from partisan gerrymandering.[497]

489. Act of November 4, 2021, ch. 173, 2021 N.C. Sess. Laws 788 (codified as amended at N.C. GEN. STAT. § 120-1) (North Carolina Senate electoral maps); Act of November 4, 2021, ch. 174, 2021 N.C. Sess. Laws 801 (codified at N.C. GEN. STAT. § 163-201) (United States House of Representatives electoral maps); Act of November 4, 2021, ch. 175, 2021 N.C. Sess. Laws 815 (codified at N.C. GEN. STAT. § 120-2 (2021)) (North Carolina House of Representatives electoral maps).

490. Harper v. Hall (*Shirley Panel*), No. 21 CVS 500085, slip op. at 53 (N.C. Super. Ct. Jan. 11, 2022).

491. *See id.* at 236.

492. *See id.* at 226–28 ("It is safe to say that none of the drafters of the 1776 Constitution were alive during the Glorious Revolution . . . .").

493. *See id.* at 231. *Harper I* noted the inconsistency of the assertion that clause 20 of the Declaration of Rights (frequent elections) was operative, but that clause 6 (free elections) and other superordinate provisions of article I of the Declaration of Rights were not. *Harper I*, 380 N.C. 317, 374, 868 S.E.2d 499, 540–41 (2022). Simply put, the notion that the North Carolina Constitution has a loophole that enables legislative despotism through frequent, manipulated elections is absurd.

494. *See supra* note 286 and accompanying text.

495. *See supra* note 292 and accompanying text (tracing the threat to democracy of biased elections).

496. *Harper I*, 380 N.C. at 403–04, 868 S.E.2d at 559–60.

497. *Id.* at 321, 868 S.E.2d at 508–09 ("We hold that our constitution's Declaration of Rights guarantees the equal power of each person's voice in our government through voting in elections that matter."); *see also supra* note 285 and accompanying text (discussing positive law in the Declaration of Rights).

Second, the individual liberties of the Declaration of Rights are superordinate to any legislative prerogatives stated in the Form of Government.[498] Third, the judiciary is obligated under the Form of Government to defend such liberties against encroachments "by the acts of individuals who are clothed with the authority of the State."[499]

On the individual right to an election free from gerrymandering, *Harper I* was simply the continuation of the constitutional tradition observed since 1275. The court grounded its textual analysis of the phrase "elections . . . ought to be free" in its 1688 usage, which enjoined "the manipulation of districts that diluted votes for electoral gain."[500] The Pennsylvania Supreme Court similarly had concluded that the same phrase appearing in their constitution prohibited "the dilution of the right of the people . . . to select representatives to govern their affairs."[501] *Harper I* found that the term retained its established usage in the 1776, 1868, and 1971 Constitutions as a guarantee that "those in power shall not attain 'electoral advantage' through the dilution of votes."[502] The court concluded:

> Thus, partisan gerrymandering, through which the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control, is cognizable under the free elections clause because it can prevent elections from reflecting the will of the people impartially and by diminishing or diluting voting power on the basis of partisan affiliation.[503]

Interpretation of constitutions, more so than basic statutes or contracts, requires an understanding of the historic meaning and context of the text, the sinews that connect its provisions, and the principles that animate its movements.[504] The court aligned its holding with other sections of the Declaration of Rights that advance equality and popular sovereignty in elections

498. *Harper I*, 380 N.C. at 366 n.10, 868 S.E.2d at 536 n.10 (discussing the primacy of the Declaration of Rights and accurately recounting the Regulator movement and other experiences of the Framers that account for the structure of the 1776 Constitution); *see also supra* notes 289–91 and accompanying text (discussing the superordination of the Declaration of Rights).

499. *Harper I*, 380 N.C. at 367, 868 S.E.2d at 536.

500. *Id.* at 373, 868 S.E.2d at 540.

501. League of Women Voters of Pa. v. Pennsylvania, 178 A.3d 737, 808 (Pa. 2018); *see also id.* at 809 ("Any legislative scheme which has the effect of impermissibly diluting the potency of an individual's vote for candidates for elective office relative to that of other voters will violate the guarantee of 'free and equal' elections afforded by Article I, Section 5.").

502. *Harper I*, 380 N.C. at 374, 868 S.E.2d at 541.

503. *Id.* at 376, 868 S.E.2d at 542.

504. *See supra* note 13 and accompanying text (discussing classical interpretation of the Constitution).

legislation.[505] The court recalled the admonition of the Constitution that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."[506] The court cited with approval the well-penned statement of Professor John V. Orth that by this text, "[a]ll generations are solemnly enjoined to return *ad fontes* (to the sources) and rethink for themselves the implications of the fundamental principles of self-government that animated the revolutionary generation."[507] Two fundamental principles were at stake—"the costly fruit paid in the blood of the Civil War and Revolutionary War, respectively: equality of persons and the democratic principle of popular sovereignty."[508]

On the question of whether a governmental prerogative justified impairing the individual right to vote on equal terms, the court, as it had in *Stephenson I*, superordinated the Declaration of Rights and applied a strict scrutiny standard to evaluate whether the encroachment was permissible.[509] The court held that "[a]chieving partisan advantage incommensurate with a political party's level of statewide voter support is neither a compelling nor a legitimate governmental interest."[510]

On the question of the remedial power of the judiciary to vindicate the right, the court, as it had in *Stephenson I*, performed its traditional constitutional

505. *Stephenson I* held that gerrymandering violated article I, section 19 of the North Carolina Constitution (equal protection of the laws). *Stephenson I*, 355 N.C. 354, 380–81, 562 S.E.2d 377, 395 (2002). *Harper I* found further support in article I, sections 1 (equality and rights of persons), 2 (sovereignty of the people), 12 (freedom of assembly), and 14 (freedom of speech) of the North Carolina Constitution. *Harper I*, 380 N.C. at 382, 868 S.E.2d at 546 (summarizing the interlocking rights). These rights all suggest protections against selective disenfranchisement. *Id.* at 390, 868 S.E.2d at 551 ("[W]e hold partisan gerrymandering claims are justiciable in North Carolina courts under the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the Declaration of Rights."). Justice Alito derided the idea that these "congeries" of protections say anything about partisan gerrymandering. Moore v. Harper, 142 S. Ct. 1089, 1090, 1092 (2022) (mem.) (Alito, J., dissenting) ("The court justified its actions on the ground that the General Assembly's maps constituted partisan gerrymanders and thus violated a congeries of state constitutional provisions. But none of those provisions says anything about partisan gerrymandering, and all but one make no reference to elections at all . . . . I therefore respectfully dissent from the denial of the stay . . . ."). To the textualist-minded dissent in *Harper I*, the inclusion of a variety of rights may have diluted the dispositive strength of the Free Elections Clause and amplified fears of judicial immodesty. But North Carolina constitutional jurisprudence traditionally strives for internal coherence with other provisions. After all, a constitution cannot violate itself, and "all constitutional provisions must be read *in pari materia*." *Stephenson I*, 355 N.C. at 378, 562 S.E.2d at 380. North Carolina constitutional jurisprudence also strives for consistency with fundamental principles. The text of the Constitution itself exhorts a recurrence to them. N.C. CONST. art. I, § 35.

506. *Harper I*, 380 N.C. at 368, 868 S.E.2d at 537 (quoting N.C. CONST. art I, § 35).

507. *Id.* at 388, 868 S.E.2d at 550 (quoting JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA CONSTITUTION 91 (2d ed. 2013)).

508. *Id.* at 369, 868 S.E.2d at 537–38.

509. *Id.* at 305, 868 S.E.2d at 547.

510. *Id.*

obligation.[511] "The only way that partisan gerrymandering can be addressed is through the courts, the branch which has been tasked with authoritatively interpreting and enforcing the North Carolina Constitution. . . . This role of the courts is not counter to precedent but was one of the earliest recognized."[512]

*Problems with the Remedial Framework.* The remedial framework of *Harper I* was tested immediately. Two days after the judgment was entered, the General Assembly adopted new redistricting plans,[513] but the trial court held that they fell short of the *Harper I* standards. To break the deadlock, the court adopted interim maps developed by several Special Masters for use in the 2022 elections in their place.[514]

This experience exposed three flaws in *Harper I*. First, the court arguably did not prescribe sufficiently robust standards for the conduct of the Special Masters.[515] The independence of the experts, advisors, and special masters was questioned by the new majority in the rehearing of *Harper II*.[516] Remedial maps are established applications of the equitable power of the judiciary,[517] but unless the process is scrupulously independent, a court properly can be accused of legislating in violation of separation of powers.

Second, the court was understood to yoke itself to specific metrics which themselves could be manipulated.[518] The court attempted to correct this

511. *See supra* Section II.A.2 (discussing obligations of the judiciary).

512. *Harper I*, 380 N.C. at 322–23, 868 S.E.2d at 508–09 (referencing Bayard v. Singleton, 1 N.C. 5, 1 Mart. 48 (1787)).

513. Act of Feb. 17, 2022, ch. 2, 2022 N.C. Sess. Laws 12 (codified at N.C. Gen. Stat. § 120-1) (North Carolina Senate electoral maps).

514. Order on Remedial Plans, No. 21 CVS 500085 20, at slip op. 20–22 (N.C. Super. Ct. Feb 23, 2022).

515. Legislative Defendants alleged irregularities with respect to two advisors to the Special Masters. *Harper II*, 383 N.C. 89, 123, 881 S.E.2d 156, 153 (2022). The dissent faulted the court for sending the maps to a "commission composed of judges and political science experts" and then substituting "its own fact-finding" for that made by the commission and the court below. *Id.* at 126, 881 S.E.2d at 182 (Newby, C.J., dissenting).

516. Supreme Court of N.C., *Supreme Court of North Carolina—413PA21-2 Harper, et al. v Hall, et al.*, YOUTUBE, at 34:34 to 39:50 (Mar. 14, 2023), https://www.youtube.com/watch?v=cp-zlPxuu2I [https://perma.cc/H79V-MGVJ] (on file with the North Carolina Law Review) [hereinafter Harper III *Oral Arguments*] (Chief Justice Newby questions).

517. Court-supervised remedial maps have been legitimized at least since the *Baker v. Carr* era, used in North Carolina in *Stephenson I* in 2002, and ratified by the Assembly in 2003. *See* N.C. GEN. STAT. §§ 1-267.1, 120-2.3 (2024).

518. The court stressed that the statistical guidance offered was advisory, and not prescriptive. *Harper I*, 380 N.C. 317, 379, 868 S.E.2d 499, 547 (2022) ("We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander."). It suggested a mean-median difference of one percent or less and an efficiency gap of seven percent or less might be presumptively constitutional. *Id.* at 379, 868 S.E.2d at 548.

impression in *Harper II*,[519] ruling that districting should focus on ensuring that votes carry roughly the same weight, rather than narrowly concentrating on any particular statistical method.[520] Nevertheless, the new majority at the rehearing picked apart the administrability of quantitative guidelines.[521]

Third, notwithstanding its explicit statements to the contrary, the court was taken to expand the Free Elections Clause to require a proportional outcome.[522] The traditional understanding is that the clause only requires a level playing field.[523] Proportional representation is materially more complex to administer, especially for the judiciary.

On the core legal questions—the scope of the right of free elections, its supremacy to prerogatives of the legislature, and the obligation of the judiciary to provide an adequate remedy—*Harper I* and *Harper II* are faithful to centuries of constitutional law. And with respect to the ultimate goal of reflecting the will of the people, *Harper I* and *Harper II* were effective[524]: on November 8, 2022, North Carolina voters elected a seven-Republican-and-seven-Democrat

519. *Harper II*, 383 N.C. at 126, 881 S.E.2d at 158. Hearing *Harper II* was fateful. Unlike *Harper I*, *Harper II* was decided within the time limit for rehearing. If *Harper II* could have been avoided, there may very well have been no *Harper III*.

520. *Id.* at 93, 881 S.E.2d at 157.

521. Harper III *Oral Arguments*, *supra* note 516, at 40:30 to 44:26 (Chief Justice Newby questions).

522. The court was clear that "we seek neither proportional representation for members of any political party, nor to guarantee representation to any particular group." *Harper I*, 380 N.C. at 319, 868 S.E.2d at 511. However, a proportionality requirement was read into the court's finding that "[t]he right to equal voting power encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." *Id.* at 383, 868 S.E.2d at 546. The lack of precision may reflect the different views of the litigants. The *Harper* plaintiffs urged a level playing field. *See* Reply Brief of Harper Plaintiffs-Appellants at 2, Harper v. Hall, No. 413PA21 (N.C. Super. Ct. Aug. 15, 2022) (urging "partisan symmetry"). The governor and attorney general's standard was similar. *See* Brief of Amici Curiae Governor Roy A. Cooper, III and Attorney General Joshua H. Stein at 2, Harper v. Hall, No. 413PA21 (N.C. Super. Ct. Feb. 23, 2022) (arguing that individuals must have "substantially equal voting power"). The League of Conservation Voters called for a more outcome-focused standard. Brief of Plaintiffs-Appellants North Carolina League Of Conservation Voters, Inc., et al. at 10, Harper v. Hall, No. 413PA21 (N.C. June 27, 2022) (calling for a standard that resulted in "votes into seats on an equal basis").

523. Enjoining discriminatory actions does not entail affirmatively creating proportionately "safe" seats. *See supra* note 272 and accompanying text (discussing the difference between proportional representation and free elections). Despite the majority's efforts to demarcate the difference, the dissent asserted: "The majority inserts a requirement of 'partisan fairness' into our constitution . . . . This outcome results . . . in a statewide proportionality standard." *Harper I*, 380 N.C. at 422, 868 S.E.2d at 571 (Newby, C.J., dissenting).

524. Experience is the heart of the common law tradition of constitutional adjudication. The common law method hones justice through experience, much like the scientific method refines truth through experimentation. O.W. HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience."); *accord* Diarmuid F. O'Scannlain, *Rediscovering the Common Law*, 79 NOTRE DAME L. REV. 755, 760–61 (2004) (distinguishing common law reasoning from unbound judge-made law by a self-confessed textualist and originalist).

congressional delegation, closely reflecting the partisan composition of the state.[525]

But the remedial aspects troubled the justices in dissent,[526] and when they later became the majority, they repudiated them in *Harper III*. In doing so, they also diluted the meaning and primacy of the Free Elections Clause. The *Harper III* court established, inadvertently perhaps, the foundations for a retrogressive constitutional model based on legislative supremacy.

### B. *Retrenchment*—Harper III *(2023)*

*Harper III* authorized the legislature to selectively disempower enfranchised voters, marking a historic break with the traditional right of free elections that extends back to 1275. The new thinking was driven by a shift in the court's composition.[527] The new court, seated in January 2023, granted a rehearing request[528] and overturned both *Harper I* and *Harper II*.[529] The imperative to do so was questionable.[530] *Harper III* is not in keeping with the

525. N.C. STATE BD. OF ELECTIONS, GENERAL ELECTION RESULTS BY CONTEST (2022), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2022-11-29/Canvass%20-%20Unofficial%20Abstracts/State_Composite_Abstract_Report-Contest.pdf [https://perma.cc/8BS3-G8JA].

526. The points made by the dissent in *Harper I* and *Harper II* track those in the majority opinion in *Harper III*, and are discussed in that section of this Article. *See infra* Section III.B.

527. On November 8, 2022, voters elected two Republican justices to the seven-member Supreme Court of North Carolina. Charles Duncan, *Republicans Win Majority on N.C. Supreme Court*, SPECTRUM NEWS (Nov. 8, 2022, 5:42 PM), https://spectrumlocalnews.com/nc/charlotte/2022-elections/2022/11/07/election-2022--north-carolina-supreme-court-races [https://perma.cc/3HKS-38RC]. The court seated in January 2023 consisted of a 5–2 Republican majority (compared to the 4–3 Democratic majority court of the prior two years). *Id.* The majority of the court was elected from the same Republican Party that controlled the legislature.

528. The new majority was sworn in on January 1, 2023. Twenty days later, legislative defendants sought a rehearing pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure, requesting that the Supreme Court of North Carolina "withdraw" its remedial opinion in *Harper II* and "overrule" its decision in *Harper I*, even though this would have no effect on its order striking down the 2021 Plans. Petition for Rehearing in Harper v. Hall at 25, No. 413PA21 (Jan. 20, 2023). The new court allowed the petition for rehearing, and *Harper III* was heard on March 14, 2023, and decided April 28, 2023. *Harper III*, 384 N.C. 292, 296, 886 S.E.2d 393, 398 (2023).

529. *Harper III*, 384 N.C. at 378–79, 886 S.E.2d at 448–49.

530. The 2022 elections had been held and had returned representatives that reflected the political and economic interests of the state. The districts drawn by the special masters represented urban and rural areas evenly. A bias in either direction was not evident. The urban centers of Charlotte, the Triad, and Raleigh were not cracked (i.e., not Republican biased). The more liberal Asheville was not grouped with Boone, nor Wilmington with Fayetteville (i.e., not Democratic biased). The 2022 maps could have stood for the remainder of the decade without further litigation. Indeed, the court risked its credibility by so eagerly rehearing and overturning a settled case immediately upon the change of partisan composition, that was punctuated with the striking assertion that the prior maps were not "enacted" and therefore the General Assembly was free to ignore the maps used in 2022. The court could have avoided the unfavorable observation that gerrymandering was held unconstitutional in all cases where the court and the legislature were of different political parties, *see* People *ex rel.* Van

constitutional text, history, structure, or precedent. Its conclusion is implausible[531]: why, fundamentally, in any era, would people entrust the legislature with the power to disenfranchise them?

The *Harper III* court maintained that: (1) the people delegated all the power to define electoral districts to the legislature, (2) they did not prohibit the legislature from exploiting that power to weaken political opponents—they made no stipulation that the power be applied evenhandedly,[532] and (3) the judiciary was incapable of correcting any injustice because its powers are constitutionally limited.[533] These propositions are examined in the next section and their consequences in the section following.

1. The Districting Powers of the Legislature According to *Harper III*

*a. Limited Right of Free Elections*

*Harper III*'s holding rests on the conclusion that "state constitutional provisions do not expressly limit the General Assembly's redistricting authority or address partisan gerrymandering in any way."[534] But the Free Elections Clause is an express limitation,[535] and it covers partisan gerrymandering.[536] The text "[a]ll elections shall be free" of article I, section 10 of the North Carolina Constitution of 1971 has remained largely unchanged over 750 years, from First Westminster through the Declaration of Rights of 1688 and the North Carolina Constitutions of 1776 and 1868.[537] Its meaning has not changed either. The Free Elections Clause protects against government actions that dilute the value of a vote, in the same way the Law of the Land Clause protects against government

Bokkelen v. Canaday, 73 N.C. 198 (1875); *Stephenson I*, 355 N.C. 354, 562 S.E.2d 377 (2002); *Harper I*, 380 N.C. 317, 868 S.E.2d 499 (2022), but not in the one case they were the same, *see Harper III*, 384 N.C. at 292, 886 S.E.2d at 393. Instead of asking whether the people were accurately represented in the legislature, it seized an opportunity to reallocate political power from the voters to the legislature and narrate a novel historical justification. *See* Karen M. Tani, *Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 12–13 (2024) (discussing docket selection and historical narration).

531. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2163 (2016) (counseling judges to ensure their interpretations are not objectively absurd).

532. They required only that the legislature not violate certain administrative requirements "beyond a reasonable doubt." *Harper III*, 384 N.C. at 343, 886 S.E.2d at 427 (2023).

533. *Harper III* analyzes these questions in the reverse order, finding limits on the judiciary first, then finding that no right exists. *Id.* at 337, 886 S.E.2d at 422–423.

534. *Id.* at 352, 886 S.E.2d at 432.

535. The North Carolina Equal Protection Clause is another express limitation on the General Assembly's redistricting authority that addresses partisan gerrymandering. *Stephenson I*, 355 N.C. at 356, 562 S.E.2d at 379; *see also supra* note 506 (discussing other embedded rights).

536. *See supra* Section I.B.4 (discussing the Declaration of Rights of 1688 prohibition of gerrymandering).

537. *See supra* Section II.C.1 (discussing the insignificance of the textual change from "ought" to "shall").

actions that diminish the value of property.[538] The Free Elections Clause has always expressly prohibited the state (including the legislature) from subverting the power of the individual's right to vote (including through practices like gerrymandering).[539]

*Harper III*'s first premise is that the Constitution must be interpreted according to the original public meaning the people gave to the text at the time it was enacted.[540] To the 1776 drafters, "elections . . . ought to be free" was a well-understood phrase and fundamental concept in English constitutional law. Knowledgeable members of society understood the phrase to mean that the government had no prerogative to bias an election. Written in plain English, the *North Carolina Gazette* on December 16, 1774, reads:

> Parliaments are not infallible; they are not always just. The members of whom they are composed are human; and therefore, they may err. They are influenced by Interest, and therefore they may deviate from their Duty. . . . The British constitution supposes that "parliaments may betray their trust, and provides, as far as human wisdom can provide . . . a sufficient control."[541]

538. Both also have the same degree of textual specificity. Had the court understood the historic conception of the right as property interest, *see supra* Section I.B.5 (discussing Lord Holt's analysis of the right to vote as an incorporeal property right), *Harper III* might not have conflated three related but distinct concepts: the enfranchisement to vote, the action of dropping a ballot in a box, and an accurate count. Enfranchisement is akin to vesting of a property right in persons that meet the qualifications of article VI of the Constitution. The actions of (a) dropping a ballot and (b) having it accurately counted are elements, but not the extent of, the full value of the property right to vote. The right of free election protects against the government diminishing the value of the property right to vote through interference. *See, e.g.*, Kirby v. N.C. Dep't of Transp., 368 N.C. 847, 853 786 S.E.2d 919, 924 (2016) (discussing takings of property by substantial interference).

539. *See* SCALIA & GARNER, *supra* note 278, at 320 ("A statute that uses a common-law term, without defining it, adopts its common-law meaning."). The clause is so "manifestly conformable" to the words of the Bill of Rights of 1688

> that we are not to consider it as a newly invented phrase, first used by the makers of our constitution; but we are to look at it as the adoption of one of the great securities of private right, handed down to us as among the liberties and privileges which our ancestors enjoyed at the time of their emigration, and claimed to hold and retain as their birthright.

*See* Jones v. Robbins, 74 Mass. (8 Gray) 329, 342 (1857) (referring to a provision of the Massachusetts Declaration of Rights). That common-law meaning does not change without a clear indication that the drafters expressly change it. SCALIA & GARNER, *supra* note 278, at 318 ("A statute will be construed to alter the common law only when that disposition is clear.").

540. *Harper III*, 384 N.C. 292, 352, 886 S.E.2d 393, 432 (2023).

541. *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, N.C. GAZETTE, Dec. 16, 1774, at 1., https://newspapers.digitalnc.org/lccn/sn84026629/1774-12-16/ed-1/ [https://perma.cc/7C6R-85HX] (quoting BOLINGBROKE, *supra* note 130, at 151 ("[N]o slavery can be so effectually brought and fixed upon us as *Parliamentary Slavery*."); *id.* at 167–68 ("[P]arliaments may betray their trust.")).

It continues:

> It will be very material to consider the several securities which the inhabitants of Great Britain have that their liberty will not be destroyed by the legislature, in whose hands it is entrusted.
>
> . . .
>
> The independent exercise of [the power of elections] is justly deemed the strongest bulwark of the British liberties, as such . . . ["elections . . . ought to be free"] is expressly stipulated . . . in the Bill of Rights. [A footnote here cites *Ashby v. White*.] . . . What can exhibit, in a more striking point of view, the peculiar care which has been taken, in order to render the election of members of parliament entirely free?[542]

The menace of an uncontrolled legislature was foremost in the minds of both the drafters and the common North Carolinian in 1776. A despotic legislature in the mother country imposed "taxation without representation,"[543] and a despotic legislature at home hung the Regulators.[544]

Elections were the control, and the phrase "elections . . . ought to be free" prevented the Assembly from circumventing their effectiveness. It ensured, as the *North Carolina Gazette* put it in 1774, that the people "were not reduced to a state of slavery[545] and wretchedness by the treachery of their own representatives, whom they indeed had elected, but whom they could not remove."[546]

Because partisan gerrymandering allows the General Assembly to circumvent the effectiveness of elections, the best reading of the Free Elections Clause is that it bars the practice.

This is the interpretation given by jurists contemporary with the relevant founding eras.[547] Lord Holt, a drafter of the Declaration of Rights of 1688, held in *Ashby* that the right limited the legislature.[548] The *Bayard* justices, contemporaries of the 1776 convention, denied that the legislature had powers

542. *Id.*

543. *See supra* Section I.C.2 (discussing parliamentary oppression of North Carolina before independence).

544. *See supra* Section I.C.2 (discussing Assembly oppression of the Piedmont before independence).

545. *See supra* note 311 (noting how legal powerlessness was equated with slavery).

546. *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, *supra* note 185, at 2 ("Secure in their seats, . . . the Members bartered the liberties of the nation . . . and threw into the scale of prerogative all that weight, which they derived from the people, in order to counterbalance it.").

547. *See supra* note 152 and accompanying text (detailing the persuasive value of the exposition of legal meaning by drafters and contemporaries).

548. *See supra* Section I.B.5 (discussing *Ashby v. White*).

to perpetuate itself.[549] The delegates to the Hillsborough Convention, also contemporaries of the 1776 founding, believed biased districting was unconstitutional and to be remedied through the judiciary.[550] The justices on the *Van Bokkelen* court, one of whom presided over the 1868 convention, withheld from the legislature the power to gerrymander.[551] The deputy attorney general at the time of the 1971 revisions was the chief justice of the *Stephenson I* court that restricted the legislature's power to gerrymander.[552] Other states which incorporated the words "elections . . . ought to be free" in their constitutions similarly have interpreted the clause to prohibit partisan gerrymandering.[553]

This also corresponds with the context in which the phrase was used in each constitutional moment. From 1275 forward, the injunction operated to prevent any political actor from debasing another's vote.[554] The target in 1688 was to prevent partisan control of the legislature through manipulated electoral districts.[555] In 1776, the aim was to prevent future legislatures from breaking free of electoral control by the people.[556] In 1868, the goal was to prevent skewed legislatures, which had sustained slavery and driven the free yeomanry into the Civil War, by expanding the protections to *all* elections.[557] In 1971, the context was equality in the wake of the Civil Rights movement.[558]

History is important because the words "all . . . elections shall be free" are not self-explanatory. A flawed reading of history is the basis on which *Harper III* finds a scant individual right, a near plenary legislative prerogative, and minimal judicial duties.

549. *See supra* Section II.A.2 (noting that Samuel Ashe, a drafter of the 1776 Constitution, served on the *Bayard* court).

550. *See supra* Section II.A.3 (discussing North Carolina judicial power "so well constructed as to be a check" on biased districting).

551. *See supra* Section II.B.1 (discussing *Van Bokkelen*).

552. *See supra* Section II.C.2 (discussing *Stephenson I*).

553. *See* League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 806–07, 814 (Pa. 2018); *In re* 2022 Legis. Districting of the State, 282 A.3d 147, 159 (Md. 2022); Young v. Red Clay Consolidated Sch. Dist., 122 A.3d 784, 820, 859 (Del. Ch. 2015).

554. *See supra* Section I.A (discussing First Westminster).

555. *See supra* Section I.B.3–4 (discussing borough remodeling and garbling of corporations); *see also* Robert H. George, *A Note on the Bill of Rights: Municipal Liberties and Freedom of Parliamentary Elections*, 42 AM. HIST. REV. 670, 670–679 (1937) (tracing how the framers of the 1689 Bill of Rights used the phrases "Freedome of Elections" and "free Representative of the Nation" with the definite purpose of conjoining untampered electoral districts with representative government, and how the influential political theory of John Locke embeds the idea that to "new model the ways of election [is to] poison to the very foundation of public security").

556. *See supra* Section II.A (discussing shadow of Long Parliament, colonial Assemblies, and British parliament in 1776).

557. *See supra* Section II.B (discussing Civil War and aftermath).

558. *See supra* Section II.C (discussing Civil Rights context).

*Harper III* identifies five limitations on the Free Elections Clause, which fade with a deeper awareness of history.

First, the court believed that the right applies to the executive but not the legislature.[559] On the contrary, the right has always applied to even the supreme authority,[560] and in 1776, the legislature was the only possible target.[561]

Second, the court interpreted Rotten Boroughs in England and malapportionment in early North Carolina as indicating that the right does not apply to districting.[562] In fact, these are examples of disproportionate representation caused by population shifts and county formation, not the legislature assigning voters to single-purpose electoral districts sculpted to diminish the voting power of rivals.[563]

Third, the court understood the right to apply only to intimidation and coercion, not disempowerment under color of law.[564] In fact, the innovation the Stuarts and their Tory allies weaponized was the manipulation of electoral units (the charters of boroughs and municipalities) without violence, within an assigned prerogative, and with the support of the courts.[565]

Fourth, the court subverted the restrictions of the Declaration of Rights by regarding them as mere "abstract[ions]," the meaning of which is limited to other provisions found in the text of the Form of Government.[566] In fact, the rights chartered in the Declaration of Rights are superordinated[567] positive law, expressed in English constitutional law usage[568] that is written intentionally

559. *Harper III*, 384 N.C. 292, 361, 886 S.E.2d 393, 438 (2023).

560. *See supra* Section I.A (noting how the king was bound by First Westminster and implicit limitations); *supra* Section I.B.5 (discussing *Ashby v. White* applying the right to parliament); *see also supra* notes 284–85 and accompanying text (discussing transposition of all English law limitations onto the General Assembly).

561. *See supra* notes 286–88 and accompanying text (noting concerns with an untethered legislature at the founding); *see also* Trs. of Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 63 (1805) (dismissing the argument in a related context as "absurd").

562. *Harper III*, 384 N.C. at 360, 886 S.E.2d at 437.

563. *See supra* Section I.B.4 (discussing Rotten Boroughs).

564. *Harper III*, 384 N.C. at 356, 886 S.E.2d at 435.

565. *See supra* Section I.B.3–4 (expanding the court's understanding of the tactics of the seventeenth century partisans); *see also* Gilbert Burnet, *An Enquiry into the Measures of Submission in the Supream Authority*, *in* STATE TRACTS: BEING A FARTHER COLLECTION OF SEVERAL CHOICE TREATISES RELATING TO THE GOVERNMENT FROM THE YEAR 1660 TO 1689, at 487 (1692) (listing the manipulation of the partisan composition of districts—regulations managed with the intent "to put such a number of men in the corporations [the electoral districts] as will certainly choose the persons who are recommended to them"—as an action that prevents an election from being made "with an entire liberty" and therefore negates a "free and legal parliament").

566. *Harper III*, 384 N.C. at 351, 886 S.E.2d at 431. It treats it as a section that establishes "general [unenforceable] principles," followed by provisions for the "practical workings for governance." *Id.* at 321–22, 886 S.E.2d at 413.

567. They "ought never to be violated, on any pretense whatsoever." N.C. CONST. of 1776, Form of Government § 44.

568. *See supra* note 285 and accompanying text (discussing positive law in the Declaration of Rights).

broadly.[569] Their meaning is not found in the Form of Government, because that section functions to array the branches of government, not to define the rights of the individual.[570]

Last, the *Harper III* court posited that the right only restricts interference with (a) vote counts and (b) liberty of conscience.[571] The first is relatively trivial,[572] but the second is so profoundly true that it negates *Harper III*'s holding. It is the principle driving the ban on all forms of interference with elections.[573] All power is implicitly limited by conscience.[574] Conscience is the basis of a codification of free elections that predates Magna Carta.[575] Conscience is the basis of chartered liberty.[576] Conscience and political choice are inseparable. To deny a vote is to deny a powerful expression of conscience. A vote is the eucharistic conversion of conscience into action.

A more encompassing view of history suggests that the individual is empowered, government is constrained, and the court must arbitrate difficult questions. At its core, the interpretative question is whether the people are the masters or the servants of their government. Not in legal theory, but in a reality that the judiciary is duty-bound to bring about. Like the legislature, the judiciary serves the people, not the other branches. Perhaps if *Harper III* had

569. *See Stephenson I*, 355 N.C. 354, 382, 562 S.E.2d 377, 396 (2002) ("Progress demands that government should be further refined in order to best respond to changing conditions. Several provisions of our Constitution provide the elasticity which ensures the responsive operation of government.").

570. The Declaration of Rights demarcates the line between the individual and the government, whereas the Form of Government demarcates the lines between branches within the government. "The purpose of a state constitution is two-fold: (1) to protect the rights of the individual from encroachment by the State; and (2) to provide a framework of government for the State and its subdivisions." CONSTITUTION COMM'N REPORT, *supra* note 423, at 1 (quoting Chief Judge Parker of the Fourth Circuit). The first are set out in the Declaration of Rights, the second in the Form of Government. The latter is subordinate to and in the service of the former. *See supra* notes 289–91 and accompanying text.

571. These are drawn from *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937), and *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964), two relatively minor cases applying the Free Elections Clause to the facts before them, not defining its outer limits. *Harper III*'s reading implies that the clause had no meaning in 1776 and remained empty for sixteen decades after. *See Harper III*, 384 N.C. at 363–64, 886 S.E.2d at 439.

572. *See supra* note 538 (noting that a fair count is only one stick in free election's bundle of rights).

573. *See supra* text accompanying notes 22–43 (discussing the early and medieval sanctitude of conscience in law).

574. In the Western tradition, conscience is the overarching implicit limitation on all forms of power. *See supra* text accompanying notes 22–43.

575. *See* Katherine Harvey, *The Freedom of Election Charter*, MAGNA CARTA PROJECT (Aug. 2014), https://magnacartaresearch.org/read/feature_of_the_month/Aug_2014 [https://perma.cc/72NQ-7RK4] (discussing the Freedom of Election Charter of 1214).

576. The protection of liberty of conscience against legislative action was a main driver of the charters of liberties of the interregnum and the settlements of 1688 and 1776. *See supra* Sections I.B–C (discussing the diverse religious traditions of England and North Carolina and the progress of constitutional protections of liberty of conscience).

accessed a more complete understanding of history, its conclusions would not have inverted the powers as originally arrayed under the Constitution. It might instead have felt compelled to push forward with the difficult work of adjudicating gerrymandering claims, rather than retrogressing to a model not in keeping with North Carolina's traditions of liberty.

Finally, North Carolina precedent heretofore has applied the Free Elections Clause and the principles of the Declaration of Rights as encompassing restrictions on legislative impairment of an individual right. But *Harper III* does not reason from precedent and instead attempts to reinterpret prior judicial decisions to conform to its conclusion.[577] The majority distinguishes *Bayard*,[578] *Swaringen*,[579] *Clark*,[580] *Stephenson I*,[581] and every other precedent[582] on the basis of insignificant facts and inattentive to the general rule driving each decision.[583] Tellingly, *Harper III* does not even mention *Van Bokkelen*, which has stood nearly 150 years as an exemplar of justice in North Carolina's most vile chapter, and which contradicts *Harper III*'s reasoning and conclusion.[584]

In sum, a more complete understanding of the text, context, history, structure, and precedent would have found that the constitutional phrase "all . . . elections shall be free" expressly prohibits the General Assembly from using redistricting authority to selectively disempower voters.

*b. Expanded Legislative Prerogative in Districting*

*Harper III* makes three additional determinations that elevate the districting powers of the legislature in new ways.

577. Instead, the court seemed minded to find legislative supremacy in districting.

578. *See supra* note 312 (noting that *Bayard* denied that the legislature has the power to perpetuate itself).

579. *See supra* notes 425–26 (noting that the decision did not purport to say that an accurate count was the full extent of the Free Elections Clause).

580. *See supra* notes 429–32 (noting that freedom of conscience inherent in the right to vote negates *Harper III*'s disempowerment of the individual).

581. *See supra* Section II.C.2 (discussing how *Stephenson I* directly contradicts each of *Harper III*'s premises, holding that (a) the Declaration of Rights protects voters from partisan gerrymandering, (b) invasions by the Assembly are subject to strict scrutiny, and (c) the judiciary is empowered to vindicate the voter).

582. The *Harper III* majority does not account for its change of heart from the dissent in *Libertarian Party of N.C. v. State*, 365 N.C. 41, 57, 707 S.E.2d 199, 209–10 (2011) (Newby, J., dissenting). *See infra* notes 605–06 and accompanying text. It also does not address the general holding of *Blankenship v. Bartlett*, 363 N.C. 518, 526, 681 S.E.2d 759, 759 (2009) (finding that "the right to vote in superior court elections on substantially equal terms" is protected by North Carolina's equal protection clause).

583. Although outside the scope of this analysis, the court's reinterpretation of equal protection and other individual liberties is also unpersuasive.

584. The dissent in *Harper I* sought to cabin *Van Bokkelen* as a "one-person, one-vote" decision, *see Harper I*, 380 N.C. 317, 432, 868 S.E.2d 499, 577 (2023) (Newby, C.J., dissenting), but the majority pointed out the anachronism, *id.* at 321, 390, 868 S.E.2d at 509, 551 (majority opinion). *Harper III* might have chosen to not address it because there is no basis to dispute it.

*Affirmative Prerogative to Discriminate.* First, the court determined that the redistricting authority of the General Assembly is subject only to the four "explicit limitations" of the Form of Government, with no obligation that they district evenhandedly.[585] This is counterintuitive—why would the people have buried such a cockatrice egg in an administrative provision?

If the framers intended to create a prerogative to discriminate in article II that overrides the Declaration of Rights, they would have said so explicitly.[586] Likewise, the drafters would have regarded an explicit prohibition in article II against discrimination superfluous because the Declaration of Rights (a) already prohibits discrimination,[587] (b) contains a well-established common law term that prohibits gerrymandering,[588] and (c) is superordinated to article II.[589] Moreover there are implicit restrictions against using legislative power arbitrarily,[590] in the same way that the textual assignment of judicial power implicitly requires judges to be impartial.[591] A founding principle is that the "inferior power" of the legislature "can by no means assume or exercise a power to subvert the principal supreme power," the people.[592]

The *Harper III* court's view does not square with the meaning of the text, nor with its history. The article II text originates from constitutional reforms aimed at equality and greater representation.[593] The best reading of the changes is that the people *continued to deny* the legislature the power to discriminate in districting while *adding a requirement* that they not split counties or districts.[594] This is how the Pennsylvania Supreme Court interpreted the interplay of their own free elections clause with specific provisions: "These neutral criteria provide a 'floor' of protection for an individual against the dilution of his or her

585. *Harper III*, 384 N.C. 292, 332, 886 S.E.2d 393, 420 (2023).

586. The Constitution does not discontinue legal rights without some clear statement. *See* SCALIA & GARNER, *supra* note 278, at 318 (positing common law meaning may not be altered without a clear disposition).

587. N.C. CONST. art. II, §§ 1, 2 (expressing obligation to use power with equality and for the good of the whole).

588. *See* SCALIA & GARNER, *supra* note 278, at 320–21 ("A statute that uses a common-law term, without defining it, adopts its common-law meaning.").

589. *See id.* at 126 (discussing hierarchy canon that superordinate provisions prevail in the event of a clash with subordinate administrative provisions).

590. *See supra* notes 42–46 and accompanying text (discussing inherent limitations on grants of power).

591. John V. Orth, *The Enumeration of Rights: "Let Me Count the Ways*," 9 U. PA. J. CONST. L. 281, 285, 285–86 (2006) ("[T]he drafters might have thought the right to an impartial judge so obvious a requirement of due process that it did not require express mention.").

592. Mecklenburg Instructions, *supra* note 268, at 870b.

593. *See supra* notes 340–65 and accompanying text. The court summarized the 1835 and 1868 changes, but it did not explain how it reconciled its interpretation with the history or the text of those documents. *See Harper III*, 384 N.C. 292, 328–29, 886 S.E.2d 393, 417–18 (2023).

594. *See* SCALIA & GARNER, *supra* note 278, at 63 ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.").

vote in the creation of such districts."[595] Instead, *Harper III* supposes that the people rendered the broad injunction of the Free Elections Clause superfluous[596] and replaced it with lighter requirements.[597] And it further supposes that the people *authorized* the legislature to discriminate with the *sole requirement* that no counties or districts were split.[598] In other words, the court imagined that, after the catastrophe of the American Civil War, the people (many of whom were formerly enslaved) gave the legislature *more* power to discriminate in elections.

Precedent does not support *Harper III*'s reading of the article II limitations.[599] *Van Bokkelen* regarded districting as merely a ministerial task "to facilitate the exercise of the right of the ballot; and not to defeat it."[600] Likewise, *Stephenson I* specifically held that the requirements of article II "are not affirmative constitutional mandates and do not authorize . . . districts in a manner violative of the fundamental right of each North Carolinian to substantially equal voting power."[601]

In sum, as with its analysis of the scope of the Free Election's right, *Harper III*'s reading of article II is inconsistent with text, context, history, and precedent. It inverts what were designed to be further guardrails on the administrative task of districting[602] into an affirmative power to discriminate.[603]

595. League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 817 (Pa. 2018). Pennsylvania's constitution is contemporaneous to North Carolina's, is similarly structured with a Declaration of Rights, and has a Free Elections Clause. *See* PA. CONST. art. I, § 5.

596. *See* SCALIA & GARNER, *supra* note 278, at 174 ("If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." (citation omitted)). It also violates the surplusage canon because it interprets the Free Elections Clause in a way that duplicates article II and causes the Free Elections Clause to have no consequence. The founders may just as well have left it out and included only the specific limitations if the *Harper III* court's interpretation is the correct one.

597. This would not be consistent with the historical context of the changes.

598. *Harper III*, 384 N.C. at 332, 886 S.E.2d at 420.

599. When "a statute uses words or phrases that have already received authoritative construction by the jurisdiction's last resort . . . they are to be understood according to that construction." *See* SCALIA & GARNER, *supra* note 278, at 322 ("Prior-Construction Canon").

600. *See supra* Section II.B.1.

601. *Stephenson I*, 355 N.C. 354, 379, 562 S.E.2d 377, 394 (2002).

602. *See* Van Hecke, *Legislative Power*, *supra* note 412, at 181 (observing the "warping" of constitutional meaning).

603. *Harper III*'s reinterpretation of *Stephenson I* is strained. Where *Stephenson I* refuses to "abrogate the constitutional limitations [of the Declaration of Rights] or 'objective constraints' [of article II]" on redistricting, *Stephenson I*, 355 N.C. at 371–72, 562 S.E.2d at 390, *Harper III* says, without irony, "[b]y 'constitutional limitations,' we meant the specific constraints in Article II," *Harper III*, 384 N.C. at 334, 886 S.E.2d at 421. This produces a nonsense repetition. *Stephenson I* is making a clear reference to the Free Elections Clause or an adjacent unenumerated right in the Declaration of Rights. *Van Bokkelen* expresses the same right. *See* People *ex rel.* Van Bokkelen v. Canaday, 73 N.C. 198, 225 (1875). A candid reading of *Stephenson I* is that article II's objective constraints are subordinate to the requirement of "substantially equal voting power." *Stephenson I*, 355 N.C. at 379, 562 S.E.2d at 394.

*Minimal Scrutiny of Rights Violations.* The second way the court elevated the legislature's districting powers was to exclude voting rights from the "strict scrutiny" protections afforded to Declaration of Rights protections (*Corum* rights). Instead, *Harper III* required that gerrymandering claims "must surmount the high bar imposed by the presumption of constitutionality and meet the highest quantum of proof, a showing that the statute is unconstitutional beyond a reasonable doubt."[604]

This is a dramatic revision of the law the Chief Justice espoused in *Libertarian Party v. State*,[605] in which he asserted that ballot access is a fundamental right requiring strict scrutiny.[606]

The traditional standard was stated in *Stephenson I*: "It is well settled in this State that the right to vote on equal terms is a fundamental right . . . thus strict scrutiny is the applicable standard."[607] Under strict scrutiny, a governmental action is unconstitutional if the State "cannot establish that it is narrowly tailored to advance a compelling governmental interest."[608] Courts have been unable to find a compelling interest that justifies gerrymandering.[609]

*Facial Conformity is Sufficient.* Third, *Harper III* eliminated the requirement that article II restrictions be applied in a way that does not selectively diminish voting power. *Stephenson I* required that "an application of the WCP that abrogates the equal right to vote, a fundamental right under the State Constitution, must be avoided in order to uphold the principles of substantially equal voting power and substantially equal legislative representation arising from that same Constitution."[610] In other words, in deciding which counties to group and how to split counties, the legislature must not selectively diminish the voting power or representation of any group. *Harper III* included no similar proviso, rendering the article II restrictions less effective.[611]

In sum, though the General Assembly is "textually assigned" redistricting power by the Form of Government, it is a grant conditioned on: (a) the Free Elections Clause and other Declaration of Rights provisions, (b) the four

604. *Harper III*, 384 N.C. at 232, 886 S.E.2d at 413. When applied to legislative actions that disconnect them from the voters, this results in a form of legislative supremacy not in keeping with North Carolina's constitutional plan of popular sovereignty.

605. 365 N.C. 41, 707 S.E.2d 199 (2011).

606. *See id.* at 49–50, 707 S.E.2d at 204–05 ("In North Carolina, statutes governing ballot access by political parties implicate individual associational rights rooted in the free speech and assembly clauses of the state constitution. . . . [S]trict scrutiny is warranted only when this associational right is severely burdened."). Peculiarly, *Harper III* makes no mention of *Libertarian Party*.

607. *Stephenson I*, 355 N.C. at 378, 562 S.E.2d at 393.

608. *Id.* at 377, 562 S.E.2d at 393.

609. *See supra* note 155 and accompanying text (rationale given in *Ashby v. White*); *supra* note 402 and accompanying text (rationale given in *Van Bokkelen*).

610. *Stephenson I*, 355 N.C. at 382, 562 S.E.2d at 396.

611. The 2024 maps satisfied the "objective constraints," but were grouped and split to deny representation to a million voters. *Id.* at 371, 562 S.E.2d at 390.

administrative restrictions in the Form of Government being applied in a way that does not abrogate the equal right to vote, and (c) inherent obligations of bona fide public stewardship. Transgressions should be strictly scrutinized to ensure they are narrowly tailored to advance a compelling governmental interest. *Harper III* did not follow this framework, creating a new legislative prerogative with few effective limits.

*c. Diminished Judicial Power to Remediate Districting Abuses*

Right at the outset, *Harper III* declared itself *hors de combat*, incapable of providing a remedy. It cited three reasons: (1) the constitution textually assigns redistricting exclusively to the legislature, (2) providing a remedy entails making legislative policy choices, and (3) there are no standards against which claims can be adjudicated.

*Separation of Powers. Harper III* reasoned that because the Constitution assigns districting to the legislature, court-ordered remedial maps violate the separation of powers principle.[612] However, the textual assignment is subject to textual limitations, and the judiciary is empowered to enforce them assertively: "deference is not abdication."[613] The prior court did not *sua sponte* legislate electoral districts; it exercised judicial power to remedy an infraction the legislature failed to correct, acting on behalf of the people. This is not a violation of the separation of powers principle established by the North Carolina founders[614] nor contrary to precedent,[615] but very much in keeping with the judiciary's duty under the original design.[616] It is instead a violation of separation of powers for the legislature to perform the judicial role of adjudicating the voting power of the electorate.[617]

612. *Harper III*, 384 N.C. 292, 379, 886 S.E.2d 393, 449 (2023) ("Apportionment is textually committed to the General Assembly . . . . This case is not about partisan politics but rather about realigning the proper roles of the judicial and legislative branches.").

613. Moore v. Harper, 143 S. Ct. 2065, 2090 (2023) (Kavanaugh, J., concurring); *accord Stephenson I*, 355 N.C. at 376, 562 S.E.2d at 392 ("[W]e cannot abdicate our duty of redressing the demonstrated constitutional violation.").

614. *See supra* notes 300–02 and accompanying text (discussing separation of powers).

615. *Stephenson I* remained in force to require that courts police its admonition that "[a]rticle II, Sections 3(1) and 5(1) are not affirmative constitutional mandates and do not authorize . . . [the Assembly to draw] districts in a manner violative of the fundamental right of each North Carolinian to substantially equal voting power." 355 N.C. at 379, 562 S.E.2d at 394.

616. *See supra* notes 299–311 and accompanying text (discussing the original design for the judiciary).

617. *See supra* notes 395–99 and accompanying text (equating gerrymandering with altering voter qualifications in *Van Bokkelen*). "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Bush v. Gore, 531 U.S. 98, 105 (2000) (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

*Political Question.* In disavowing a role for the judiciary, *Harper III* cast *Rucho*'s political question analysis onto the North Carolina Constitution.[618] However, *Rucho* only applies to the federal constitution, and it even encourages remedies under state constitutions, particularly those with provisions like the Free Elections Clause.[619] In contrast to the federal constitution, the North Carolina Constitution does not permit a Declaration of Rights violation to go unremedied. It obligates the judiciary.[620] The remedies need not be themselves political.[621] The distinction between judicial and political acts is clear.[622]

*Manageable Standards.* North Carolina precedents set out clear,[623] measurable,[624] justiciable,[625] and manageable standards because the North

618. *See* Richard Dietz, *Factories of Generic Constitutionalism*, 14 ELON L. REV. 1, 4 (2022) (cautioning against "lockstepping" with federal standards, particularly in interpreting unique state provisions).

619. *Rucho* approved of state constitutional restrictions on gerrymandering such as the Florida Constitution's Fair Districts Amendment, which corresponds to the North Carolina Constitution's Free Elections Clause, though in more specific fashion. *See* Rucho v. Common Cause, 588 U.S. 684, 718–19 (2019).

620. *See supra* Section II.A.2 (discussing the court's constitutionally obligation to remedy violations).

621. Outside the federal context, or a proportional representation framework, the questions are fundamentally judicial. The petition before the court was not for it to legislate districts, but to adjudicate the right of the citizenry to free elections and the limits of the legislature's prerogative. A court insulates itself from legislating by delegating the remedial task to an independent panel.

622. Nixon v. Herndon, 273 U.S. 536, 540 (1927) ("The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage [denial of the right to vote]. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White* . . . and has been recognized by this Court.").

623. *See supra* Sections II.B–C (identifying the "will of the people" determinations of *Van Bokkelen*, *Stephenson I*, *Harper I*, and *Harper II*).

624. There is a surfeit of data. *See, e.g.*, PRINCETON GERRYMANDERING PROJECT, https://gerrymander.princeton.edu/ [https://perma.cc/YA2V-GRE3]. The measurement of the effects of a regulation, and not its intent, is required by North Carolina law. *See supra* Sections II.B–C (identifying the *effects* focus of *Van Bokkelen* and *Stephenson I*). Thus, for example, a randomly generated map (no partisan intent) that is measurably predicted to produce an unrepresentative Assembly (partisan effect) would be impermissible. It is the same with a map grouping as a community of interest proximity to University of North Carolina system schools (purported nonpartisan intent, unrepresentative effect). Conversely, a map produced with manifest partisan awareness that is predicted to produce a proportional outcome (and satisfies other constitutional requirements) would be permissible.

625. The "how much is too much" question in the federal Constitution arises from the absence of a Free Elections Clause, and because federalism deference necessitates tolerating a level of state-initiated political bias. Each requirement of the North Carolina Constitution has a corresponding quantitative measurement that makes it justiciable. The fundamental requirement of a representative Assembly is measured by the net voters represented by an official they voted against (similar to the efficiency gap). The requirement of an election free from partisan bias is measured by partisan bias, mean-median difference, and declination methods. The requirement of districts with equal numbers of inhabitants is a simple count, with allowable variation. The requirement of contiguous districts is a binary observation. The requirements that incursions into the whole county provision: (a) not frustrate

Carolina Constitution tolerates no discrimination based on political belief.[626] *Harper III* could have ruled that districting criteria may not include partisan *or similarly correlated* demographic data.[627] At least seventy years of experience with the equivalent task of detecting racial gerrymandering shows it is judicially manageable.[628]

In the end, the court did not face a measurement problem, nor a standards problem, nor a constitutional authority problem,[629] but a problem with judges micromanaging the work of the independent remediation panel. It would have served the state better if the court had fixed this single issue surgically, instead of short-circuiting the democratic process by closing it to the large number of North Carolinians who deplore gerrymandering.[630] If the legislature wants the power to disenfranchise, it can propose a constitutional amendment.[631]

In sum, while purporting to restore the Constitution, *Harper III* fundamentally rewires it. The court professes that "[t]his case is not about partisan politics but rather about realigning the proper roles of the judicial and legislative branches."[632] But in that realignment, the people of North Carolina for the first time are inferior to their government. So omnipotent is the legislature according to *Harper III* that it may—there are no explicit textual restrictions beyond a reasonable doubt against it—district to seat their "heirs male forever."[633]

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the will of the people uses the above measurement, (b) be minimal is measured at 11 splits or less, and (c) compact is measured by the Polsby-Popper compactness score.

626. *Harper III* extensively quotes *Rucho*'s passage about the risks of "asking judges to predict how a particular districting map will perform in future elections." *Harper III*, 384 N.C. 292, 320, 886 S.E.2d 393, 412 (2023). But predictive accuracy is only an issue for results-focused proportional representation, which is not what the North Carolina Constitution demands.

627. It is already a requirement not to use racial data. *See* Miller v. Johnson, 515 U.S. 900, 918 (1995).

628. *Harper III* concedes these are judicially manageable to adjudicate racial discrimination but fails to explain why they are not in the context of party affiliation, implausibly suggesting that unlike racial categorization, partisan categorization is insufficiently accurate in predicting voter preferences. *Harper III*, 384 N.C. at 316, 886 S.E.2d at 410. It is hard to explain why political strategists would hold such methods so dear if they did not correlate strongly with voter preferences. In any event, the North Carolina Constitution does not require the court to predict an outcome, but to detect a designed bias.

629. It is noteworthy that the court was not being asked to legislate a proportionate outcome, but to judge whether the process was biased.

630. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022) (condemning the use of raw judicial power to foreclose fundamental questions).

631. The court must put the burden of proof on the legislature as they alone have the power to initiate a constitutional amendment. The people do not have the power. *See* N.C. CONST. art. XIII, §§ 1–4 (providing that the people may amend the Constitution via a convention, but "[n]o Convention of the People of this State shall ever be called unless by the concurrence of two-thirds of all the members of each house of the General Assembly").

632. *Harper III*, 384 N.C. at 379, 886 S.E.2d at 449.

633. Bayard v. Singleton, 1 N.C. 5, 7, 1 Mart. 48, 50 (1787).

### 2. The Broader Implications of *Harper III*

Unless *Harper III*'s reasoning is confined to narrow grounds, it establishes a foundation for future troubles.

*Unaccountable Government.* The first concern is the consequences of the decision on representative government. The 2024 elections showed that article II limits alone are insufficient. All four criteria were met while still halving the representation of urban voters in Charlotte and Raleigh and eliminating it in Greensboro and Winston-Salem. The voting power of one million people was neutralized by their district assignment.[634] Such disparities in representation can impair the accountability that determines the economic performance and social cohesion of the state. Whatever the merits of the intramural dispute about the role of the judiciary, *Harper III*'s jurisprudence empirically produced a greater imbalance in the people's representation.

*Legislative Abridgement of Rights.* A second concern is the possibility for legislative abridgment of other fundamental rights.[635] Following *Harper III*'s reasoning, the Assembly can assert, on the basis of their broad wording, that no part of the Declaration of Rights imposes an explicit limitation beyond a reasonable doubt.[636] If so, rights of property[637] and conscience,[638] among others, have no discernible protections against encroachments by the legislature.[639] In contrast, and more in keeping with the Constitution, it seems the court holds

634. As a result of the districting for the 2024 elections for the U.S. House of Representatives, 1.3 million people are represented by a Republican candidate they voted against, whereas only 0.3 million people are represented by a Democratic candidate they voted against. Republicans won 10 of 14 seats, 71% of the legislative power, with 53% of the votes. In broad terms, the net votes of 1.0 million non-Republican voters were neutralized by the Republican legislature, within the boundaries established by the *Harper III* court. In contrast, the districting for the 2022 elections produced 0.6 million people represented by a Republican candidate they voted against, and 0.6 million people represented by a Democratic candidate they voted against. Republicans won 7 of 14 seats, 50% of the legislative power, with 52% of the votes. In broad terms no net votes were neutralized by the remedial panel established by the *Harper I* and *Harper II* courts. The source data is from the North Carolina Board of Elections Website. *See* N.C. BOARD OF ELECTIONS, https://www.ncsbe.gov/ [https://perma.cc/YTG4-D73H]. The elements are essentially another expression of the efficiency gap. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 831 (2015).

635. It has long been thought that when free elections are poisoned, other liberties die. *See, e.g.*, BOLINGBROKE, *supra* note 130, at 151.

636. It is beyond the scope of this Article, but it would be interesting to better understand the origin and development of this standard of review because it was not present at the 1776 or 1865 foundings.

637. N.C. CONST. art. I, § 19 (Law of the Land Clause). If a voter can be disseized of his franchise because it is not explicitly barred in the text of the Constitution, the same could be said for other property rights. *See id.*

638. *Id.* art. I, § 13 (Religious Liberty Clause). If vote dilution is not "interference," the door seems open for authorities to suppress religion in ways that do not "interfere with the rights of conscience" as a legal matter. *See id.*

639. Taken to its logical conclusion, *Harper III* also would undermine the entire foundation of corporate law and make any land granted by the State subject to repossession.

the executive to a high standard.[640] Because of the potential for despotism by the Assembly, the founders did not construct an idol-temple to the legislature. They did not make legislative supremacy the founding theory of the Constitution. The distortive effects the case could have on many important legal doctrines unrelated to elections has put *Harper III* on a collision course with the North Carolina Constitution from the day it was decided.

*Selective Judicial Abdication.* A third concern is selective judicial dissolution of fundamental rights. *Harper III* models the techniques by which the judiciary can selectively empty other fundamental rights of meaning. The methodological rigor of text, context, history, precedent, deference, and other precepts can be misapplied to uphold some rights but not others. Rights such as equality, property protections, religious liberty, education, criminal process, gun ownership, and others might vary depending on the court. The right of a racetrack owner to operate during a pandemic could be held more sacred than the rights of one million people to choose their representative to Congress. The founders did not intend the judiciary to gatekeep the chartered liberties of the people like high priests of Baal, withholding justice based on their own sense of righteousness. Fundamental rights, all of them, are established to be inviolable under any pretext in any political environment by any arbiter.

In sum, *Harper III* deadens the responsiveness of the legislature to the welfare of the people. It deploys a pattern of reasoning that can subvert other foundational concepts as well: (a) empty a fundamental right of meaning, (b) elevate a legislative prerogative, and (c) abdicate from judicial vindication.

### C. *Paths to Renewing the Right of Free Election*

> *We must vindicate: What? New things? No: Our ancient, legal, and vital liberties; by reinforcing the laws, enacted by our ancestors; by setting such a stamp upon them, that no licentious spirit shall dare henceforth to invade them.*
>
> Thomas Wentworth, 1628[641]

The power to restore the functioning of the Constitution to its original plan of representative democracy is in the hands of the Supreme Court of North Carolina. The path is proven and attainable now, and in our own time.

640. *See, e.g.*, Kinsley v. Ace Speedway Racing, Ltd., 386 N.C. 418, 425, 904 S.E.2d 720, 727 (2024) (holding that the state must demonstrate a proper governmental purpose, and that the means chosen to achieve that purpose were reasonable).

641. 5 DAVID HUME, THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 126 (Liberty Fund 1983) (1778). "And shall we think this a way to break a parliament? No: Our desires are modest and just." Thomas Wentworth was addressing the crucial 1627 Parliament that produced the Petition of Right, a foundation of American liberty. *Id.*; 6 GARDINER, *supra* note 76, at 236.

*Restore Common Law Meaning*. The first step is to reconnect the Free Elections Clause with its English constitutional origins.[642] The right must be restored in North Carolina law to its ancient meaning as a broad injunction against all forms of election interference (including gerrymandering) by any power of the State, including the Assembly. It is not cabined in the ways suggested by *Harper III*. The two meanings given there (accurate count and free conscience) are inadequate dicta pulled from two minor recent cases rather than centuries of experience. Tethering the clause to an established principle keeps each new case from becoming an adventure.

Subsequent cases by the Supreme Court of North Carolina show that, having lost contact with the accumulated wisdom of the Free Elections Clause, the court turns on a widening gyre beyond hailing distance of its constitutional authority. In *Bouvier v. Porter*,[643] the court extended the absolute immunity in judicial proceedings to nonlitigant partisans who libelously published that the plaintiffs had voted illegally. The court described the Free Elections Clause as guaranteeing "that voters are free to vote according to their consciences without interference or intimidation" and that votes are accurately counted.[644] As detailed above, an accurate count is but one of the commonplace administrative requirements for a free election, but the freedom-of-conscience roots of the right of free election are profound. And yet anomalously, the court elevated the "conscience" of a political organization that baselessly sought to interfere with voters over the conscience of the voters themselves.[645]

In *Kennedy v. State Board of Elections*,[646] the court put aside all the inhibitions about separation of powers, political questions, and other limitations expressed in *Harper III*. Without any evidence that the Board of Elections acted inappropriately, the court disregarded the statutory framework and the "textual assignment" of the Board's authority and empowered itself to write elections

642. Scholarship on this and other Declaration of Rights matters may be helpful.

643. Bouvier v. Porter, 386 N.C. 1, 900 S.E.2d 838 (2024).

644. *Id.* at 3, 900 S.E.2d at 842.

645. Gerrymandering likewise directly interferes with the expression of conscience but incongruously is unvindicated by the court. Interference is wrongful conduct that prevents or disturbs another in the enjoyment of their full legal rights. Justice Newby wrote in *Kirby v. N.C. Department of Transportation*, 368 N.C. 847, 786 S.E.2d 919 (2016), that the mere filing of a plan which could signal ultimate condemnation amounted to "interference" with property. *Kirby* relied on North Carolina's longstanding protection of property (conceived broadly by Locke and Madison to encompass the free exercise of personal rights) to hold that not only an actual occupation of land, but an interference with a key element that decreases its value implicates the right. *Id.* at 856, 786 S.E.2d at 926. Gerrymandering is not an actual taking, but an interference which prevents a qualified voter from enjoying the full value of his legal right to vote. Likewise, the Free Elections Clause would ban other forms of interference, such as canvassing local elections officials to ascertain whether they would support the Governor or the Assembly's legislative goals, allowing either branch to create a short list of approved candidates, purging local elections officials based on party, or permitting the presence of local sheriffs at polls to intimidate voters.

646. Kennedy v. N.C. State Bd. of Elections, 386 N.C. 620, 905 S.E.2d 55 (2024).

regulations on behalf of a nonlitigant class, shorten the absentee voting period, and increase the risk of a contested election.[647]

In an order dismissing a petition for writ of prohibition in *Griffin v. State Board of Elections*,[648] members of the court expanded their "accurate count" interpretation of the Free Elections Clause in a new direction, asserting the authority, unconstrained by separation of powers, to rewrite election rules—this time after the fact. Such inconsistencies harm the actual and perceived integrity of the judicial process. The arbitrary dexterity with which *Harper III* and its early offspring wield or set aside the Free Elections Clause to reallocate political power prove the importance of reconnecting that clause to its traditional meaning.

The specific districting instruction to the General Assembly is that, like the use of racial data, the use of political data and its proxies are prohibited.

*Reestablish Supremacy of Equal Voting Power.* The next step is to reestablish the supremacy of the Free Elections clause over the requirements of article II. These latter districting requirements are supplementary minimum requirements, not a license to discriminate. The specific districting instruction to the General Assembly is that, as in *Stephenson I*, the article II requirements must be satisfied such that counties are not grouped or cracked in a manner that violates the fundamental right of each North Carolinian to substantially equal voting power.

*Reinstate Strict Scrutiny.* The third step is to again recognize in law that free elections are a fundamental right that is accorded strict scrutiny. If there are any encroachments, the legislature must prove they are narrowly tailored to advance a compelling state interest.

*Reassert Judicial Vindication and Remedial Integrity.* On behalf of the people, the judiciary must also vindicate any infractions.[649] Any remedial maps must be prepared under a robust process designed to ensure its independence.

*Revive the Democratic Process.* A final step in renewal is to let democratic process play out in a way that does not usurp the people's authority. The court must "sustain the will of the people as expressed in the Constitution, *and not the will of the legislators, who are but agents of the people*."[650] When the court sides with the legislature, the people cannot disavow it by corrective legislation. Their path to a constitutional amendment is foreclosed. If the court instead sides with the people, it creates an incentive for the legislature to enhance the districting and

647. In dissent, Justice Deitz wrote: "I view my role as enforcing the law as it is written." *Id.* at 635, 905 S.E.2d at 65 (Dietz, J., dissenting).

648. Order Dismissing Petition for Writ of Prohibition, Griffin v. N.C. State Bd. of Elections, No. 320-P-24 (N.C. Jan. 22, 2025).

649. Reverting to nonpartisan, state-funded election of judges might further ensure objectivity.

650. Bickett v. Knight, 169 N.C. 333, 352, 85 S.E. 418, 428 (1915) (finding the Assembly exceeded its power when it declared that a woman could hold the position of notary public).

remedial protocols by statute. The legislature is free to propose any necessary constitutional amendments.

## CONCLUSION

*Salus populi suprema lex*—the welfare of the people is the object of law. The North Carolina Constitution aggregates two millennia of experience. Its mandate that "elections . . . shall be free" embodies its evolution: society collapses when consent and consultation by the people is an illusion; the divine speaks equally, unintermediated, through all conscious souls; the invisible hand of the multitude produces the greatest welfare. *Harper I* and *Harper II* demonstrated a constitutional path to end gerrymandering in North Carolina, proving that the ancient order of balanced government works in the modern present. Districting is meant to realize the will of the people, not unlike the creative destruction by shareholders replacing poor managers. If the incumbents use the power of the legislature to subvert this revitalizing process, the judiciary must intervene. The remedy is not to impose the judiciary's own will, but to assign the task to an independent tribunal. This is the time-proven constitutional order.

*Harper III* subverts the North Carolina Constitution. It creates a legislature with the power to perpetuate itself, regardless of whether its performance is satisfactory to the rest of society. North Carolina legislatures have created wonderous institutions and prosperity. But the state has also seen its people misuse government to enslave and deprive their fellow souls, and the grip is hard to shake. *Harper III* condemns a generation or maybe more of North Carolinians to live their lives hoping their dreams align with those who hold power, but powerless if they do not. The path back to North Carolina's original liberties is open, awaiting only jurists who love the law and its ancient plan of freedom to take it.