



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 95 | Number 6

Article 2

9-1-2017

Recent Developments in North Carolina Property Law: Where's the Supreme Court of North Carolina?

John V. Orth

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

John V. Orth, *Recent Developments in North Carolina Property Law: Where's the Supreme Court of North Carolina?*, 95 N.C. L. REV. 1561 (2017).

Available at: <http://scholarship.law.unc.edu/nclr/vol95/iss6/2>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

RECENT DEVELOPMENTS IN NORTH
CAROLINA PROPERTY LAW
WHERE’S THE SUPREME COURT OF NORTH
CAROLINA?*

JOHN V. ORTH**

From its creation in 1818 until the creation of the North Carolina Court of Appeals in 1967, the Supreme Court of North Carolina was the state’s sole appellate court. As such, it was solely responsible for the development of the state’s common law. At first, the creation of an intermediate appellate court did not change that situation. Created to address the burgeoning number of appeals following the great expansion of federal rights for criminal defendants in the mid-twentieth century, the Court of Appeals was originally intended to be a court for the correction of error rather than a precedent-setting court. But in 1989 the Supreme Court held that where one panel of the Court of Appeals has decided an issue, subsequent panels are bound by that precedent unless it is overturned by a higher court. From 1989 until today, state law has in many instances been shaped by decisions of three-judge panels of the Court of Appeals rather than by the seven-member Supreme Court. This Article focuses on several significant decisions concerning basic property law that have been made by panels of the Court of Appeals and explores the consequences of delegating the Supreme Court’s precedent-setting function to panels of the intermediate appellate court.

INTRODUCTION1562
I. UNCLAIMED PERSONAL PROPERTY—STATE’S DUTY TO PAY
 INTEREST1568

* © 2017 John V. Orth.

** William Rand Kenan, Jr. Professor of Law, University of North Carolina School of Law. A.B. 1969, Oberlin College; J.D. 1974, M.A. 1975, Ph.D. (history) 1977, Harvard University.

II. TENANT ABANDONMENT—LANDLORD’S DUTY TO MITIGATE—WAIVER BY TENANT	1572
III. THE RULE AGAINST PERPETUITIES—OPTIONS IN LEASES	1577
IV. THE RULE AGAINST PERPETUITIES—PERPETUAL PRIVATE NONCHARITABLE TRUSTS	1582
V. EASEMENTS—CONTINUING ENCROACHMENT.....	1589
VI. LOOKING FORWARD—THE EN BANC PROCEDURE AND THE FUTURE ROLE OF THE COURT OF APPEALS	1594
CONCLUSION	1596

INTRODUCTION

The Supreme Court of North Carolina was first created by statute in 1818.¹ Prior to that year, the Court of Conference, composed of superior court judges, had functioned as the state’s highest court.² As constituted by the 1818 court act, the Supreme Court was the state’s only appellate court.³ As such, it was solely responsible for maintaining and developing the state’s common law. The court continued in that role, with enhanced status after 1868, when the state’s new constitution vested in it “the Judicial power of the State[.]”⁴

In 1965, the North Carolina Constitution was amended to reconstitute the judicial branch. The amendment created the

1. Act of Nov. 17, 1818, ch. 1, 1818 N.C. Sess. Laws 3, 3–5.

2. Originally created by statute in 1799, Act of Nov. 18, 1799, ch. 4, 1799 N.C. Sess. Laws 133, 133–35, the court did not receive the official name of Court of Conference until 1801, Act of Nov. 16, 1801, ch. 12, § 1, 1801 N.C. Sess. Laws 176, 176. In 1805, the court’s title was changed to Supreme Court, Act of Nov. 18, 1805, ch. 1, § 1, 1805 N.C. Sess. Laws 1, but it continued to be composed of superior court judges and to be commonly referred to as the Court of Conference. *See* Walter Clark, *The Supreme Court of North Carolina*, 4 GREEN BAG 457, 459 (1892).

3. Act of Nov. 17, 1818, ch. 1, 1818 N.C. Sess. Laws 3, 3–5.

4. N.C. CONST. of 1868, art. IV, § 4 (“The Judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of Justices of the Peace, and Special Courts.”). Among the various courts referred to, only the Supreme Court was an appellate court of general jurisdiction. *Id.* § 10

The Supreme Court shall have jurisdiction to review, upon appeal, an[y] decision of the courts below, upon any matter of law or legal inference; but no issue of fact shall be tried before this court: and the court shall have power to issue any remedial writs necessary, to give it a general supervision and control of the inferior courts.

Id.

Appellate Division of the General Court of Justice, consisting of the Supreme Court and the Court of Appeals.⁵ The amendment authorized a Supreme Court composed of up to nine justices, although the court continues to function with seven, as it has since 1937.⁶ On January 1, 1967, legislation provided for a Court of Appeals staffed with six judges.⁷ In 1969, the number of Court of Appeals judges increased to nine;⁸ in 1977, to twelve;⁹ and, in 2000, to fifteen.¹⁰ The Court of Appeals sits in panels consisting of three judges each, assigned by the Chief Judge, “in such fashion that each member sits a substantially equal number of times with each other member.”¹¹ Rotation of the judges was intended “to prevent the growth of diverging bodies of case law among various panels of fixed membership.”¹²

On its creation, the Court of Appeals was expected to be primarily responsible for the correction of errors made at the trial level, leaving the Supreme Court with responsibility for review of “those cases having [the] added dimension of general jurisprudential significance[.]” whether decisions of a trial court or of the Court of

5. See AMENDMENTS TO THE CONSTITUTION OF NORTH CAROLINA, 1776–1996, at 14 (John L. Sanders & John F. Lomax, Jr. eds., 1997). After the revision of the North Carolina Constitution, approved by the voters on November 3, 1970 (effective January 1, 1971), the provision appears in the North Carolina Constitution at article IV, section 5. See JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 130 (2d ed. 2013).

6. Act of Feb. 3, 1937, ch. 16, 1937 N.C. Sess. Laws 47, 47 (increasing number of justices from five to seven, as authorized by a constitutional amendment adopted in 1935); see N.C. CONST. art. IV, § 6; Act of May 11, 1935, ch. 444, sec. 1, 1935 N.C. Sess. Laws 745, 745; see also AMENDMENTS TO THE CONSTITUTION OF NORTH CAROLINA, *supra* note 5, at 8.

7. See N.C. GEN. STAT. § 7A-16 (2015) (“The Court of Appeals is created effective January 1, 1967. It shall consist initially of six judges . . .”).

8. *Id.* (“Effective January 1, 1969, the number of judges is increased to nine . . .”).

9. *Id.* (“Effective January 1, 1977, the number of judges is increased to 12 . . .”). For the early history of the Court of Appeals, see DAVID M. BRITT, COURT OF APPEALS OF NORTH CAROLINA: THE FIRST TWENTY-FIVE YEARS, 1967–1992, at 2–8 (1992).

10. § 7A-16 (“On or after December 15, 2000, the Governor shall appoint three additional judges to increase the number of judges to 15.”). *But see* Act to Reduce the Number of Judges on the Court of Appeals to Twelve, sec. 1, § 7A-16, 2017-2 N.C. Adv. Legis. Serv. 37, 37 (LexisNexis) (“On or after January 1, 2017, whenever the seat of an incumbent judge becomes vacant prior to the expiration of the judge’s term due to death, resignation, retirement, impeachment, or removal pursuant to G.S. 7A-374.2(8) of the incumbent judge, that seat is abolished until the total number of Court of Appeals seats is decreased to 12.”).

11. § 7A-16.

12. STATE OF N.C. COURTS COMM’N, REPORT OF THE COURTS COMMISSION TO THE NORTH CAROLINA GENERAL ASSEMBLY 7 (1967).

Appeals.¹³ In consequence, there was an appeal of right from the Court of Appeals to the Supreme Court in any case that “directly involves a substantial question arising under the Constitution of the United States or of this State.”¹⁴ In addition, there was an appeal of right from any decision of the Court of Appeals “[i]n which there is a dissent[.]”¹⁵ In other cases that have “significant public interest” or that involve “legal principles of major significance to the jurisprudence of the State,” the Supreme Court could certify a cause for review on the motion of a party or on its own motion.¹⁶ In a few

13. *Id.* at 13. As the Courts Commission itself recognized, “These two functions of course are frequently carried on simultaneously. In many cases the general law is clarified or expanded in the very process of correcting trial court error in the individual case.” *Id.* at 12.

14. N.C. Gen. Stat. § 7A-30 (2015). The complete grounds for appeals as of right from Court of Appeals decisions are as follows:

Except as provided in G.S. 7A-28 [concerning decisions of Court of Appeals on post-trial motions for appropriate relief, valuation of exempt property, or courts-martial], an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case: (1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or (2) In which there is a dissent.

Id.; See also Robert Orr, *What Exactly Is a “Substantial Constitutional Question” for Purposes of Appeal to the North Carolina Supreme Court?*, 33 CAMPBELL L. REV. 211 (2011) (analyzing the “statutory right of appeal based on a substantial constitutional question”). North Carolina General Statutes section 7A-30 was amended in December 2016 to render unavailable the appeal of right in a case decided by a panel in which there was a dissent “until after the Court of Appeals sitting en banc has rendered a decision in the case . . . or until after the time for filing a motion for rehearing of the cause by the Court of Appeals has expired or the Court of Appeals has denied the motion for rehearing.” Act of Dec. 16, 2016, ch. 125, sec. 22.(c), § 7A-30(2), 2016 N.C. Sess. Laws 10, 32.

15. § 7A-30; see Act of Dec. 16, 2016, ch. 125, sec. 22.(c), § 7A-30, 2016 N.C. Sess. Laws 10, 32; see also N.C. R. APP. P. 16(b); Thomas L. Fowler, *Appellate Rule 16(b): The Scope of Review in an Appeal Based Solely upon a Dissent in the Court of Appeals*, 24 N.C. CENT. L. J. 1, 5 (2001).

16. N.C. GEN. STAT. § 7A-31(b)(1)–(2) (2015). “[T]he Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals.” *Id.* § 7A-31(a). Certification before determination by the Court of Appeals may be allowed

when in the opinion of the Supreme Court: (1) The subject matter of the appeal has significant public interest, or (2) The cause involves legal principles of major significance to the jurisprudence of the State, or (3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or (4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.

§ 7A-31(b).

cases, there was an appeal of right from a trial court directly to the Supreme Court.¹⁷

In 1989, in *In re Appeal from Civil Penalty*,¹⁸ the Supreme Court of North Carolina held: “where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a[n intervening decision from] a higher court.”¹⁹ Although this holding made theoretically impossible “diverging bodies of case law”²⁰ among different panels of the Court of Appeals,²¹ the Chief Judge continued to rotate the judges among the

Certification after determination by the Court of Appeals may be allowed when in the opinion of the Supreme Court: (1) The subject matter of the appeal has significant public interest, or (2) The cause involves legal principles of major significance to the jurisprudence of the State, or (3) The decision of the Court of Appeals appears to be in conflict with a decision of the Supreme Court.

§ 7A-31(c).

17. § 7A-27(a)(1) (sentences of death); § 7A-27(a)(2)–(3) (certain decisions of the business court); § 7A-27(a1), *repealed by* Act of Dec. 16, 2016, ch. 125, sec. 22.(b), § 7A-27(a1), 2016 N.C. Sess. Laws 10, 31 (decisions by a special three-judge Superior Court holding a state statute “facially invalid” for violation of the North Carolina Constitution or federal law). § 7A-27 was amended in December 2016 to abolish the appeal of right to the Supreme Court from decisions by the special three-judge Superior Court holding a state statute unconstitutional, so any appeal would now lie to the Court of Appeals. Act of Dec. 16, 2016, ch. 125, sec. 22.(c), § 7A-27(a1), 2016 N.C. Sess. Laws 10, 31.

18. 324 N.C. 373, 379 S.E.2d 30 (1989).

19. *Id.* at 384, 379 S.E.2d at 37 (citing *Monroe Cty., Florida v. U.S. Dep’t of Labor*, 690 F. 2d 1359, 1363 (11th Cir. 1982); *Caldwell v. Ogden Sea Transp., Inc.*, 618 F.2d 1037, 1041 (4th Cir. 1980)). There is an exception to the precedent-setting function of the Court of Appeals when a decision of a panel is affirmed by an equally divided Supreme Court. In that case, the judgment below is affirmed “without precedential value.” *E.g.*, *Faires v. State Bd. of Elections*, 368 N.C. 825, 825, 784 S.E.2d 463, 464 (2016) (citing *State v. Long*, 365 N.C. 5, 705 S.E.2d 735 (2011) (per curiam); *State v. Greene*, 298 N.C. 268, 258 S.E.2d 71 (1979) (per curiam)); *State v. Franklin*, 367 N.C. 183, 183, 752 S.E.2d 143, 143 (2013) (citing *Amward Homes, Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011); *Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010)); *see also* John V. Orth, “Without Precedential Value”—*When the Justices of the North Carolina Supreme Court Are Equally Divided*, 93 N.C. L. REV. 1719, 1732–38 (2015) (criticizing the denial of precedential value to appellate decisions affirmed by an equally divided Supreme Court); *infra* Part VI (discussing whether the Court of Appeals sitting en banc would be bound by a precedent set by a three-judge panel).

20. N.C. COURTS COMM’N, *supra* note 12, at 7.

21. For examples of real or apparent divergences among panels of the Court of Appeals, see John V. Orth, *Why the North Carolina Court of Appeals Should Have a Procedure for Sitting En Banc*, 75 N.C. L. REV. 1981, 1982–84 (1997). At the time *In re Civil Penalty* was decided, the Court of Appeals, staffed by twelve judges, sat in four panels; since 2000, when the size of the court was increased to fifteen, it sits in five panels. It is uncertain how the court will function as its authorized strength is progressively reduced. *Cf. supra* note 10.

panels.²² Since the Court of Appeals originally had no procedure for sitting en banc, the decision of one panel of the Court of Appeals was the decision of the entire court. As a result, since 1989, North Carolina common law has been, in significant cases, developed by three-judge panels of rotating membership rather than by the seven-member Supreme Court.

Recently, significant changes have been made to North Carolina's appellate procedure. On December 16, 2016, the North Carolina General Assembly adopted Senate Bill 4, authorizing the Court of Appeals to sit "en banc to hear or rehear any cause upon a vote of the majority of the judges of the court."²³ This law would change the appellate procedure that is described in this Article and that was followed in the cases discussed herein. The new statute would allow the Court of Appeals sitting en banc to rehear a case decided by a panel that involved a constitutional issue.²⁴ It would also render unavailable the appeal of right in a case decided by a panel in which there was a dissent "until after the Court of Appeals sitting en banc has rendered a decision in the case . . . or until after the time for filing a motion for rehearing of the cause by the Court of Appeals has expired or the Court of Appeals has denied the motion for rehearing."²⁵

A suit that makes a "facial challenge" to the constitutionality of an act of the General Assembly is heard by a special three-judge superior court.²⁶ Prior to the passage of Senate Bill 4, if that court held the act unconstitutional, there was an appeal of right to the Supreme Court.²⁷ Senate Bill 4 abolishes the appeal of right to the

22. See N.C. GEN. STAT. § 7A-16 (2015).

23. Act of Dec. 16, 2016, ch. 125, sec. 22.(a), § 7A-16, 2016 N.C. Sess. Laws 10, 30. The en banc procedure that is authorized by this statute is implemented by North Carolina Rules of Appellate Procedure Rule 31.1, adopted by the Supreme Court of North Carolina on December 22, 2016. N.C. SUPREME COURT, ORDER ADOPTING RULE 31.1 OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE, 369 N.C. ___, ___ (Dec. 22, 2016) <http://www.aoc.state.nc.us/www/public/html/pdf/Rule-31.1.pdf> [<https://perma.cc/M9L4-C6R4>].

24. See Act of Dec. 16, 2016, ch. 125, sec. 22.(b), § 7A-27, 2016 N.C. Sess. Laws 10, 31.

25. *Id.* sec. 22.(c), § 7A-30, 2016 N.C. Sess. Laws at 32.

26. N.C. GEN. STAT. § 1-267.1(a1) (2015) (providing that "any facial challenge to the validity of an act of the General Assembly shall be transferred . . . to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County").

27. § 7A-27(a1), *repealed by* Act of Dec. 16, 2016, ch. 125, sec. 22.(b), § 7A-27(a1), 2016 N.C. Sess. Laws 10, 31 (providing an appeal of right in case of decision by a special three-judge superior court holding a state statute "facially invalid" for violation of the North Carolina Constitution or federal law).

Supreme Court, so any appeal now lies to the Court of Appeals.²⁸ Similarly, appeals from a decision of the special three-judge superior court that declared invalid an act redistricting congressional or legislative districts, once directed to the Supreme Court,²⁹ are now also routed to the Court of Appeals.³⁰

The present Article focuses on several significant decisions concerning basic North Carolina property law that were made by three-judge panels of the Court of Appeals and not reviewed by the Supreme Court. The cases decided a wide array of basic property issues: (1) whether the state is constitutionally required to pay interest on unclaimed personal property in its possession; (2) whether a commercial tenant may waive a landlord's duty to mitigate damages in case of tenant abandonment; (3) whether the common law Rule Against Perpetuities applies to a right of first refusal in a lease; (4) whether a perpetual private noncharitable trust violates the state constitutional prohibition of perpetuities; and (5) whether an action to enjoin a continuing encroachment on an easement is subject to the running of a six-year statute of limitations. The decisions in all these cases are subject to criticism, but the object of this Article is not to advocate for any particular result.

Instead, this Article explores the consequences of effectively delegating the Supreme Court's precedent-setting function to the intermediate appellate court. It notes the effect of precedents set by Court of Appeals decisions in cases in which no review was sought by the Supreme Court, as well as in cases in which appeals were dismissed or petitions for discretionary review were denied. Finally, this Article concludes that the constitutional plan of relieving the Supreme Court of the burden of correcting error in order to allow the court the opportunity to develop the state's common law has been severely compromised.

28. Act of Dec. 16, 2016, sec. 22.(b), 2016 N.C. Session Laws 10 at 31.

29. N.C. GEN. STAT. § 120-2.5.

30. Act of Dec. 16, 2016, ch. 125, sec. 22.(f), § 120-2.5, 2016 N.C. Sess. Laws 10 at 33 (repealing N.C. GEN. STAT. § 120-2.5).

I. UNCLAIMED PERSONAL PROPERTY—STATE’S DUTY TO PAY INTEREST

In 2008, in Rowlette v. State,³¹ a panel of the Court of Appeals held that the state’s retention of interest earned on unclaimed personal property in its possession is not an unconstitutional taking.

In *Rowlette*, Plaintiffs owned personal property that was transferred to the custody of the state treasurer pursuant to the Unclaimed Property Act.³² While in the custody of the treasurer, Plaintiffs’ property paid dividends to the state and accrued “funds”—presumably interest.³³ Having proved their ownership to the satisfaction of the treasurer, Plaintiffs received the value of their property as it was when the treasurer first took custody of it but not the dividends and interest that it had produced since then.³⁴ Pursuant to the statute, the treasurer holds unclaimed property “without liability for income or gain.”³⁵ Plaintiffs claimed that the treasurer’s retention of the dividends and interest was an unconstitutional taking under both the state and the federal constitutions.³⁶ The superior court judge dismissed the complaint.³⁷

31. 188 N.C. App. 712, 656 S.E.2d 619 (2008), *perm. app. granted, disc. rev. denied*, 362 N.C. 474, 666 S.E.2d 487 (2008).

32. *Id.* at 713, 656 S.E.2d at 620; *see also* N.C. GEN. STAT. §§ 116B-51 to -80. While raising a presumption that unclaimed property has been abandoned, § 116B-53(c), the statute nonetheless characterizes the state’s possession of the property as mere “custody,” § 116B-56(a), -63(b). The drafters of the Uniform Unclaimed Property Act, on which the North Carolina statute is based, maintain that “[t]he owner’s rights are never cut off; under this Act, the owner’s rights exist in perpetuity.” UNIF. UNCLAIMED PROP. ACT § 16 cmt. (UNIF. LAW COMM’N 1995). I have previously argued that *Rowlette* was wrongly decided. John V. Orth, *Interest Follows Principal: Why North Carolina Should Pay Interest on Unclaimed Personal Property*, 37 CAMPBELL L. REV. 321, 331–32 (2015). I do not intend to re-argue that point. I mention *Rowlette* in this Article as an example of a significant property issue resolved by a three-judge panel of the Court of Appeals and unreviewed by the Supreme Court.

33. *Rowlette*, 188 N.C. App. at 712, 656 S.E.2d at 620.

34. *Id.* at 712–13, 656 S.E.2d at 620.

35. N.C. GEN. STAT. § 116B-64.

36. *Rowlette*, 188 N.C. App. at 714, 656 S.E.2d at 620; *see* U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”); N.C. CONST. art. I, § 19 (“No person shall be . . . deprived of his life, liberty, or property, but by the law of the land.”). Although the North Carolina Constitution lacks an express takings clause comparable to the Fifth Amendment to the United States Constitution, the principle has been found implicit in the law of the land clause. *See* ORTH & NEWBY, *supra* note 5, at 70.

37. *Rowlette*, 188 N.C. App. at 714, 656 S.E.2d at 620–21. From October 1, 2015 to December 16, 2016, cases that challenged a state statute under the state constitution or federal law were assigned to a special three-judge superior court. N.C. GEN. STAT. § 1-267.1(a1) (“[A]ny facial challenge to the validity of an act of the General Assembly shall

The Court of Appeals unanimously rejected Plaintiffs' claim and affirmed the dismissal of their complaint.³⁸ Stressing the presumption that state legislation is constitutional³⁹ and that unclaimed property was "abandoned,"⁴⁰ the court held that Plaintiffs' loss was attributable to their own "neglect."⁴¹ Citing several United States Supreme Court decisions, the Court of Appeals relied principally on *Texaco, Inc. v. Short*,⁴² which upheld the constitutionality of Indiana's Mineral Lapse Act.⁴³ That statute provided that a severed mineral interest that is unused for twenty years automatically lapses and reverts to the current surface owner, unless the mineral owner filed a timely statement of claim in the registry of deeds.⁴⁴ Quoting *Texaco*, the Court of Appeals noted that "[t]he [United States] Supreme Court 'has never required the State to compensate [an] owner for the consequences of his own neglect . . .'"⁴⁵ The Court of Appeals also relied on decisions of appellate courts in Pennsylvania, Indiana, Louisiana, and Ohio that upheld the retention of interest on unclaimed property.⁴⁶

be transferred . . . to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County."). If that court found the statute "facially invalid," there was an appeal of right to the Supreme Court. *Id.* For criticism of this statute, see Joshua A. Yost, Comment, "If It Ain't Broke, Don't Fix It": Evaluating North Carolina's Creation of a Three-Judge Court to Hear Constitutional Challenges to State Law, 93 N.C. L. REV. 1893, 1896 (2015). Now, because of legislation passed on December 16, 2016, cases that challenge the constitutionality of a statute are directed to the Court of Appeals. Act of Dec. 16, 2016, ch. 125, sec. 22.(c), § 7A-27(a1), 2016 N.C. Sess. Laws 10, 31.

38. *Rowlette*, 188 N.C. App. at 723, 656 S.E.2d at 626.

39. *Id.* at 714–15, 656 S.E.2d at 621 ("In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." (quoting Guilford Cty. Bd. of Educ. v. Guilford Cty. Bd. of Elections, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684–85 (1993))).

40. See N.C. GEN. STAT. § 116B-53(c) (stating that "[p]roperty is presumed abandoned if it is unclaimed by the apparent owner" over specified periods).

41. *Rowlette*, 188 N.C. App. at 723, 656 S.E.2d at 626. No reason for the plaintiffs' failure to communicate with the institutions that held their property within the time necessary to prevent transfer appears in the opinion.

42. 454 U.S. 516 (1982); see *Rowlette*, 188 N.C. App. at 717–20, 656 S.E.2d at 622–24 (citing *Texaco, Inc. v. Short*, 454 U.S. 516, 518, 526, 530 (1982)).

43. *Texaco*, 454 U.S. at 518.

44. *Id.*

45. *Rowlette*, 188 N.C. App. at 720, 656 S.E.2d at 624 (quoting *Texaco*, 454 U.S. at 530).

46. *Id.* at 720–22, 656 S.E.2d at 624–25 (citing *Smolow v. Hafer*, 867 A.2d 767 (Pa. Commw. Ct. 2005); *Smyth v. Carter*, 845 N.E.2d 219 (Ind. Ct. App. 2006); *Hooks v. Kennedy*, 06-0541 (La. App. 1 Cir. 5/4/07); 961 So.2d 425; *Sogg v. Ohio Dept. of*

Plaintiffs sought Supreme Court review, but the court dismissed their appeal of right,⁴⁷ presumably finding that the constitutional question was not substantial,⁴⁸ and denied discretionary review,⁴⁹ presumably finding that the case was not significant or that it did not involve an important legal principle.⁵⁰ Pursuant to the Supreme Court's decision in *In re Civil Penalty*, the decision in *Rowlette* is binding on all other panels of the Court of Appeals until overturned by a higher court.⁵¹

Had the Supreme Court reviewed *Rowlette*, it might have noted that other courts have found the constitutional question concerning interest on unclaimed property to be of great significance. When the Ohio Supreme Court reversed the lower court's decision that was relied on in *Rowlette*, it declared that the state's retention of interest "strikes at the core of the concept of private property because, at a stroke, the [Ohio] General Assembly severed the link between the owner of an asset and the income produced by that asset."⁵² The Ohio Supreme Court distinguished the Ohio Unclaimed Property Act from

Commerce, 2007-Ohio-3219, 2007 WL 1821306 (Ohio Ct. App. 2007) *rev'd sub nom.* *Sogg v. Zurz*, 121 Ohio St.3d 449, 2009-Ohio-1526, 905 N.E.2d 187 (Ohio 2009)). At the time the decision in *Rowlette* was filed on February 19, 2008, the appeal in *Sogg* was pending. See *Sogg v. Ohio Dept. of Commerce*, 116 Ohio St.3d 1410, 2007-Ohio-6140, 876 N.E.2d 968, 968 (Ohio 2007) (allowing appeal). On April 8, 2009, the Ohio Supreme Court reversed the Ohio Court of Appeals' decision. *Sogg*, 121 Ohio St.3d at ¶ 16, 905 N.E.2d at 193.

47. *Rowlette v. State*, 362 N.C. 474, 474, 666 S.E.2d 487, 488 (2008).

48. The Supreme Court of North Carolina has held that for there to be an appeal of right from a unanimous decision of the Court of Appeals, the constitutional question "must be real and substantial rather than superficial and frivolous" or "a constitutional question which has not already been the subject of conclusive judicial determination." *State v. Colson*, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968). Since *Rowlette* was a case of first impression, the appeal of right must have been dismissed on the former ground. The United States Supreme Court has held that where the Supreme Court of North Carolina has dismissed an appeal of right on a constitutional question, the dismissal is a ruling by the state Supreme Court on the merits, thus permitting United States Supreme Court review. *R.J. Reynolds Tobacco Co. v. Durham Cty.*, 479 U.S. 130, 138 (1986). However, the Supreme Court of North Carolina does not recognize dismissal as a precedent. See *Jenkins v. Aetna Cas. & Sur. Co.*, 324 N.C. 394, 400, 378 S.E.2d 773, 777 (1989) (stating that denial of discretionary review has "no value as a precedent").

49. *Rowlette*, 362 N.C. at 474, 666 S.E.2d at 488.

50. See *supra* note 48 for discussion of dismissals' precedential value; see also *supra* note 16 (describing instances in which the Supreme Court may allow discretionary review).

51. See *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.").

52. *Sogg v. Zurz*, 121 Ohio St.3d 449, ¶ 6, 2009-Ohio-1526, 905 N.E.2d 187, 190 (Ohio 2009).

the statutes of other states because the Ohio statute “does not contain a presumption of abandonment.”⁵³

In a case decided by the U.S. Court of Appeals for the Seventh Circuit in 2013, Judge Richard Posner, long a leader in the field of law and economics,⁵⁴ held that Indiana’s retention of interest earned on unclaimed property was an unconstitutional taking.⁵⁵ Posner agreed with the Ohio Supreme Court that interest is linked to principal: “[I]f you own a deposit account that pays interest, you own the interest.”⁵⁶ Posner observed that “[a]bandonment of property other than as a consequence of death without a valid will or heirs means at common law a voluntary relinquishment of ownership” and described the presumption of abandonment in many unclaimed property acts a “misunderstanding of the concept of abandonment.”⁵⁷

Following *Rowlette*, any subsequent constitutional challenge to North Carolina’s retention of interest on unclaimed personal property would necessarily be rejected by the lower courts. Only a very determined and well-resourced plaintiff would commence such a challenge in the hope that the Supreme Court of North Carolina would hear an appeal from the inevitable, unanimous adverse judgment in the Court of Appeals.⁵⁸ As a practical matter, the three-

53. *Id.* at ¶ 9, 905 N.E.2d at 190–91 (quoting *Sogg v. Ohio Dept. of Commerce*, 2007-Ohio-3219, 2007 WL 1821306, at *8 (Ohio Ct. App. 2007) *rev’d sub nom. Sogg*, 121 Ohio St.3d 449, 2009-Ohio-1526, 905 N.E.2d 187 (Ohio 2009)).

54. See STEPHEN B. PRESSER, LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW 299–300 (2017) (“Posner is generally credited with the invention or at least the popularization of Law and Economics, the jurisprudential strain within American Legal Education that argued that American law in general, and the American common law in particular, was best understood as the application of cost-benefit analysis to social problems, in a search for the best means of wealth maximization or efficiency.”) Joining in Posner’s opinion was Judge Frank Easterbrook, *Cerajeski v. Zoeller*, 735 F.3d 577, 578 (7th Cir. 2013), a jurist also noted for his use of economic analysis of law. See generally FRANK H. EASTERBROOK & DANIEL R. FISCHER, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) (applying economic and legal doctrines to “conclude that corporate law has an economic structure [which] increases the wealth of all by supplying the rules that investors would select if it were easy to contract more fully”).

55. *Cerajeski*, 735 F.3d. at 580.

56. *Id.* The concept is hardly original. See *Beckford v. Tobin* (1749) 27 Eng. Rep. 1049, 1051; 1 Ves. Sen. 308, 310 (“[I]nterest shall follow the principal, as the shadow the body.”). Posner admitted that “[t]he state can charge a fee for custodianship and for searching for the owner, but the interest on the principal in a bank account is not a fee for those services.” *Cerajeski*, 735 F.3d. at 583.

57. *Cerajeski*, 735 F.3d at 582. For a discussion of unclaimed property acts, see JOHN V. ORTH, REAPPRAISALS IN THE LAW OF PROPERTY 78–82 (2010).

58. For an example of such a “deep pocketed plaintiff,” see the discussion of *Duke Energy Carolinas v. Gray*, *infra* notes 207–15 and accompanying text.

judge panel of the Court of Appeals made the final decision in a case that concerned the constitutional protection of property.

II. TENANT ABANDONMENT—LANDLORD’S DUTY TO MITIGATE—WAIVER BY TENANT

In 2006, in Sylva Shops Limited Partnership v. Hibbard,⁵⁹ a panel of the Court of Appeals held that a clause in a commercial lease in which a tenant waives the landlord’s duty to mitigate damages in a case of tenant abandonment is not contrary to public policy and is enforceable.

In *Sylva Shops*, Defendants entered into a five-year lease in Plaintiff’s shopping center to operate a restaurant.⁶⁰ Within six months, the business failed, leaving four and a half years remaining on the lease.⁶¹ Plaintiff made some effort to find a replacement tenant⁶² but refused to reduce the rent below that originally agreed to by Defendants, and months passed before a new tenant was found.⁶³ Plaintiff sued for unpaid rent and relied on a lease provision that “Landlord shall have no obligations to mitigate Tenant’s damages by reletting the Demised Premises.”⁶⁴ Holding the proviso invalid, the superior court judge ordered a trial to determine the amount of damages that Plaintiff could have avoided by proper acts in mitigation, and reduced Plaintiff’s recovery to that extent.⁶⁵

The Court of Appeals reversed, holding Defendants liable for the entire amount, without offset.⁶⁶ The court began its analysis by implicitly recognizing that a lease is a contract, quoting an earlier

59. 175 N.C. App. 423, 623 S.E.2d 785 (2006).

60. *Id.* at 424, 623 S.E.2d at 787–88.

61. *Id.* at 424, 623 S.E.2d at 788.

62. *Id.* Plaintiff’s leasing agent “placed a ‘For Lease’ sign in the window of the space, sent mailings to national tenants, and called other local businesses about leasing the space.” *Id.*

63. *Id.* Defendants argued that Plaintiff’s failure to find a replacement tenant resulted from its “unwillingness to agree to a lower rent.” *Id.*

64. *Id.* at 424, 426, 623 S.E.2d at 788–89. A contractual waiver of the duty to mitigate should be distinguished from the waiver that occurs when a defendant fails to assert at trial the affirmative defense of the duty to mitigate. See Jacqueline Sandler, Note, *Waiving the Duty to Mitigate in Commercial Leases*, 5 WM. & MARY BUS. L. REV. 647, 649 n.4 (2014). Although commonly referred to as a duty to mitigate damages, no true duty is involved, in the sense that failure to mitigate is actionable. In fact, failure to mitigate simply offsets the landlord’s damages to the extent of value received, or that could by reasonable efforts have been received. See Stephanie G. Flynn, *Duty to Mitigate Damages Upon a Tenant’s Abandonment*, 34 REAL PROP., PROB. & TR. J. 721, 724 (2000).

65. *Sylva Shops*, 175 N.C. App. at 424, 623 S.E.2d at 787.

66. *Id.* at 433, 623 S.E.2d at 787.

Supreme Court of North Carolina opinion: “Liberty to contract carries with it the right to exercise poor judgment as well as good judgment. It is the simple law of contracts that as a man consents to bind himself, so shall he be bound.”⁶⁷ It then acknowledged that North Carolina has adopted from contract law the duty of mitigation of damages in all leases, commercial as well as residential.⁶⁸ Nonetheless, reverting to the principle of freedom of contract, the court held that it was not contrary to public policy to contract away that duty in commercial leases,⁶⁹ analogizing it to a contract exculpating a person from the results of ordinary negligence.⁷⁰ The court cited appellate court cases allowing waiver of the duty to mitigate from appellate courts in Arkansas, New York, Ohio, and Texas,⁷¹ while recognizing that the Texas decision had been superseded by statute.⁷² The Court of Appeals also recognized that a federal district court predicted that New Jersey would not enforce a covenant in a lease waiving the duty to mitigate.⁷³

Although Defendants in *Sylva Shops* did not argue that the provision against mitigation was the product of unequal bargaining power, the court clearly would not have been receptive to that argument given its observation that in commercial leases there is “relatively equal bargaining power due to the availability of other

67. *Id.* at 427, 623 S.E.2d at 789 (quoting *Troitino v. Goodman*, 225 N.C. 406, 414, 35 S.E.2d 277, 283 (1945)).

68. *Id.* at 427, 623 S.E.2d at 789–90 (quoting *Isbey v. Crews*, 55 N.C. App. 47, 51, 284 S.E.2d 534, 537 (1981)).

69. *Id.* at 424, 623 S.E.2d at 787.

70. *Id.* at 428–29, 623 S.E.2d at 790. However, the court in *Sylva Shops* emphasized “that this opinion does not address the viability of such a clause in a residential lease, which presents an entirely different situation.” *Id.* at 429, 623 S.E.2d at 791.

71. *Id.* at 430, 623 S.E.2d at 791 (citing *Weingarten/Arkansas, Inc. v. ABC Interstate Theatres, Inc.*, 811 S.W.2d 295, 297 (Ark. 1991); *Comar Babylon Co. v. Goldberg*, 497 N.Y.S.2d 405 (N.Y. App. Div. 1986); *New Towne Ltd. P’ship v. Pier 1 Imps. (U.S.), Inc.*, 680 N.E.2d 644, 647 (Ohio Ct. App. 1996); *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299 (Tex. 1997)).

72. *Id.* (citing *Lunsford Consulting Grp. v. Crescent Real Estate Funding VIII*, 77 S.W.3d 473, 476 (Tex. Ct. App. 2002)); *see also* TEX. PROP. CODE ANN. § 91.006(a)–(b) (West 2016, Westlaw through 2017 Reg. Sess.) (“A landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease. A provision of a lease that purports to waive a right or to exempt a landlord from a liability or duty under this section is void.”).

73. *Sylva Shops*, 175 N.C. App. at 430, 623 S.E.2d at 791 (citing *Drutman Realty Co. v. Jindo Corp.*, 865 F.Supp. 1093 (S.D.N.Y. 1994) (holding under New Jersey law that parties to a commercial lease may not contract to relieve the landlord of its duty to mitigate under New Jersey law)).

space and the fact that neither party is compelled to make a deal.”⁷⁴ Nor did the court find it relevant that the lease also included a covenant against tenant transfer by assignment or sublease without the landlord’s prior written consent, which consent could be withheld in the landlord’s “sole discretion.”⁷⁵ “This Court has previously upheld such clauses [against tenant transfer without landlord’s consent] even when they do not place any limitations on the landlord’s ability to withhold consent to an assignment of the lease.”⁷⁶ The court’s decision in *Sylva Shops* was not reviewed by the Supreme Court: Defendants did not petition for discretionary review, and the Supreme Court did not exercise its discretion to take the case on its own motion.⁷⁷

Although not a constitutional decision like *Rowlette*, *Sylva Shops* was probably of more immediate practical consequence. Without a contrary decision by a higher court, the precedent it set was necessarily followed the next year in *Kotis Properties, Inc. v. Casey’s, Inc.*,⁷⁸ which also went unreviewed by the Supreme Court. Authors of an influential treatise on North Carolina property law promptly advised lawyers for commercial landlords to include provisions in their standard leases that “limit[] mitigation requirements in the event of a tenant’s breach,”⁷⁹ while small business owners were cautioned to “strive—in spite of unequal bargaining power—to require some reasonable mitigation requirements of lessors.”⁸⁰

Right or wrong, the decision in *Sylva Shops* would have benefitted from Supreme Court review.⁸¹ While Defendants could

74. *Id.* at 429, 623 S.E.2d at 791.

75. *Id.* at 430–31, 623 S.E.2d at 791–92.

76. *Id.* at 431, 623 S.E.2d at 792 (citing *Isbey v. Crews*, 55 N.C. App. 47, 49, 284 S.E.2d 534, 536 (1981)).

77. See generally N.C. GEN. STAT. § 7A-31(a) (2015) (“[T]he Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals.”).

78. 183 N.C. App. 617, 624, 645 S.E.2d 138, 142–43 (2007) (citing *Sylva Shops*, 175 N.C. App. at 432, 623 S.E.2d at 792).

79. See JAMES A. WEBSTER, JR., WEBSTER’S REAL ESTATE LAW IN NORTH CAROLINA § 12.28, p. 12-67 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. Supp. 2016).

80. *Id.*

81. One commentator has argued that the Arkansas and New York cases, relied on by the Court of Appeals are not directly on point. Sandler, *supra* note 64, at 655 n.55, 657 n.63. That commentator points out that *Weingarten/Arkansas, Inc.* “was decided mostly within the context of a surrender clause, so its wider applicability is limited . . .” *Id.* at 657, n.55. She also argues that *Comar Babylon Co.* must be placed in the context of

certainly have refused Plaintiff's lease and gone elsewhere, it is questionable that the parties had "relatively equal bargaining power."⁸² Plaintiff was a Wal-Mart shopping center,⁸³ while Defendants were small business owners.⁸⁴ Critics of the decision have contended that the rule governing residential leases should be extended to commercial leases, arguing that "[t]here should be little or no distinction between treatment of residential leases (where the duty to mitigate cannot be waived) and commercial leases involving 'mom-and-pop' tenants."⁸⁵ Of course, not all commercial tenants lack bargaining power: grocery store chains or large department stores may have more bargaining power than operators of single malls or shopping centers.⁸⁶ The difficulty of calibrating a rule depending on bargaining power has led one commentator to advocate a "blanket rule" rendering all such provisions void.⁸⁷

Perhaps more significant is the societal interest in avoiding economic waste when premises are left unoccupied. It is precisely this concern that led to the adoption of a duty to mitigate in contract law on the ground that damages should be compensatory rather than punitive. As leases came to be seen as contractual, the duty from contract law was adopted into property law.⁸⁸ However, commercial leases raise issues specific to the real estate market,⁸⁹ some of them demonstrated in *Sylva Shops*. If landlords are held to a duty to mitigate, how aggressively must they seek a replacement tenant? Must landlords accept offers to rent for less than the amount in the abandoning tenant's lease?⁹⁰ And does the contract theory of anticipatory breach⁹¹

disagreement among New York courts over whether the duty to mitigate applies to commercial landlords. *Id.* at 657 n.63.

82. See *Sylva Shops*, 175 N.C. App. 423, 429, 623 S.E.2d 785, 791 (2006).

83. *Id.* at 424, 623 S.E.2d 785 at 787-88.

84. *Id.* at 424, 623 S.E.2d 785 at 787 (identifying Defendants as "Loanne G. Hibbard, Stanley L. Hibbard, and Linda Gedney").

85. WEBSTER, JR., *supra* note 79, § 12.28, p. 12-67.

86. See, e.g., *Piggly Wiggly S., Inc. v. Heard*, 405 S.E.2d 478, 479 (Ga. 1991) (involving a tenant grocery store that drafted the lease and a landlord that agreed to construct a building for the tenant according to the tenant's plans).

87. See Sandler, *supra* note 64, at 668-71.

88. For a critical discussion of the concept that a lease is "like any other contract," see ORTH, *supra* note 57, at 47-55.

89. A lease is a conveyance as well as a contract. See, e.g., *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 570, 500 S.E.2d 752, 756 (1998) ("A lease is a contract which contains both property rights and contractual rights.").

90. On the one hand, the rent from the replacement tenant plus the damages owed by the abandoning tenant (if collectable) would make the landlord whole. On the other hand, a reduction of the rent for the replacement tenant would put downward pressure on rent

also apply to the damages calculation if the tenant abandons years before the expiration of the lease? These are questions the Supreme Court could have answered had it reviewed the case.

The interaction between *ex ante* waiver of the landlord's duty to mitigate and the covenant against tenant transfer without consent, particularly if consent could be refused arbitrarily, deserved further review. The Court of Appeals in *Sylva Shops* simply cited a 1981 Court of Appeals decision holding that, in the absence of a provision that consent would not be unreasonably withheld, the landlord's decision could be based on "arbitrary considerations of personal taste, sensibility, or convenience."⁹² The issue is unsettled elsewhere.⁹³ The Second Restatement of Property adopts the position that "the landlord's consent to an alienation by the tenant cannot be withheld unreasonably,"⁹⁴ while acknowledging that this is the "minority view."⁹⁵ In England, there is a presumption that consent to assigning or subleasing may not be unreasonably refused.⁹⁶ Without the ability to transfer the tenancy or to require mitigation, a tenant whose business has failed is left with few options other than bankruptcy.⁹⁷

for comparable property and might adversely affect other tenants in the landlord's property.

91. See *Anticipatory Breach*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A breach of contract caused by a party's anticipatory repudiation, i.e., unequivocally indicating that the party will not perform when performance is due. Under these circumstances, the nonbreaching party may elect to treat the repudiation as an immediate breach and sue for damages.")

92. *Isbey v. Crews*, 55 N.C. App. 47, 49, 284 S.E.2d 534, 536–37 (1981); see also *Sylva Shops Ltd. P'ship v. Hibbard*, 175 N.C. App. 423, 431, 623 S.E.2d 785, 792 (2006). *Isbey* was decided before *In re Civil Penalty* and was not reviewed by the Supreme Court of North Carolina.

93. See *Dick Broad. Co. v. Oak Ridge FM*, 395 S.W.3d 653, 656–57, 665–66 (Tenn. 2013) (surveying recent decisions on the subject before rejecting *Isbey* and adopting "the 'modern' position . . . imposing an implied duty of good faith and fair dealing in interpreting a silent consent clause").

94. RESTATEMENT (SECOND) PROP.: LANDLORD AND TENANT § 15.2(2) (AM. LAW INST. 1977). The ultimate issue is not whether a particular reason is reasonable or not, but whose idea of reasonableness should prevail: that of the landlord or of the legal finder of fact.

95. *Id.* § 15.2 reporter's note 1; see also Brent C. Shaffer, *Sublease Due Diligence*, 17 PROB. & PROP. 44, 50 (2003) ("[C]ase law . . . in a slight minority of jurisdictions implies that the prime landlord's consent [to tenant transfer] can not [sic] be unreasonably withheld, unless there is express language setting forth a stronger standard for consent.") (citing Landlord & Tenant Act 1927).

96. See WILLIAM GELDART, INTRODUCTION TO ENGLISH LAW 81 (D.C.M. Yardley ed., 9th ed. 1984).

97. Defendants in *Sylva Shops* had petitioned for bankruptcy. *Sylva Shops Ltd. P'ship v. Hibbard*, 175 N.C. App. 423, 425 n.1, 623 S.E.2d 785, 788, n.1 (2006).

III. THE RULE AGAINST PERPETUITIES—OPTIONS IN LEASES

In 2012, in New Bar Partnership v. Martin,⁹⁸ a panel of the Court of Appeals held that the common law Rule Against Perpetuities applies to a right of first refusal in a lease.

In 1988, Landlord leased commercial property to Tenant for a five-year term with an option to renew the lease for three additional five-year terms. The lease also granted Tenant an option to purchase⁹⁹ during the first five-year term and a right of first refusal to purchase¹⁰⁰ during any subsequent five-year term if the option to renew was exercised.¹⁰¹ Before the expiration of the first five-year term, Tenant, with Landlord's consent, transferred to an Assignee all its interest in the lease, including Tenant's option to renew and right of first refusal.¹⁰² At the same time, Landlord granted Assignee an option to renew the lease for two additional five-year terms.¹⁰³ In 2002, Landlord extended Assignee's option to renew for two additional five-year terms.¹⁰⁴ In 2004, Landlord transferred title to the property to Landlord's son ("Trustee") to hold in a family trust.¹⁰⁵ In 2010, Trustee transferred title to a limited liability corporation ("LLC") with himself as manager thereof.¹⁰⁶ As manager, he entered into a contract of sale with Purchaser to close in 2011.¹⁰⁷ Assignee, then in its fifth five-year term, brought an action against the LLC and Purchaser

98. 221 N.C. App. 302, 729 S.E.2d 675 (2012).

99. *Id.* at 305, 729 S.E.2d at 679. "An option creates in the optionee a power to compel the owner of property to sell it at a stipulated price whether or not he be willing to part with ownership." 6 AMERICAN LAW OF PROPERTY § 26.64 (A. James Casner ed., 1952).

100. *New Bar P'ship*, 221 N.C. App. at 305, 729 S.E.2d at 679. A right of first refusal, also known as a pre-emptive right, is a specific type of option to purchase. "The most common right of first refusal becomes operative when the landlord receives an offer to purchase the leased property from a third party. If the landlord decides to sell, he must first offer the property to the tenant upon the terms of the third party's bid." ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 9:9 (1980).

101. *New Bar P'ship*, 221 N.C. App. at 305, 729 S.E.2d at 679.

102. *Id.*

103. *Id.* By the terms of the agreement with Assignee, renewal was automatic, unless Assignee served notice otherwise. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

to enforce Assignee's right of first refusal.¹⁰⁸ The superior court dismissed the action.¹⁰⁹

The Court of Appeals affirmed the dismissal, holding that the right of first refusal violated the common law Rule Against Perpetuities, so was void *ab initio*.¹¹⁰ In its classic form, the Rule Against Perpetuities provides: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."¹¹¹ North Carolina applied the common law Rule Against Perpetuities until 1995,¹¹² when the General Assembly adopted the Uniform Statutory Rule Against Perpetuities (USRAP),¹¹³ providing that an interest is good if it must vest either within the period of the common law Rule Against Perpetuities or if it actually vests within ninety years of its creation.¹¹⁴ USRAP expressly excludes "nondonative transfers,"¹¹⁵ apparently leaving the common law Rule Against Perpetuities in effect as to interests created by such transfers. The Court of Appeals reasoned that the right of first refusal in *New Bar* was created in 1993¹¹⁶ and remained potentially exercisable until 2028, assuming all seven options to renew

108. *Id.* at 305–306, 729 S.E.2d at 679.

109. *Id.* at 304, 729 S.E.2d at 678. *New Bar* involved several other issues that contributed to the dismissal, *see id.*, but this Article is concerned only with the holding regarding the Rule Against Perpetuities.

110. *Id.* at 314, 729 S.E.2d at 685.

111. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201, at 191 (Roland Gray ed., 4th ed. 1942).

112. For information on how the common law Rule Against Perpetuities was applied before the Uniform Statutory Rule Against Perpetuities was adopted, *see generally* Ronald K. Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C. L. REV. 727 (1979) (collecting and analyzing North Carolina cases regarding the Rule Against Perpetuities).

113. Act of June 7, 1995, ch. 190, 1995 N.C. Sess. Laws 346 (codified as amended at N.C. GEN. STAT. §§ 41-15 to -22 (2016)). For a discussion of the statute, *see generally* Ronald K. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C. L. REV. 1783, 1789–1800 (1996).

114. N.C. GEN. STAT. § 41-15 (2015). The second prong of USRAP allows what is commonly called a ninety year wait-and-see period for the validity of remote unvested interests. *Id.*

115. § 41-18.

116. *New Bar P'ship v. Martin*, 221 N.C. App. 302, 314, 729 S.E.2d at 675, 685 (2012) ("[T]he right of first refusal was created on 15 December 1993 when the lease was renewed . . ."). Actually, the right of first refusal was created in the 1988 lease, but did not become exercisable until 1993, when the first option to renew was exercised. *Id.* at 304, 729 S.E.2d at 679. The perpetuities period begins to run when an option becomes exercisable.

the lease were exercised.¹¹⁷ Because no life in being in 1993 was implicated in the lease, the right of first refusal could only be valid under the common law Rule Against Perpetuities if it had to vest, if at all, not later than twenty-one years after its creation.¹¹⁸ Although the action was filed in 2011—within twenty-one years of 1993—the interest was still held invalid because the common law Rule is “a rule of logical proof[;]” for an interest to be valid it must appear at its creation that it must necessarily vest, if at all, within the perpetuities period.¹¹⁹ Review by the Supreme Court was not sought, and the court did not take the case on its own motion.¹²⁰

In 2015, in the absence of an intervening contrary decision by a higher court, *New Bar* was followed in *Khwaja v. Khan*.¹²¹ The court in *Khwaja* acknowledged that

117. *Id.* at 314, 729 S.E.2d at 685. At the time the complaint in *New Bar* was filed in 2011, four options to renew had been exercised: in 1993, 1998, 2003, and 2008. *Id.* at 304, 729 S.E.2d at 679. Options to renew a lease are not subject to the common law Rule Against Perpetuities. GRAY, *supra* note 111, § 230, at 231 (“It is no objection to a lease that it contains [a covenant for renewal], if the entire control of the covenant is in the hands of those persons who have vested interests under the lease.”). By contrast, rights of first refusal in a lease are subject to the common law Rule Against Perpetuities because, while “the present interest is a tenancy for years . . . [,] the interest to be purchased is a fee.” *Id.* § 230.3, at 234 (“An option to a tenant for years to purchase the fee, exercisable at a remote time, is bad as violating the Rule [A]gainst Perpetuities.”).

118. Options and rights of first refusal that are exercisable only by optionees living at their creation are valid under the common law Rule Against Perpetuities. *See, e.g.*, *Gore v. Beren*, 867 P.2d 330, 341 (Kan. 1994) (finding no violation of the Rule Against Perpetuities because the right of first refusal was personal to the parties and did not run to successors in interest, even though agreements creating an option or preemptive right to purchase real estate are subject to the Rule Against Perpetuities). Where a right of first refusal could be exercised by the optionee’s “heirs and assigns” beyond twenty-one years after the optionee’s death, the common law Rule is clearly violated. *See, e.g.*, *Low v. Spellman*, 629 A.2d 57, 58–59 (Me. 1993) (reaffirmed by *Pew v. Sayler*, 2015 ME 120 at ¶ 22, 123 A.3d 522, 529 (Me. 2015)); *see also Khwaja v. Khan*, 239 N.C. App. 87, 92–93, 767 S.E.2d 901, 904–05 (2015), *disc. rev. denied*, 772 S.E.2d 724 (N.C. 2015) (holding a right of first refusal “binding upon and insures [sic] to the benefit of the heirs [and] successors in interest to the parties” invalid under the common law Rule Against Perpetuities (alterations in original)).

119. JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 882 (9th ed. 2013) (describing the common law Rule Against Perpetuities as “a rule of logical proof”).

120. *See generally* N.C. GEN. STAT. § 7A-31(a) (2015) (“[T]he Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals.”).

121. 239 N.C. App. 87, 767 S.E.2d 901 (2015).

[t]he parties' arguments in their briefs raise a number of interesting issues However, we do not reach any of these issues. Rather based on our holding in *New Bar* . . . , we are compelled to conclude that the Lease provision granting the Tenant a preemptive right violates the common law rule against perpetuities and is, therefore, void and unenforceable.¹²²

One judge concurred reluctantly in the result, “writ[ing] separately to express [her] concern that [the court] should proceed with caution in applying the common law [Rule Against Perpetuities] to non-donative transfers”¹²³ But the panel of the Court of Appeals that heard *Khwaja* had no opportunity to proceed in any other way than to follow the precedent set by *New Bar*.¹²⁴ Because *Khwaja* was decided unanimously, there was no automatic right of appeal, and a petition for discretionary review was denied.¹²⁵

The common law Rule Against Perpetuities can raise famously complicated questions. Even the leading authority on the Rule admitted that its study was “a constant school of modesty.”¹²⁶ Although significant aspects of perpetuities law have been altered in the last two decades, the Rule remains a residual source of problems, as shown by *New Bar*. It is noteworthy that at the time the General Assembly adopted USRAP in 1995, it also adopted several companion statutes, including one limiting a right of first refusal in gross to 30 years.¹²⁷ A right of first refusal in gross is one in which the holder of the right does not own any other interest in the land that is subject to the right.¹²⁸ While this still would not have saved a right of

122. *Id.* at 90, 767 S.E.2d at 903.

123. *Id.* at 93, 767 S.E.2d at 905 (Bryant, J., concurring).

124. *Id.* at 90, 767 S.E.2d at 903 (majority opinion) (deciding that the court was “compelled to conclude” that the lease in question violated the Rule Against Perpetuities).

125. *Khwaja v. Khan*, 772 S.E.2d 724, 724 (N.C. 2015).

126. GRAY, *supra* note 111, at xi.

127. Act of July 29, 1995, ch. 525, § 41-29, 1995 N.C. Sess. Laws 1911, 1912 (codified at N.C. GEN. STAT. §§ 41-28 to -33 (2015)) (“An option in gross with respect to an interest in land or a preemptive right in the nature of a right of first refusal in gross with respect to an interest in land becomes invalid if it is not actually exercised within 30 years after its creation.”). Other sections adopted in 1995 allow a thirty year wait-and-see period for leases to commence in the future, § 41-30, and for unvested easements, § 41-31. For a discussion of these statutes, see Link & Licata, *supra* note 113, at 1800–05.

128. N.C. GEN. STAT. § 41-28(3) (2015) (“‘Preemptive right in the nature of a right of first refusal in gross with respect to an interest in land’ means a preemptive right in which

first refusal in a lease that had a theoretical life of thirty-five years, it indicates a legislative willingness to abandon the common law Rule Against Perpetuities in nondonative transfers. Rights of first refusal in leases are arguably less objectionable than such rights unrelated to other interests in the land—that is, rights in gross. “[T]he option in gross tends to discourage the development of land by the holder of the possessory interest, whereas the option held by one who is also lessee tends to encourage the development of the land by the lessee-optionee.”¹²⁹ Given those incentives, it is ironic that an option in gross is valid for thirty years, but an option in a lease exercisable for the same period is void *ab initio*.¹³⁰

If the Supreme Court had exercised its discretion *sua sponte* to grant review of the Court of Appeals decision in *New Bar*, it could have considered whether the lower court had misapplied the common law Rule Against Perpetuities. Rather than find that the right of first refusal continued beyond the perpetuities period, the Supreme Court could have recognized that the right was tied to the option to renew the lease. The right would never have been exercisable at all if the assignee had not exercised the option to renew the lease at the end of the first five-year term in 1993. In this view, the right of first refusal in *New Bar* was not one continuous right, but a series of successive rights that arose each time the lease was renewed. Therefore, the right that arose in 1993 expired unexercised in 1998. Repeated renewals of the lease made successive rights of first refusal exercisable. Each one would fail within five years if unexercised. On this view, the assignee in *New Bar* was attempting to enforce the right of first refusal that became exercisable in 2008 and that would expire in 2013.

Rather than—or in addition to—reviewing whether the Rule had been properly applied by the Court of Appeals in *New Bar*, the Supreme Court could have considered whether the common law Rule Against Perpetuities should continue to apply to a right of first refusal in a lease if it could not be exercised beyond the lease term. Other

the holder of the preemptive right does not own any leasehold or other interest in the land which is the subject of the preemptive right.”).

129. THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES AND FUTURE INTERESTS 207 (2d ed. 1984).

130. A right of first refusal in gross with a stated duration of more than thirty years is not void *ab initio*, but void only “if it is not actually exercised within thirty years after its creation.” § 41-29. The right of first refusal in the lease in *New Bar* would have expired in 2023, thirty years after 1993, if the final option to renew the lease were not exercised in that year. *See id.*

states permit such rights even under the common law Rule Against Perpetuities.¹³¹ The Supreme Court could also have considered whether the common law Rule should continue to apply to commercial transactions in general. Prominent commentators have advocated the abandonment of the Rule in nondonative transfers: “the rule against perpetuities is obviously not suited to the commercial transaction. The rule against perpetuities was formulated in the context of donative transfers of family wealth. Lives in being plus twenty-one years has no purpose in the commercial field.”¹³² “The concept of remote vesting designed for future interests does not easily or predictably apply to contract rights created by business organizations.”¹³³ Courts in other jurisdictions have declined to apply the Rule “where its purposes will not be served,”¹³⁴ and some have found the adoption of USRAP a significant indicator of a change in public policy concerning perpetuities.¹³⁵ Of course, these issues of general jurisprudential significance could not have been considered by the Court of Appeals because they would involve overruling earlier cases,¹³⁶ something only the Supreme Court can do.

IV. THE RULE AGAINST PERPETUITIES—PERPETUAL PRIVATE NONCHARITABLE TRUSTS

In 2010, in Brown Brothers Harriman Trust Co. v. Benson,¹³⁷ a panel of the Court of Appeals held that legislation allowing perpetual private noncharitable trusts was constitutional.

131. See, e.g., W. VA. CODE ANN. § 36-1-24 (West 2016, Westlaw through 2017 Reg. Sess. (excluding HB 2459)); *Wing, Inc. v. Arnold*, 107 So.2d 765, 769 (Fla. Dist. Ct. App. 1958); *Keogh v. Peck*, 147 N.E. 266, 271–72 (Ill. 1925); *Quarto Mining Co. v. Litman*, 326 N.E.2d 676, 681 (Ohio 1975).

132. BERGIN & HASKELL, *supra* note 129, at 207–08.

133. *Link & Licata*, *supra* note 113, at 1800.

134. *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, 345 P.3d 1040, 1043 (Nev. 2015) (concerning an area-of-interest mineral royalty); see also *Rich, Rich, & Nance v. Carolina Constr. Corp.*, 35 N.C. 190, 194, 558 S.E.2d 77, 80 (2002) (“Commercial transactions that do not violate the underlying policies behind the rule against perpetuities . . . do not fit under the umbrella of the common law rule.”) (dictum).

135. *Juliano & Sons Enter.’s., Inc. v. Chevron USA, Inc.*, 593 A.2d 814, 815 (N.J. Super. Ct. App. Div. 1991) (refusing to apply the common law Rule Against Perpetuities to nondonative commercial transfers because the USRAP “abolishes the common law and embodies the State’s entire law on the rule”).

136. See, e.g., *Vill. of Pinehurst v. Reg’l Inv. of Moore, Inc.*, 330 N.C. 725, 729, 412 S.E.2d 645, 646–47 (1995); *Smith v. Mitchell*, 301 N.C. 58, 66–67, 269 S.E.2d 608, 613 (1980).

137. 202 N.C. App. 283, 688 S.E.2d 752 (2010), *disc. rev. denied*, 364 N.C. 239, 698 S.E.2d 391 (2010). In an article written before the *Benson* litigation, I questioned the

On November 27, 2007, Settlor transferred property to Trustee in trust¹³⁸ for the benefit of Settlor's three then-living children for their lives, then to Settlor's unborn and unascertained heirs for their lives, generation after generation forever.¹³⁹ Trustee was given a present power of sale with respect to the trust property.¹⁴⁰ Perpetual private noncharitable trusts first became possible in North Carolina in August 2007 when the General Assembly amended USRAP to allow future interests in trusts to remain unvested in perpetuity, if the trustee has a power of sale over trust assets exercisable within twenty-one years of some life in being at the creation of the interest.¹⁴¹ The living beneficiaries claimed that by allowing perpetual private noncharitable trusts, the statute violated the North Carolina Constitution's prohibition of perpetuities.¹⁴² "[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."¹⁴³ This, they argued, prohibited the state from abandoning or modifying the common law Rule Against Perpetuities.¹⁴⁴ The living beneficiaries demanded that Trustee immediately terminate the trust and distribute the assets to them.¹⁴⁵ In response, Trustee brought action against Settlor and the beneficiaries and moved for summary judgment, seeking a declaration concerning the constitutionality of

constitutionality of the 2007 amendments to USRAP. John V. Orth, *Allowing Perpetuities in North Carolina*, 31 CAMPBELL L. REV. 399, 409–10 (2009). I do not intend to re-argue the point here; rather I include *Benson* in this Article as an example of a significant property issue resolved by a three-judge panel of the Court of Appeals and unreviewed by the Supreme Court.

138. It does not appear in the facts whether the Benson Trust is a revocable or an irrevocable trust. Trusts created in North Carolina after January 1, 2006 are revocable unless expressly made irrevocable. N.C. GEN. STAT. § 36C-6-602 (2015).

139. *Benson*, 202 N.C. App. at 284, 688 S.E.2d at 753. In addition to Settlor's heirs, Settlor's sister was also named a contingent beneficiary. *Id.* The quality of her interest and the condition precedent to its vesting is not described. *Id.*

140. *Id.* at 284, 688 S.E.2d at 753–54. It is not stated whether the beneficiaries' interests are subject to a restraint on alienation (a spendthrift provision). *See id.*

141. Act of August 19, 2007, ch. 41, § 1, 2007 N.C. Sess. Laws 390 (codified as amended at N.C. GEN. STAT. § 41-23(e) (2015)). Alternatively, unvested remote remainder interests in trusts are allowable "if there exists an unlimited power to terminate the trust in one or more persons in being." *Id.*

142. *Benson*, 202 N.C. App. at 284, 688 S.E.2d at 754.

143. N.C. CONST. art. I, § 34. This provision has been part of the North Carolina Constitution since 1776. *See* ORTH & NEWBY, *supra* note 5, at 11, 90–91.

144. *Benson*, 202 N.C. App. at 288, 688 S.E.2d at 756. According to the living beneficiaries, "North Carolina courts have recognized the common law rule against perpetuities, and specifically, its restriction of the remote vesting of future interests, as constitutionally required to preserve the alienability of property." *Id.*

145. *Id.* at 284, 688 S.E.2d at 754. One of the living beneficiaries represented the two other living beneficiaries who were minors. *See id.* at 285 n.3, 688 S.E.2d at 754 n.3.

the 2007 statute.¹⁴⁶ The superior court upheld the constitutionality of the statute and granted Trustee's motion for summary judgment, allowing Trustee to administer the trust according to its terms.¹⁴⁷ All parties other than Settlor joined in a petition for discretionary review by the Supreme Court prior to determination by the Court of Appeals, but the petition was denied.¹⁴⁸

The Court of Appeals affirmed the judgment of the superior court.¹⁴⁹ Recognizing that the Benson Trust was "intended to be perpetual,"¹⁵⁰ the court framed the "sole issue" on appeal to be "whether the North Carolina Constitution requires application of the common law rule against perpetuities' restriction of the remote vesting of future interests in property."¹⁵¹ The court concluded "it did not."¹⁵² In support, the court traced the history of the constitutional provision that prohibits perpetuities to the state's first Declaration of Rights in 1776¹⁵³ and concluded that the provision was linked to another provision in the 1776 Constitution requiring "[t]hat the future Legislature of this State shall regulate entails, in such manner as to prevent perpetuities."¹⁵⁴ Obeying the constitutional command, in 1784, the General Assembly converted present estates in tail into

146. *Id.* at 284–85, 688 S.E.2d at 754. Settlor joined in Trustee's motion, as did her sister, a contingent beneficiary, and Settlor's unborn heirs. *Id.* at 283, 688 S.E.2d at 752.

147. *Id.* at 285, 688 S.E.2d at 754. The case was heard by Albert Diaz, Special Superior Court Judge for Complex Business Cases. *Id.*

148. *Brown Bros. Harriman Trust Co. v. Benson*, 684 S.E.2d 692 (N.C. 2009) (denying discretionary review); see N.C. GEN. STAT. § 7A-31(a) (2015) ("[T]he Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals.").

149. *Benson*, 202 N.C. App. at 291, 688 S.E.2d at 752.

150. *Id.* at 284, 688 S.E.2d at 753.

151. *Id.*

152. *Id.*

153. *Id.* at 287, 688 S.E.2d at 755; see N.C. CONST. of 1776, Declaration of Rights, § 23. For a discussion of this section of the 1776 Declaration of Rights, see John V. Orth, *Does the Fee Tail Exist in North Carolina?* 23 WAKE FOREST L. REV. 767, 778–86 (1988); see also Joshua C. Tate, *Perpetuities and the Genius of a Free State*, 67 VAND. L. REV. 1823, 1830–33 (2014).

154. N.C. CONST. of 1776, § 43. The Constitution of 1776 comprises two separate documents with their own section numbers: the "Declaration of Rights" and the "Constitution." *Id.* This provision was not carried forward in the North Carolina Constitution of 1868 or in the current Constitution adopted in 1970 effective January 1, 1971. See generally N.C. CONST.; N.C. CONST. of 1868. Entails, or estates in fee tail, are estates of indefinite duration, limited to pass only to descendants of the first taker. For a discussion of the history of the fee tail, see Orth, *supra* note 153, at 767–78.

estates in fee simple.¹⁵⁵ The Court of Appeals concluded that “the North Carolina Constitution’s prohibition of perpetuities prohibits unreasonable restraints on alienation without requiring a rule specifying a time period within which a future interest must vest.”¹⁵⁶ The 2007 statute, therefore, did not violate the North Carolina Constitution because the prohibition applies only to restraints on alienation of trust property. Since Trustee in *Benson* had a present power of sale with respect to the trust property, the court held that the beneficiaries’ future interests that remained unvested for an indefinite period of time were not unconstitutional perpetuities.¹⁵⁷

The living beneficiaries filed notice of appeal and petitioned for discretionary review, but the Supreme Court dismissed the appeal,¹⁵⁸ presumably finding that the constitutional question was not substantial,¹⁵⁹ and denied discretionary review, presumably finding that the case was not significant or did not involve an important legal principle.¹⁶⁰ Perhaps surprised by this result, Trustee filed an extraordinary motion asking the court to issue a per curiam order affirming the holding of the Court of Appeals, and the living beneficiaries filed extraordinary motions asking the court to vacate the order dismissing their appeal and to treat their appeal as raising a

155. N.C. GEN. STAT. § 41-1 (2015) (“Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple.”). For a discussion of the subsequent history of the fee tail in North Carolina, see Orth, *supra* note 153 at 786–93; see generally John V. Orth, *After the Revolution: “Reform” of the Law of Inheritance*, 10 LAW & HIST. REV. 33 (1992) (discussing of the abolition of the fee tail in the context of colonial and post-Revolutionary America).

156. *Benson*, 202 N.C. App at 290, 688 S.E.2d at 757.

157. *See id.* at 291, 688 S.E.2d at 758.

158. *Brown Bros. Harriman Trust Co. v. Benson*, 364 N.C. 239, 698 S.E.2d 391, 391–92 (2010) (dismissing appeal *ex mero motu*).

159. *See generally* N.C. GEN. STAT. § 7A-30 (2015) (“[A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case: (1) Which directly involves a substantial question arising under the Constitution of the United States or of this State . . .”). Section 7A-30 was amended in December 2016 to render unavailable the appeal of right in a case decided by a panel in which there was a dissent “until after the Court of Appeals sitting en banc has rendered a decision in the case . . . or until after the time for filing a motion for rehearing of the cause by the Court of Appeals has expired or the Court of Appeals has denied the motion for rehearing.” Act of Dec. 16, 2016, ch. 125 sec. 22.(c), § 7A-30(2), 2016 N.C. Sess. Laws 10, 32.

160. *See generally* § 7A-31 (providing that certification after determination by the Court of Appeals may be allowed “when in the opinion of the Supreme Court: (1) The subject matter of the appeal has significant public interest, or (2) The cause involves legal principles of major significance to the jurisprudence of the State . . .”).

substantial constitutional question.¹⁶¹ The Supreme Court denied all three motions.¹⁶²

This case would have benefitted from further review. The Supreme Court could have considered whether the lower court had properly understood perpetuities law.¹⁶³ If the North Carolina Constitution did require application of the common law Rule Against Perpetuities, as claimed by the living beneficiaries, they would not have been entitled to immediate distribution. When unvested future interests are invalidated by the Rule, vested present interests are unaffected.¹⁶⁴ As applied to the Benson Trust, that would have meant preserving the life interests of the living beneficiaries¹⁶⁵ and passing the invalid remainder interests to Settlor by resulting trust.¹⁶⁶

Greater attention should have also been paid to the interests of Settlor's unborn heirs. If the 2007 statute that amended USRAP was held unconstitutional and the unamended USRAP was thereby restored,¹⁶⁷ then the interests of Settlor's unborn heirs that would vest within ninety years would be valid. The only beneficiaries who were certain to be disadvantaged by a declaration of the unconstitutionality of the 2007 statute were Settlor's unborn heirs whose identities were not ascertained within ninety years. But even at the end of ninety

161. See *Brown Bros. Harriman Trust Co. v. Benson*, 364 N.C. 600, 600, 703 S.E.2d 157, 157–58 (2010). All three motions were filed under Rule 2 of the Rules of Appellate Procedure, which permits a court of the appellate division to suspend or vary the Rules when necessary “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.” N.C. R. APP. P. 2; see also *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (discussing Rule 2).

162. *Benson*, 364 N.C. at 600, 703 S.E.2d at 157–58 (denying all three motions in three separate orders).

163. In addition, the court could have considered various “procedural anomalies” identified in Russell A. Willis III, *Landmark or Mirage*, N.C. LAW.’S WKLY, May 23, 2016, at 4, 10.

164. See *DUKEMINIER & SITKOFF*, *supra* note 119, at 877–81 (introducing the basics of the Rule Against Perpetuities). If the Benson Trust is a revocable inter vivos trust, the common law perpetuities period would not even have begun to run until the power to revoke terminates.

165. Depending on the condition precedent, Settlor's sister's contingent interest might have been valid.

166. “A resulting trust is an *equitable reversionary interest* that arises by operation of law . . . if an express trust fails or makes an incomplete distribution . . .” *DUKEMINIER & SITKOFF*, *supra* note 119, at 416.

167. Although it was once the rule that repeal of a statute that repeals a prior statute revives the repealed statute, this is no longer true. For a discussion of this canon of statutory construction, see John V. Orth, *Blackstone's Rules for the Construction of Statutes*, in *BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY* 79, 80–82 (Wilfrid Prest ed., 2009). However, the unconstitutionality of a repealing statute may have that effect in light of the legislature's likely intention.

years, interests that remain unvested are subject to reformation under USRAP “in the manner that most closely approximates the transferor’s manifested plan of distribution”¹⁶⁸—perhaps resulting in the immediate distribution to them of the remaining principal.¹⁶⁹

The constitutional question in *Benson* particularly deserved further examination. The claim by the living beneficiaries that the North Carolina Constitution incorporates the common law Rule Against Perpetuities was thinly supported. Only two North Carolina cases were cited: a Supreme Court decision repeating the unremarkable proposition that the common law Rule is a rule of law, to be applied “irrespective of the question of intention,”¹⁷⁰ and a Court of Appeals decision that the Rule “has the continuing sanction of Article I, Section 34 of our State Constitution.”¹⁷¹ It was generally accepted at the time that the Court of Appeals did not mean that the common law Rule Against Perpetuities was constitutionally required,¹⁷² and in 1995 the General Assembly acted on that assumption when it adopted USRAP and the companion statutes,¹⁷³

168. N.C. GEN. STAT. § 41-17 (2015).

169. According to one commentator, under the terms of the Benson Trust distributions are discretionary and income may be accumulated indefinitely. Willis, *supra* note 163, at 4. If so, the principal at termination could be substantial. But indefinite accumulation of income would raise a question under the common law rule against accumulations, which prohibits accumulations beyond the perpetuities period. An amendment to North Carolina perpetuities law adopted in 2014, seven years after the execution of the Benson Trust, exempts trusts from the common law rule against accumulations. § 41-23(h).

170. Mercer v. Mercer, 230 N.C. 101, 103 52 S.E.2d 229, 230 (1949) (citing N.C. CONST. of 1868 art. I, § 31). The Court of Appeals in *Benson* failed to recognize that the sections of the Declaration of Rights had been renumbered in 1971, and thought that “[t]he Supreme Court erroneously cited section 31 of the Declaration of Rights, which addresses the quartering of soldiers. The relevant constitutional provision addressing perpetuities is section 34.” Brown Bros. Harriman Trust Co. v. Benson, 202 N.C. App. 283, 288 n.7, 688 S.E.2d 752, 757 n.7 (2010). On the nature of the Rule Against Perpetuities, see GRAY, *supra* note 111, § 629 (“The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention.”).

171. N.C. Nat’l Bank v. Norris, 21 N.C. App. 178, 180, 203 S.E.2d 657, 658 (1974).

172. JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 76 (1993) (“Although the North Carolina Court of Appeals has mentioned in passing that the application of [the common law Rule Against Perpetuities] has the ‘continuing sanction’ of [section 34] . . . [this] should not be taken to mean that the Rule Against Perpetuities in its present formulation is beyond the reach of the legislature.”).

173. See Act of July 29, 1995, ch. 525, art. 3 § 41-29, 1995 N.C. Sess. Laws 1911, 1912 (codified at N.C. GEN. STAT. §§ 41-28 to -33 (2015)); Rich, Rich, & Nance v. Carolina Constr. Corp., 355 N.C. 190, 194, 558 S.E.2d, 77, 79 (2002) (assuming validity of USRAP); see also *Benson*, 202 N.C. App. at 288–89, 688 S.E.2d at 756 (“The General Assembly’s modification of the common law rule against perpetuities through passage of the Uniform Statutory Rule Against Perpetuities (‘USRAP’) in 1995 supports our interpretation of the

all of which permitted departures from the Rule.¹⁷⁴ The question of whether the Constitution incorporates the common law Rule Against Perpetuities was easily answered in the negative.

Further review of *Benson* would have allowed the Supreme Court to decide what the constitutional ban on perpetuities forbids—or, alternatively, what it allows. Analysis would have been materially aided by recognition of the distinction between legal and equitable interests in trusts. “The hallmark characteristic of a common law trust is *bifurcation*: The trustee holds *legal title* to the trust property, but the beneficiaries have *equitable* or *beneficial* ownership.”¹⁷⁵ Stated in these terms, the issue in *Benson* is whether the North Carolina Constitution permits the remote vesting of future equitable interests in property.

As recognized by the Court of Appeals, the state’s first constitution associated perpetuities with entails and directed the legislature to “regulate entails, in such manner as to prevent perpetuities.”¹⁷⁶ When complying with that direction in 1784, the General Assembly explained that the North Carolina Constitution declared perpetuities to be “contrary to the genius of a free state”¹⁷⁷ because “entails of estates tend only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances the source of great contention and injustice.”¹⁷⁸ The living beneficiaries in *Benson* candidly acknowledged that the constitutional ban on perpetuities had been adopted “in the context of estate entails

rule as one acceptable method for regulating unreasonable restraints on alienability rather than as a constitutionally required rule.”).

174. If the Constitution required the application of the common law Rule Against Perpetuities, the statutes allowing a thirty year wait-and-see period, North Carolina General Statutes §§ 41-29 (options in gross), 41-30 (leases to commence in the future), and 41-31 (unvested easements), would have been unconstitutional. In addition, three other statutes adopted at the same time, § 36A-145 (honorary trusts), § 36A-146 (trusts for pets), and § 36A-147 (trusts for cemetery lots), which permitted trusts without ascertainable beneficiaries, would also have been unconstitutional. Act of June 13, 1995, ch. 225, art. 14, 1995 N.C. Sess. Laws 1, 1–2 (*repealed by* Act of July 15, 2005, ch. 192 art. 9, 2005 N.C. Sess. Laws 1, 53 (codified at N.C. GEN. STAT. § 36C9-901 (d)(1)(f) (2005))). For a discussion of the latter statutes, see Link & Licata, *supra* note 113, at 1805–07. These statutes have since been repealed and replaced by the North Carolina Uniform Trust Code. See N.C. GEN. STAT. §§ 36c-1-101 to -11-1106.

175. DUKEMINIER & SITKOFF, *supra* note 119, at 393.

176. N.C. CONST. of 1776, § 43.

177. *Id.* Declaration of Rights, § 23.

178. Act of 1784, ch. 22, § V, *reprinted in* 24 STATE RECORDS OF NORTH CAROLINA 574 (Walter Clark ed. 1904).

that kept property within one family for generations.”¹⁷⁹ Although the 1784 legislation ended entails, successive North Carolina Constitutions in 1868 and 1971 continued to forbid “perpetuities,” suggesting that something other than legal estates such as fees tail were prohibited.¹⁸⁰ The 2007 statute that amended USRAP eliminated restrictions on the duration of unvested equitable interests in trusts, allowing the creation of perpetual trusts tying up property in one family for generations, commonly known as “dynasty trusts”—recognized to be “a sort of throwback to entail[s].”¹⁸¹ The ultimate issue in *Benson*, unreviewed by the Supreme Court, is whether the constitutional ban on perpetuities prohibits entails in function, as well as in form.¹⁸²

V. EASEMENTS—CONTINUING ENCROACHMENT

In 2007, in Pottle v. Link,¹⁸³ a panel of the Court of Appeals held that an action to enjoin a continuing encroachment is subject to the running of the six-year statute of limitations for injury to an easement.

Defendant, who owned land burdened by a thirty-foot-wide right-of-way easement, planted and maintained trees that encroached on the easement.¹⁸⁴ Over the following nine to eleven years,¹⁸⁵ the trees grew and narrowed the right of way and created an overhanging obstruction that prevented access by large vehicles.¹⁸⁶ Plaintiffs, who

179. *Brown Bros. Harriman Trust Co. v. Benson*, 202 N.C. App. 283, 287, 688 S.E.2d 752, 755 (2010).

180. See N.C. CONST. of 1868, art. I, § 31; N.C. CONST. of 1971, art. I, § 34.

181. Adam Hirsch, *Inheritance: United States Law*, in 3 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 235, 239 (Stanley Katz ed., 2009); see also John V. Orth, *Escaping the Malthusian Trap: Dynasty Trusts for Serious Dynasts*, 17 GREEN BAG 2D 29, 30–31 (2013).

182. See Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1811–12 (2014) (describing *Benson*'s analysis as “deeply flawed [T]he term ‘perpetuity’ as used in the state constitution[] means an entail, in function or in form, with reference to alienability of beneficial ownership, not merely alienability of underlying property.”).

183. 187 N.C. App. 746, 654 S.E.2d 64 (2007), *disc. rev. allowed*, 663 S.E.2d 316 (N.C. 2008), *appeal dismissed*, 668 S.E.2d 31 (N.C. 2008), *overruled in part*, *Duke Energy Carolinas, LLC v. Gray*, 369 N.C. 1, 7, 789 S.E.2d 445, 449 (2016).

184. *Id.* at 746–47, 654 S.E.2d at 65. Defendant and a co-defendant also erected fences that were alleged to encroach on the right of way. *Id.*

185. *Id.* There was evidence that during that time another individual who was also benefited by the easement had made attempts to have the encroaching vegetation removed, but had been prevented by Defendant. *Id.* at 748, 654 S.E.2d at 66.

186. *Id.* at 747, 654 S.E.2d at 65.

were owners of adjacent land that was benefitted by the easement, sued for an injunction prohibiting the burdened landowner from continuing to obstruct their right of way.¹⁸⁷ Defendant asserted that the action was barred by the running of a six-year statute of limitations.¹⁸⁸ Rejecting that defense, the superior court granted Plaintiffs' motion for summary judgment.¹⁸⁹

The Court of Appeals unanimously reversed the judgment of the superior court.¹⁹⁰ The issue as presented on appeal was which of two statutes of limitations applied to the action: the six-year statute of limitations for "injury to any incorporeal hereditament,"¹⁹¹ or the twenty-year statute of limitations for adverse possession.¹⁹² A unanimous panel of the Court of Appeals rejected Plaintiffs' argument that the twenty-year adverse possession statute applied since Plaintiffs were not claiming an interest in fee but rather were seeking to enjoin an injury to their easement.¹⁹³ In consequence, it ruled that the proper limitations period was six years and that the Plaintiffs' action was therefore barred.¹⁹⁴ Plaintiffs petitioned for discretionary review, and two utility companies, presumably concerned about the implications for their extensive network of utility easements, sought and received leave to file amicus briefs in

187. *Id.*, 654 S.E.2d at 66. An easement owner has a right to maintain the easement. *Green v. Duke Power Co.*, 305 N.C. 603, 610, 290 S.E.2d 593, 598 (1982); JON W. BRUCE & JAMES W. ELY, JR., *LAW OF EASEMENTS AND LICENSES IN LAND* § 8:37 (1988). In consequence, Plaintiffs might have been better advised to remove the obstructions themselves. If Defendant had prevented them, they could then have sought an injunction to prevent interference.

188. *Pottle*, 187 N.C. App. at 748, 654 S.E.2d at 66.

189. *Id.*

190. *Id.* at 752, 654 S.E.2d at 68. The court remanded the case for a determination of the location of the fences. *Id.*

191. N.C. GEN. STAT. § 1-46 (2015) ("The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article."); § 1-50(a)(3) ("Within six years an action . . . [f]or injury to any incorporeal hereditament."). An incorporeal hereditament is a non-possessory, inheritable property interest such as an easement.

192. § 1-40 ("No action for the recovery of possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for 20 years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability."); *see also Pottle*, 187 N.C. App. at 749, 654 S.E.2d at 67.

193. *Pottle*, 187 N.C. App. at 751, 654 S.E.2d at 68.

194. *Id.*

support.¹⁹⁵ The Supreme Court initially granted Plaintiffs' petition¹⁹⁶ but subsequently, on the motion of both parties, dismissed their appeal.¹⁹⁷

If the Supreme Court had reviewed the *Pottle* decision, it could have considered the merits and clarified the law concerning continuing injuries to an easement without the need for further litigation. It is seemingly well settled that an easement by prescription can be created by adverse use by a benefitted party and that the prescriptive period is twenty years.¹⁹⁸ Correspondingly, it seems that an easement can be terminated by the reverse process: adverse use by the burdened landowner for the prescriptive period.¹⁹⁹ The root of the problem in *Pottle* is that the prescriptive period for the creation and termination of easements is not established by statute. The twenty-year statute of limitations for adverse possession is obviously inapplicable to an action to enjoin a continuing encroachment on an easement. The adverse possession statute limits, as its terms indicate, an "action for the recovery of possession," and gives a person who has proved the elements of adverse possession "a title in fee."²⁰⁰ But an

195. *Pottle v. Link*, 663 S.E.2d 317 (N.C. 2008) (petition of Carolina Power & Light); *id.* (petition of Duke Energy).

196. *Pottle v. Link*, 362 N.C. 361, 663 S.E.2d 316 (2008).

197. *Pottle v. Link*, 362 N.C. 509, 668 S.E.2d 31 (2008).

198. See WEBSTER, JR., *supra* note 79, § 15-18[1].

To establish an easement by prescription, the party seeking to do so must show the following by a preponderance of the evidence: (1) that the use is adverse, hostile, or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.

Id.

199. *Id.* § 15-32.

An easement may be extinguished through adverse user by the servient owner for the prescriptive period. Since easements may be created by prescription, by a reverse process they may also be lost if the servient owner refuses to recognize the rights of the easement holder and prevents the use of the easement for the statutory period. In order to extinguish an easement, the interference or user by the servient owner must be adverse to the easement holder, continuous, uninterrupted, and for the prescriptive period.

Id. "User" in this section means simply use, "the exercise or employment of a right or property." See *User*, BLACK'S LAW DICTIONARY (8th ed. 2004). Adverse use by the burdened landowner for the prescriptive period technically results in the landowner's acquisition of the easement, which merges with the landowner's fee simple and thereby terminates.

200. N.C. GEN. STAT. § 1-40 (2015).

easement is a nonpossessory (incorporeal) interest. An easement owner has the right to use the land of another, not the right to possess it.²⁰¹ The prescriptive period for the creation and termination of easements was adopted by analogy to the period for acquiring a title by adverse possession.²⁰² Therefore, if twenty years of adverse possession is sufficient to acquire a fee, twenty years of adverse use should be enough to secure an easement.

Plaintiffs in *Pottle* were not seeking title to the land subject to the encroachment but only an injunction to preserve their right of use. Once it is realized that the prescriptive period is not a statutory period but a common law limitation, the focus shifts to whether the statute of limitations for actions for “injury to any incorporeal hereditament”²⁰³ is appropriate for a continuing injury, such as in *Pottle*, or only for a transient injury.²⁰⁴ A continuing encroachment on an easement that cannot be enjoined reduces the dimensions of the easement pro tanto. While the record title to the burdened land in *Pottle* will continue to show a thirty-foot easement for the benefit of the adjacent landowners, the easement is narrowed to the extent of the encroachment.²⁰⁵ Unless an easement owner has a cause of action

201. See *Pottle v. Link*, 187 N.C. App. 746, 749, 654 S.E.2d 64, 67 (2007) (citing *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972)) (describing an affirmative easement as “a right to make some use of land owned by another without taking a part thereof”).

202. “In most jurisdictions, the period of prescription [for the creation of easements] is derived by analogy from the statute of limitations governing actions to recover possession of land.” Bruce & Ely, *supra* note 187, § 5:17, at 5-70.

In order for an easement to be extinguished by prescription, the servient owner’s use or possession must satisfy the same elements required for obtaining an easement by prescription. Thus, the use or possession must be adverse, open and notorious, and continuous and uninterrupted, and it must last for the prescriptive period, which is generally the same period required for creating an easement by prescription.

Id. § 10-25, at 10-66 to -67.

203. N.C. GEN. STAT. § 1-50(a)(3).

204. Plaintiffs should at least be entitled under the statute to an injunction to prevent the encroachment from growing further over the next six years.

205. This is presumably what is meant by the comment in an influential treatise on North Carolina property law: “The holding of *Pottle* is not necessarily inconsistent” with the law concerning the termination of an easement by twenty years’ adverse use. WEBSTER, JR., *supra* note 79, § 15-32 n.289. For a discussion of the ambiguity lurking in the words “burden of an easement,” see ORTH, *supra* note 57, at 57-62.

to remove such an encroachment, the easement owner does not own the easement to its full extent. Without a remedy, there is no right.²⁰⁶

In 2014, the precedent set in *Pottle* was followed by the Court of Appeals in *Duke Energy Carolinas v. Gray*.²⁰⁷ In that case, Defendant's house was constructed on a portion of the utility company's easement.²⁰⁸ Although Duke Energy discovered the encroachment and demanded its removal, the company waited more than six years to file suit seeking an injunction.²⁰⁹ The trial court granted Defendant's motion for summary judgment and a unanimous panel of the Court of Appeals affirmed the judgment.²¹⁰ The judges of the intermediate appellate court commented,

even if we agreed with plaintiff that *Pottle* was wrongly decided, we would nonetheless be bound by its holding. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel is bound by that precedent, unless it has been overturned by an intervening decision from a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, we do not address plaintiff's arguments regarding the substantive merits of the *Pottle* decision.²¹¹

Unlike *Pottle* and the other cases discussed in this Article, in which decisions of subsequent panels that applied a precedent set by a prior panel went unreviewed because the Supreme Court either failed

206. Although a legal maxim proclaims "*ubi jus ibi remedium*," HERBERT BROOM, LEGAL MAXIMS *191 (8th American ed. 1882), the converse is also true: where there is no remedy, there is no right. For examples of the latter, see JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 4-5, 52, 107 (1987).

207. 237 N.C. App. 420, 766 S.E.2d 354 (2014), *rev'd*, 369 N.C. 1, 3, 789 S.E.2d 445, 446 (2016). In 2015 a superior court, following the precedent set in *Pottle*, ruled that the six-year statute of limitations for injury to an incorporeal hereditament applied to an action seeking a declaratory judgment that an easement had been terminated by adverse use. *See Lewis v. Hedgepeth*, No. COA15-914, 2017 WL 1079620, at *1-2 (N.C. Ct. App. Mar. 21, 2017) (unpublished) (explaining the "long-running legal dispute" between the parties). On appeal, a three-judge panel of the Court of Appeals held the case in abeyance awaiting the Supreme Court's decision in *Duke Power*. *See Hedgepeth v. Parker's Landing Prop. Owners Ass'n Inc.*, ___ N.C. App. ___, ___ 781 S.E.2d 822, 823-25 (2016). After the Supreme Court overruled *Pottle*, the panel reversed and remanded the case. *Lewis v. Hedgepeth*, No. COA15-914, 2017 WL 1079620, at *6 (N.C. Ct. App. Mar. 21, 2017).

208. *Duke Energy*, 237 N.C. App. at 423, 766 S.E.2d at 356.

209. *See id.* at 425, 766 S.E.2d at 358.

210. *Id.* at 424, 430, 766 S.E.2d at 357, 361.

211. *Id.* at 429, 766 S.E.2d at 361 (quoting *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)).

to certify the case on its own motion (*Kotis*)²¹² or denied a petition for discretionary review (*Khwaja*),²¹³ Duke Energy's petition for discretionary review was allowed.²¹⁴ In 2016, the Supreme Court overturned the precedent set by the Court of Appeals in *Pottle* nine years earlier: “[W]e overrule the decision of the Court of Appeals in *Pottle v. Link*, insofar as that opinion deemed [North Carolina General Statutes] Section 1-40 inapplicable to actions involving encroachments on easements.”²¹⁵

Although the Supreme Court did not clarify which suits for “injury to [an] incorporeal hereditament” would be barred by the six-year statute of limitations, it did indicate that the twenty-year period for adverse possession was applicable to “actions involving encroachments on easements”—at least, to encroachments of a permanent character.²¹⁶ Presumably twenty years obstruction of an easement by the burdened landowner would be required to terminate an easement, just as twenty years of adverse use would give rise to an easement by prescription.

It took a determined and deep-pocketed plaintiff to undertake a challenge to a precedent set by a panel of the Court of Appeals in the certain knowledge that it would suffer defeat in the trial court and a unanimous adverse judgment in the Court of Appeals, in the hope that it would ultimately be able to convince the Supreme Court to overturn the precedent.

VI. LOOKING FORWARD—THE EN BANC PROCEDURE AND THE FUTURE ROLE OF THE COURT OF APPEALS

There is reason to hope that the new en banc procedure of the Court of Appeals will bring benefits to the Appellate Division of North Carolina's General Court of Justice.²¹⁷ It will give the Court of Appeals a corporate character for the first time, making it more than a mere collection of panels.²¹⁸ It will eliminate the risk that a randomly chosen group of three Court of Appeals judges will create a

212. See *supra* text accompanying note 78.

213. See *supra* text accompanying note 125.

214. *Duke Energy Carolinas, LLC v. Gray*, 773 S.E.2d 57, 57 (N.C. 2015).

215. *Duke Energy Carolinas, LLC v. Gray* 369 N.C. 1, 7, 789 S.E.2d 445, 449 (2016).

216. *Id.*

217. See generally Orth, *supra* note 21 (discussing the potential benefits an en banc procedure could bring to the North Carolina Court of Appeals).

218. *Id.* at 1982 (referring to the Court of Appeals without a procedure for sitting en banc as “not a single court at all, but only a collection of panels”).

precedent, binding all other panels of the court, with which a majority of the judges disagree.²¹⁹ This may reduce unnecessary appeals to the Supreme Court and will provide a more fully developed record for appeals that the Supreme Court does accept.²²⁰

On the other hand, the new en banc procedure will increase the workload of a court that is already very busy, and that will be coping with its increased workload with fewer judges as the size of the court is progressively reduced.²²¹ The judges will be expected to monitor filings and be prepared to call for an en banc hearing in cases they deem appropriate. They will be expected to review the decisions of all other panels and to decide whether to call for rehearing en banc. They will be required to decide motions for rehearing en banc—motions that may be filed frequently, as there is reason to fear that criminal defense lawyers will feel bound to move for rehearing in any case in which their client's appeal is rejected by a panel. And, of course, they will be required to decide cases accepted by a majority of the judges for hearing or rehearing en banc. Moreover, the new statute increases the Court of Appeals caseload by adding appeals from the special three-judge Superior Court, if that court holds a state statute "facially invalid" for violation of the North Carolina Constitution or federal law, or if the three-judge panel declares invalid an act redistricting congressional or legislative districts.²²²

Before weighing the advantages and disadvantages of the en banc procedure however, two serious questions concerning the new statute need to be addressed. A suggestion has been made that the North Carolina Constitution prohibits the Court of Appeals from sitting en banc.²²³ Referring to the Court of Appeals, the state constitution provides that it "may be authorized to sit in divisions, or other than en banc."²²⁴ Although the constitutional text can be read to

219. *Id.* (observing that "[a]lthough further thought or practical experience may convince a later panel of the unsoundness or impracticality of a rule," without a procedure for sitting en banc the rule "must continue to be applied until overruled by the supreme court").

220. *Id.* (observing that an en banc procedure may eliminate "needless appeals to a higher court" and will provide "a fully developed record" for those that do go forward).

221. *See supra* note 10. In the last two decades, the Court of Appeals has consistently heard more than a thousand cases a year. Orr, *supra* note 14, at 217.

222. Act of Dec. 16, 2016, ch. 125, sec. 22.(a), § 7A-16, 2016 N.C. Sess. Law 10, 30.

223. David Donovan, *Assembly Rushes Appellate Changes*, N.C. LAW.'S WKLY, Dec. 26, 2016, at 6. ("The courts will likely also have to decide whether en banc hearings are permitted under the state's constitution.").

224. N.C. CONST. art. IV, § 7. The Court of Appeals was never authorized to sit in divisions, either geographic divisions or subject matter divisions. N.C. GEN. STAT. § 7A-16

prohibit the General Assembly from authorizing the Court of Appeals to sit en banc, the text can also be read simply to allow the legislature to authorize sitting other than en banc.²²⁵ This question would seem to require resolution by the Supreme Court before the en banc procedure can be accepted.²²⁶

An additional question may arise concerning the holding of the Supreme Court that gave the decision of a panel of the Court of Appeals precedential value: “Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel is bound by that precedent, unless it has been overturned by an intervening decision from a higher court.”²²⁷ Is the Court of Appeals hearing a case en banc bound by a precedent set by a three-judge panel of that court in a prior case? The answer may simply be that the Court of Appeals sitting en banc is not “a subsequent panel.” Alternatively, it may be that the Court of Appeals sitting en banc is “a higher court,” enabled to overturn a precedent set by a three-judge panel.²²⁸ This question too would seem to require resolution by the Supreme Court in an appropriate case.

CONCLUSION

In significant instances in the last decade, important decisions concerning basic North Carolina property law have been made by three-judge panels of the Court of Appeals rather than by the seven-member Supreme Court. Constitutional questions concerning

(2015) (“The Court of Appeals shall sit in panels of three judges each . . .”). The North Carolina Courts Commission, established in 1963 to advise the General Assembly on the creation of the Court of Appeals, expressly recommended against “dividing the State into a number of geographic divisions.” N.C. COURTS COMM’N, *supra* note 12, at 8.

225. See Orth, *supra* note 21 at 1985 (“In context, the express constitutional permission to authorize sittings ‘other than en banc’ seems designed to rebut a possible inference that the judges of the court of appeals necessarily would, like the supreme court, always sit en banc.”).

226. Although the Supreme Court’s prompt issuance of Rule 31.1 implementing the en banc procedure may be taken as Supreme Court acceptance of its constitutionality, the rule was issued without an adversarial proceeding in which opposing arguments could be heard. SUPREME COURT OF NORTH CAROLINA, ORDER ADOPTING RULE 31.1 OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE, 369 N.C. ___, ___ (Dec. 22, 2016), <http://www.aoc.state.nc.us/www/public/html/pdf/Rule-31.1.pdf> [<http://perma.cc/M9L4-C6R4>].

227. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (N.C. 1989).

228. Unanswered is whether a decision made by the Court of Appeals sitting en banc that is subsequently affirmed by an equally divided Supreme Court would have precedential value. See generally Orth, *supra* note 19 (suggesting that “a court of appeals decision affirmed by an equally divided supreme court *could* be allowed to have precedential value,” despite its lacking such value under current North Carolina case law).

whether the state can seize the interest earned on an asset in the state's custody (*Rowlette*)²²⁹ and whether it can allow perpetually unvested interests in private trusts (*Benson*)²³⁰ have been decided without the high court's review. Important decisions concerning the law of landlord and tenant—whether a tenant's ex ante waiver of a commercial landlord's duty to mitigate damages is contrary to public policy (*Sylva Shops*)²³¹ and whether public policy requires the application of the common law Rule Against Perpetuities to rights of first refusal in leases (*New Bar*)²³²—have also been functionally delegated by the Supreme Court to panels of the Court of Appeals. And a fundamental conflict in statutes of limitation concerning actions for possession of real property and actions for injury to nonpossessory property interests (*Pottle*)²³³ has been left for resolution by a panel of the intermediate appellate court. In each of these cases, the precedent set by the panel of the Court of Appeals binds all subsequent panels that confront the same issue. Only in the last case was the issue belatedly addressed by the Supreme Court, and then only because of the persistence of a major corporation.

In the constitutional cases (*Rowlette* and *Benson*), appeals of right were dismissed, presumably because the Supreme Court did not consider the constitutional question in each case to be “substantial.” In the two landlord-tenant cases (*Sylva Shops* and *New Bar*) and in the case concerning the statutes of limitations (*Pottle*), the decisions went unreviewed by the Supreme Court, either because no review was sought and review sua sponte was not granted (*Sylva Shops* and *New Bar*) or because the appeal was dismissed on the motion of the parties (*Pottle*). In all three cases, the precedents set were soon followed by subsequent panels of the Court of Appeals (*Kotis*, *Khwaja*, and *Duke Power*), despite some uneasiness expressed by judges in the latter two cases. In only one of the subsequent cases did the Supreme Court grant discretionary review (*Duke Power*).

According to the original plan, the intermediate appellate court was intended to relieve an overworked Supreme Court of the burden of correcting error in routine cases in order to allow it the opportunity to give extended consideration to cases of general jurisprudential significance. Over the years, that plan has been lost sight of, and the

229. See *supra* Part I.

230. See *supra* Part IV.

231. See *supra* Part II.

232. See *supra* Part III.

233. See *supra* Part V.

Court of Appeals has become in many such cases the de facto court of last resort. Facing the likelihood of adverse decisions in the trial and intermediate appellate courts, only well-resourced litigants adversely affected by a precedent set by a panel of the Court of Appeals will be able to seek the attention of the Supreme Court. And the Supreme Court's historic role in developing the state's common law will in many instances be surrendered to the lower court.