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Kicking and Screaming: Dragging North Carolina's Direct Constitutional Claims Into the Twenty-First Century

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KICKING AND SCREAMING: DRAGGING NORTH CAROLINA'S DIRECT CONSTITUTIONAL CLAIMS INTO THE TWENTY-FIRST CENTURY*

> *"[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under [the North Carolina] Constitution."* Corum v. Univ. of N. Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). "[T]o be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim."* Craig v. New Hanover Cty. Bd. of Educ., *363 N.C. 334, 339–40, 678 S.E.2d 351, 355 (2009). . . . However, if the Court rules in favor of Defendants on the statute of repose issue, then Plaintiff would not be able to bring any state-law claim, and would not have an "adequate state remedy" for his state constitutional rights.*[1]

1. Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings at 22–23, Grimes v. City of Hickory, No. 5:14-CV-00160-RLV (W.D.N.C. Feb. 17, 2016), ECF No. 76 [hereinafter Grimes Mem. in Opp'n].

INTRODUCTION

Provisions of the North Carolina Constitution are "self-executing," meaning they "neither require[] any law for [their] enforcement, nor [are they] susceptible of impairment by legislation."[2] The constitution guarantees, at minimum, that litigants must have an opportunity to bring a claim directly under the constitution for constitutional violations.[3] Specifically, a doctrine of case law has developed in North Carolina that provides plaintiffs with broader claims when proceeding against the government than otherwise would be available under North Carolina statutes.[4] When plaintiffs would otherwise be without a statutory or common law claim, the doctrine announced in *Corum v. University of North Carolina* gives plaintiffs the right to proceed directly under the North Carolina Constitution.[5]

While the scope of this right has ebbed and flowed over past decades, it reached its nadir in 2009 when the Supreme Court of North Carolina recognized that regardless of certain immunities and defenses raised by the state, "a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim."[6] This is perhaps the broadest language the Supreme Court of North Carolina has used in guaranteeing plaintiffs a right to bring claims

2. Sale v. State Highway & Pub. Works Comm'n, 242 N.C. 612, 617, 89 S.E.2d 290, 295 (1955). Provisions of the North Carolina Constitution that have been specifically held to be self-executing include: (1) the protection of freedom of speech, State v. Petersilie, 334 N.C. 169, 184, 432 S.E.2d 832, 840–41 (1993), (2) the exemption from taxation of municipal property, *In re* Univ. of N.C., 300 N.C. 563, 570, 268 S.E.2d 472, 477 (1980), and (3) the prohibition against the taking of private property for public use without just compensation, Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 274 N.C. 362, 372, 163 S.E.2d 363, 371 (1968).

3. Corum v. Univ. of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992), *cert. denied*, 506 U.S. 985 (1992). As a general principle, the doctrine of sovereign immunity protects the state from suit—courts can only hear claims against the state when the state has authorized it to do so, which is usually done through an enabling statute. Whitfield v. Gilchrist, 348 N.C. 39, 41–42, 497 S.E.2d 412, 414 (1998) ("It has long been the established law of North Carolina that the State cannot be sued except with its consent or upon its waiver of immunity."); *see also* Smith v. State, 289 N.C. 303, 309, 222 S.E.2d 412, 417 (1976) ("The doctrine of [sovereign immunity] has proscribed both contract and tort actions against the state and its administrative agencies."); News & Observer Publ'g Co. v. McCrory, __ N.C. App. __, __, 795 S.E.2d 243, 248–53 (2016) (explaining sovereign immunity further); Sharon N. Humble, Annotation, *Implied Cause of Action for Damages for Violation of Provisions of State Constitutions*, 75 A.L.R. 5th 619, 623–29 (2000) (collecting similar cases in other states "where there exists no direct enabling statute").

4. *Corum*, 330 N.C. at 783, 413 S.E.2d at 289–90.

5. *Id.* at 782, 413 S.E.2d at 289.

6. Craig *ex rel.* Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009).

directly under the North Carolina Constitution. Nevertheless, a threat has loomed over this right in recent years, not by any action of the Supreme Court of North Carolina, but instead by its very inaction. A lack of clarity in the doctrinal underpinnings has meant that courts, both state and federal, have struggled with providing the rights plaintiffs have ostensibly been guaranteed.[7] Consider, for example, the hypothetical plaintiff who feels that his or her constitutional rights have been violated by a state actor, yet his or her claim could be barred by a statute of limitations. As will be explained,[8] it is currently unclear whether that plaintiff may bring a direct constitutional claim.[9] This lack of clarity has led judges to decide such questions on other grounds, rather than wading into the tricky questions of state constitutional law.[10]

Plaintiffs have sought to use the potentially broad scope of this right by seeking to overcome numerous defenses and immunities through the invocation of their right to "enter the courthouse doors and present [their] claim[s]."[11] All the while, the lack of guidance on such issues has led to few decisions and the limited development of a body of case law. Over the past decade, direct constitutional claims have withered on the vine, rarely being given thorough attention by the Supreme Court of North Carolina.[12]

7. *Infra* Section I.D & Part II.

8. *Infra* Part II.

9. As used in this Comment, "direct constitutional claim" refers to a claim brought by a plaintiff directly under a constitutional provision and not under any statutory or common law cause of action. For example, in the federal arena, a direct constitutional claim would be brought alleging violations of constitutional provisions, as opposed to a statutory claim granting a cause of action for such violations.

10. *See infra* note 109 and accompanying text; *see also* Anderson v. Assimos, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) (highlighting the doctrine of constitutional avoidance).

11. *Craig*, 363 N.C. at 340, 678 S.E.2d at 355; *see also* Grimes Mem. in Opp'n, *supra* note 1, at 22–23 (seeking to overcome the statute of repose with reference to the rights established in *Craig* and *Corum*); Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 18, Randleman v. Johnson, No. 1:15-cv-159-TDS (M.D.N.C. May 21, 2015) (seeking to overcome waiver of common law claims); Perry v. Pamlico County, 88 F. Supp. 3d 518, 535–36 (E.D.N.C. 2015) (discussing public official immunity in light of *Craig* and *Corum*); *Corum*, 330 N.C. at 785–86, 413 S.E.2d at 291 (stating that sovereign immunity "cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights").

12. *Craig*, a seminal case, was decided in 2009. 363 N.C. at 334, 678 S.E.2d at 351. Since then, this doctrine has been addressed by members of the supreme court just twice: once in a terse majority opinion, Copper v. Denlinger, 363 N.C. 784, 788–89, 688 S.E.2d 426, 428–29 (2010), and once in a concurring opinion, Town of Boone v. State, 369 N.C. 126, 138–41, 794 S.E.2d 710, 719–20 (2016) (Ervin, J., concurring in the result). While a majority of the Supreme Court of North Carolina has not recently addressed this issue, *Corum* claims have continued to see lively debate in federal courts and in the North

This Comment argues that judicial action is necessary to protect direct constitutional claims for the twenty-first century. North Carolina would not be alone in doing so; courts across the country have proven an effective means of protecting constitutional rights, unafraid even to go so far as sanctioning other branches of government, and in doing so, making clear their disdain for such violations.[13] Clarifying constitutional rights would protect those rights while remaining well within the traditional province of the courts.[14]

Additionally, this Comment seeks to identify the bounds of the right of an individual to enforce the North Carolina Constitution. First, Part I traces the development of the so-called "*Corum* claim," from its origin to its expansion in an attempt to define the modern *Corum* doctrine. A robust understanding of the current status and contours of this doctrine must be developed before being able to fully address the need for further doctrinal development.[15] Then, considering a recent claim that *Corum* can be used to overcome North Carolina's statute of repose, Part II analyzes the strength of the *Corum* claim against other similar doctrines. Finally, Part III argues that the time has come for the Supreme Court of North Carolina to readdress the right to bring claims directly under the North Carolina Constitution and suggests contours that the court should consider.

I: THE DEVELOPMENT OF DIRECT CLAIMS UNDER NORTH CAROLINA'S CONSTITUTION

A. Using the North Carolina Constitution for Jurisdiction

In analyzing direct constitutional claims in North Carolina, it is first necessary to trace the development of the body of case law

Carolina Court of Appeals. *See, e.g.*, Hunter v. Town of Mocksville, No. 1:12-cv-333, 2017 WL 680434, at *12, *13 (M.D.N.C. Feb. 21, 2017), *appeal docketed*, No. 17-1374 (4th Cir. Mar. 24, 2017); Davis v. Blanchard, 175 F. Supp. 3d 581, 588–92 (M.D.N.C. 2016); Wilkie v. City of Boiling Spring Lakes, __ N.C. App. __, __, 796 S.E.2d 57, 63–64 (2016); Hubbard v. N.C. State Univ., __ N.C. App. __, __, 789 S.E.2d 915, 923 (2016).

13. *See, e.g.*, Order at 5–7, Covington v. North Carolina, No. 1:15-CV-399 (M.D.N.C. Nov. 29, 2016), ECF No. 140 (ordering North Carolina's General Assembly to hold a special session for the purpose of redistricting state legislative districts), *stay granted pending cert.*, 508 U.S.__, 137 S. Ct. 808 (Jan. 10, 2017). Another example of this involves the Supreme Court of Washington, which has gone so far as to sanction the State of Washington $100,000 per day for failure to comply with a Washington constitutional provision. Order at 13, McCleary v. Washington, No. 84362-7 (Wash. Oct. 6, 2016).

14. *See infra* Part III.

15. While subsequent cases have built upon the contours of the law announced in *Corum*, for the sake of clarity, this Comment will refer to the doctrine as the *Corum* doctrine.

surrounding such claims. The Supreme Court of North Carolina was in a unique situation in the 1950s. In 1955, Fred Sale and others commenced a proceeding against the North Carolina Highway Commission ("Commission") under a statutory provision allowing for suit against the state.[16] They sought to recover money they were allegedly owed for granting the Commission an easement for construction of a bridge over the French Broad River in Asheville and damages stemming from a fire caused by a Commission subcontractor.[17] This was not the first time these parties would appear before the supreme court. In 1953, the court dismissed their first suit but instructed the plaintiffs that they could recover damages if they proved that the Commission's behavior was negligent and caused the injury.[18] By the time 1955 came around, the plaintiffs had done just that,[19] yet the Commission claimed that the court lacked jurisdiction—that there was, in fact, no statutory jurisdiction over state agencies for negligence or breach of contract claims.[20]

What would become an important doctrine of North Carolina constitutional law thus began, in essence, by accident. The supreme court told Sale to come back if he could prove negligence, which is exactly what he did. The court then held that he was entitled to damages,[21] yet there was no statute on the books that would afford

16. Sale v. State Highway & Pub. Works Comm'n, 242 N.C. 612, 613, 89 S.E.2d 290, 292 (1955) ("This is a special proceeding instituted . . . under the authority of G.S. § 136-19 and G.S. § 40-12 *et seq* . . . .").

17. *Id.* at 613–15, 89 S.E.2d at 292–94.

18. Sale v. State Highway & Pub. Works Comm'n, 238 N.C. 599, 606, 78 S.E.2d 724, 729 (1953).

19. *Sale*, 242 N.C. at 620–22, 89 S.E.2d at 297–99. In the first suit, Sale and others based their claim in a contract and right-of-way agreement executed between them, as landowners, and the Commission. *Sale*, 238 N.C. at 602–03, 78 S.E.2d at 727. The plaintiffs alleged that the Commission negligently caused a structure fire on the land and failed to perform certain building and rebuilding obligations. *Id.* at 606, 78 S.E.2d at 729. However, the court found that none of these allegations were actually based in the contract; therefore, because "[t]he proof materially depart[ed] from the allegations," the court held that the plaintiffs could not recover until they "d[id] so on the case set up in their complaint." *Id.* In the second suit, the plaintiffs based their theory in a takings claim under the North Carolina Constitution, alleging that failure of the Commission to remediate the property damage constituted an unconstitutional taking of their property. *Sale*, 242 N.C. at 620, 89 S.E.2d at 297. Because the action was therefore no longer based in the contract, the plaintiffs were ultimately able to recover. *Id*. at 620–22, 89 S.E.2d 297–99; *see also* John D. Boutwell, Note, *The Cause of Action for Damages Under North Carolina's Constitution:* Corum v. University of North Carolina, 70 N.C. L. REV. 1899, 1906 (1992) (discussing the facts and law of *Sale*).

20. *Sale*, 242 N.C. at 616, 89 S.E.2d at 294.

21. *Id.* at 620–21, 89 S.E.2d at 297–98; *see also* 1A CHRISTINE M. G. DAVIS ET AL, STRONG'S NORTH CAROLINA INDEX § 561 (4th ed. 2016) (discussing the "law of the case doctrine" in North Carolina).

jurisdiction over the Commission.[22] In an effort to extricate itself from this awkward position, the supreme court announced a new principle: that the constitution "forbids damage to private property" and that such a provision is "self-executing."[23] As a result, while the Commission was correct that there was no jurisdiction under the applicable statute, the plaintiffs were still allowed to bring the action under the common law.[24]

Nearly a decade later, in a separate case, the Commission came before the Supreme Court of North Carolina again in *Midgett v. North Carolina State Highway Commission*,[25] this time arguing that according to a North Carolina statute, claims alleging takings by the Commission must be heard in administrative proceedings.[26] In this new case, the Commission had not taken Midgett's property, as had been the case with the plaintiffs in *Sale*; instead, its construction on neighboring properties had led to floodwaters being rerouted, which in turn, had damaged Midgett's property.[27] The factual differences between *Midgett* and *Sale* as well as the substantive law regarding floodwaters is largely irrelevant for this Comment; what is important is Midgett's right to relief. Typically, the procedure for adjudicating the proper value of compensation owed for takings was a statutory administrative proceeding,[28] but such proceedings were unavailable to neighboring landowners.[29] Therefore, Midgett had ostensibly suffered a taking but had no statutory recourse against the Commission.[30] In response, the court built upon the law as stated in *Sale* by holding that article I, section 17 of the North Carolina Constitution[31] was not only self-executing, but that it also "neither requires any law for its enforcement nor is [it] susceptible of impairment by legislation."[32] Whereas *Sale* held only that the plaintiffs could proceed under the

22. *Sale*, 242 N.C. at 621–22, 89 S.E.2d at 298.

23. *Id.* at 618, 89 S.E.2d at 296 (citing Swift & Co. v. City of Newport News, 52 S.E. 821, 824 (Va. 1906)).

24. *Id.* at 621–22, 89 S.E.2d at 298.

25. 260 N.C. 241, 132 S.E.2d 599 (1963), *overruled on other grounds*, Lea Co. v. N.C. Bd. of Transp., 308 N.C. 603, 615, 304 S.E.2d 164, 173 (1983).

26. *Id.* at 243, 132 S.E.2d at 603 (citing N.C. GEN. STAT. § 136-19 (1959)).

27. *Id.* at 242–43, 132 S.E.2d at 632.

28. *Id.*

29. *Id.* at 248–51, 134 S.E.2d at 606–09.

30. *See id.* at 251, 134 S.E.2d at 608.

31. N.C. CONST. of 1868, art. I, § 17. The North Carolina Constitution has been revised and amended multiple times since its original ratification, most recently in 1970. JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 4, 19, 32–33 (2d ed. 2013).

32. *Midgett*, 260 N.C. at 250, 132 S.E.2d at 608.

constitution,[33] *Midgett* went further in stating that such a right could not be "impair[ed]" by the legislature. As the *Midgett* court put it, "[W]here the Constitution points out no remedy and no statute affords an adequate remedy . . . the common law will furnish the appropriate action for adequate redress of such grievance[s]."[34]

The doctrine of *Corum* claims thus got off to a somewhat inauspicious start; it is not by coincidence that these claims are not called *Sale* or *Midgett* claims. In *Sale*, the supreme court backed itself into a corner and subsequently implied a common law constitutional claim against the state but only on a specific fact pattern. Dealing with the same constitutional provision, *Midgett*, on one hand reaffirmed *Sale*, and on the other, expanded it by applying the *Sale* reasoning beyond a specific fact pattern. On the surface, *Sale* and *Midgett* were just two jurisdictional cases; yet on a macro level, the court simply refused to dismiss two compelling claims against the state. For nearly three decades, these cases remained oddities. While both were cited as important cases within the realms of the substantive law they dealt with,[35] the concept of direct constitutional claims under the North Carolina Constitution lay dormant until 1992.

B. Corum v. University of North Carolina

In the 1980s, Dr. Alvis Corum was responsible for overseeing the Appalachian Collection, a collection of artifacts important to North Carolina's history, housed at the library of Appalachian State University.[36] After Dr. Corum expressed his disagreement with the decision of school administrators to divide the collection among libraries in the University of North Carolina system, he was removed from his deanship.[37] He subsequently brought state and federal constitutional claims for violations of his free speech rights.[38] After

33. 242 N.C. 612, 618, 89 S.E.2d 290, 296 (1955).

34. 260 N.C. at 250, 132 S.E.2d at 608.

35. *See, e.g.*, Finch v. City of Durham, 325 N.C. 352, 375, 384 S.E.2d 8, 28 (1989) (Martin, J., concurring) (citing *Sale* as a loss-of-property-by-fire case); Olan Mills v. Cannon Aircraft Exec. Terminal, Inc., 273 N.C. 519, 525, 160 S.E.2d 735, 741 (1968) (applying the *Midgett* definition of an "act of God").

36. Corum v. Univ. of N.C., 330 N.C. 761, 767, 413 S.E.2d 276, 280–81 (1992). Appalachian State is a part of the University of North Carolina system, *About Appalachian State University*, APPALACHIAN STATE UNIVERSITY (2016), http://www.appstate.edu/about/ [https://perma.cc/9EQU-MB24], which is a state incorporated public agency, N.C. GEN. STAT. § 116-1 (1971). For further discussion of the facts surrounding *Corum*, see generally Boutwell, *supra* note 19.

37. *Corum*, 330 N.C. at 769, 413 S.E.2d at 282.

38. *Id.* at 770, 413 S.E.2d at 282. Dr. Corum's federal claims were brought under 42 U.S.C. § 1983 for violations of his rights under the First and Fourteenth Amendments of

upholding the grant of summary judgment for the defendants on the federal claims,[39] the supreme court turned to the direct state constitutional claims and looked to cases that were nearly thirty years old, heralding the return of *Midgett* and *Sale*. In doing so, *Corum* would become the paragon of a line of cases protecting constitutional remedies.[40]

The *Corum* court did two things: it created a remedy and it limited sovereign immunity. First, by relying on *Midgett* and *Sale*, the court held that in the absence of "adequate" state remedies, plaintiffs have a direct claim against the State for abridgements of constitutional rights.[41] It based this holding both in the text and in the history of the North Carolina Constitution, as well as in the inherent power of the judiciary.[42] While leaving the exact relief to the discretion of the trial court, the supreme court recognized that this judicially created remedy must bow to established claims where they already existed, and that lower courts should seek the "least intrusive remedy available."[43] Whereas *Midgett* and *Sale* created direct claims for violations of one specific constitutional provision,[44] *Corum* ostensibly allowed claims for violations of any constitutional provision, or at the very least, for violations of constitutional rights

the U.S. Constitution. *Id.* The Supreme Court of North Carolina held that the trial court properly concluded that the defendants were entitled to qualified immunity against these federal claims. *Id*. at 781, 413 S.E.2d at 289.

39. *Id.*

40. *Cf.* Paul R. Owen, *Reticent Revolution: Prospects for Damages Suits Under the New Mexico Bill of Rights*, 25 N.M. L. REV. 173, 186 n.118 (1995) (noting the "strong independent line of state cases" leading up to *Corum*).

41. *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. Confusingly, the court seemed to hold that direct claims were available for *any* constitutional infringements, yet in the same paragraph, it also held that the freedom of speech provision in the constitution is self-executing. *Id.* It is therefore unclear what, if anything, it means for a constitutional provision to be "self-executing" after *Corum*. Subsequent cases have not clarified this issue.

42. *Id.* at 783, 413 S.E.2d at 290 (explaining that as "the ultimate interpreter of our State Constitution," the court is bound only to apply the common law and acts of the legislature that are "consistent with the Constitution").

43. *Id*. at 784–85, 413 S.E.2d 290–91. Unfortunately, what constitutes the "least intrusive remedy available" has seen only limited development in the case law. For the purposes of illustration, however, in 2002 the Supreme Court of North Carolina ruled a state legislative redistricting scheme unconstitutional and imposed a standard to be used by the General Assembly in drawing up new districts. Stephenson v. Bartlett, 335 N.C. 354, 388, 562 S.E.2d 377, 401 (2002) (Orr, J. concurring in part and dissenting in part). In his dissent, Justice Butterfield argued that the imposition of specific criteria constituted an "encroachment" beyond the "least intrusive remedy available." *Id.* at 419, 562 S.E.2d at 419 (Butterfield, J., dissenting).

44. *See supra* Section I.A.

generally.[45] By allowing for these claims, *Corum* allowed plaintiffs broader opportunities for recovery. A plaintiff whose cause of action does not fall under a statutory or common law cause of action would have been without any opportunity for recovery before *Corum*—there would have been no cause of action under which to bring suit. However, *Corum* served to broaden the availability of direct constitutional claims[46]: even without a statutory or common law cause of action, a plaintiff can bring a cause of action specifically under a constitutional provision alleging violations of that provision.

Second, the *Corum* court addressed how this newly fashioned remedy interacted with the doctrine of sovereign immunity.[47] Absent statutory authorization for suit against the state, sovereign immunity would generally prevent suit against the state.[48] As announced in *Corum*, direct constitutional claims in North Carolina can only be brought when there is no established statutory claim or remedy.[49] Therefore, if the *Corum* court had not addressed the interaction between direct constitutional claims, the opening up of direct constitutional claims would have been meaningless: direct constitutional claims can only occur when there is no statutory authorization for suit, but if there is no statutory authorization for suit, the claim is barred by sovereign immunity. The court therefore was required to "resolve[] the paradox between constitutional torts and sovereign immunity."[50] Sovereign immunity, the court stated, is a common law theory, while the rights to recovery are constitutional rights.[51] As a result, "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail."[52] Because sovereign immunity would preclude common law claims and there were no statutory claims Dr. Corum could proceed under, Dr. Corum could proceed directly under the North Carolina Constitution.[53] Having thus established a new

45. *Corum*, 330 N.C. at 782–83, 413 S.E.2d at 289–90.

46. *Id.*

47. *Id.* at 785–86, 413 S.E.2d at 291–91.

48. *See supra* note 3 and accompanying text.

49. *Corum*, 330 N.C. at 782–83, 413 S.E.2d at 290–91.

50. T. Hunter Jefferson, Note, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions Against State Governments*, 50 VAND. L. REV. 1525, 1542–43 (1997).

51. *Corum*, 330 N.C. at 786, 413 S.E.2d at 291–92; *see also* Moffitt v. City of Asheville, 103 N.C. 237, 258, 9 S.E. 695, 698 (1889) (adopting the doctrine of sovereign immunity in North Carolina by stating that "[c]ounties are never answerable in damages for torts, unless made so by the provisions of some statute").

52. *Corum*, 330 N.C at 786, 413 S.E.2d at 292.

53. *Id.*

constitutional claim, the court explicitly decided that at least one well-known doctrine—sovereign immunity—cannot "stand as a barrier" to those vitally important constitutional claims.[54]

Corum is thus notable both for what it did and what it did not do.[55] In one fell swoop, the supreme court greatly expanded potential claims for plaintiffs to bring.[56] Yet these claims are not unfettered—direct claims can only be brought "in the absence of an adequate state remedy."[57] This is a logical limitation; for when there is already a statute enabling claims against the state, plaintiffs are required to take advantage of that statute.[58] Nevertheless, the *Corum* court left undefined what exactly would constitute an "adequate" remedy.[59]

In particular, the court did not explain the role of shielding doctrines in evaluating the adequacy of a remedy. When the doctrine of sovereign immunity bars suit, it appears that such a bar against litigation will constitute an inadequate remedy.[60] Therefore, in *Corum* claims, while defendants may attempt to invoke sovereign immunity, they will likely be unsuccessful. As the *Corum* court said, sovereign

54. *Id*. at 785, 413 S.E.2d at 291–92.

55. It should be noted that some have read *Corum* as simply a federal *Bivens* claim extended to the state. *See* Helen Gugel, *Remaking the Mold: Pursuing Failure-to-Protect Claims Under State Constitutions Via Analogous* Bivens *Actions*, 110 COLUM. L. REV. 1294, 1326 n.187 (2010); *see also* Minneci v. Pollard, 565 U.S. 118, 120 (2012) (declining to extend a *Bivens* action to the Eighth Amendment when there is an "adequate alternative [state law] damages action"); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (holding that the Fourth Amendment implies a cause of action for damages arising out of conduct by federal officials in violation of the Fourth Amendment).

56. It is worth briefly discussing statutory remedies for violations of constitutional rights. At the federal level, there is a statutory claim to recover for any deprivation of federal constitutional rights by state officers acting under the color of law. 42 U.S.C. § 1983 (2012). However, qualified immunity is sometimes available to public officials accused of § 1983 violations. *See generally* Pearson v. Callahan, 555 U.S. 223 (2009) (holding that qualified immunity will apply to an official's conduct unless that conduct violated a "clearly established" constitutional right). While North Carolina does have a civil rights statute, it is much more limited in scope than its federal counterpart. *Compare* N.C. GEN. STAT. § 99D-1 (2016), *with* 42 U.S.C. § 1983 (2012) (North Carolina's civil rights statute requires a conspiracy of two or more persons and the use of force or threats of force, while the federal statute merely requires a deprivation of "any rights, privileges, or immunities").

57. *Corum*, 330 N.C. at 782, 413 S.E.2d at 289.

58. *Id.*

59. *Id.*

60. *See id.* at 786, 413 S.E.2d at 291 ("It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.").

immunity cannot "stand as a barrier" to direct constitutional claims.[61] Nevertheless, while defendants are still "entitled to all defenses that may arise,"[62] the court left open the question of what those defenses might be. Essentially, outside of sovereign immunity, it is still unclear how other substantive bars to litigation, such as qualified immunity or statutes of repose, interact with these *Corum* claims. Moreover, the question remains of whether the existence of a federal remedy constitutes an adequate remedy under *Corum*'s analysis. In this way, *Corum* perhaps raised just as many questions as it answered.

Corum not only recognized new claims, it also held that a long standing doctrine such as sovereign immunity could not protect the state against these claims.[63] For this reason, it is perhaps not surprising that just eight months later, retired Associate Justice Harry Martin of the Supreme Court of North Carolina penned an essay identifying *Corum* as part of a wave of cases which put North Carolina "at the head of the movement to energize state constitutional law."[64] As he noted, "[t]he North Carolina Supreme Court's willingness to infer a remedy directly from the state constitution stands in sharp contrast to the recent constitutional jurisprudence of the United States Supreme Court, which ha[d] curtailed dramatically the availability of damage actions directly under the Federal Constitution."[65] It is worth situating *Corum* in time. Starting in the 1970s, scholars, including Supreme Court Justice William Brennan, began calling for state courts to strengthen constitutional rights in reaction to United States Supreme Court decisions weakening such protections in the Federal Constitution.[66] By 1992, when *Corum* was decided, a strong wave of "independent

61. *Id*. at 785, 413 S.E.2d at 291.

62. *Id*., 413 S.E.2d at 292.

63. *Id.* at 786, 413 S.E.2d at 291–92.

64. Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1751, 1756–57 (1992).

65. *Id*. at 1757.

66. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); *see also* Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 809 (2000) ("At that point, state courts around the country began to question the assumption that parallel state and federal constitutional provisions must have identical meaning.").

constitutional judgments"[67] began to heed the call for strengthened state constitutional rights.[68]

C. Craig ex rel. Craig v. New Hanover County Board of Education

Nearly two decades after *Corum* was decided, the Supreme Court of North Carolina revisited it in *Craig v. New Hanover County Board of Education*.[69] In *Craig*, a mentally disabled student brought suit against his school district for negligence in failing to adequately protect him from sexual assault.[70] Additionally, he claimed "that the Board deprived him of an education free from harm and psychological abuse, thereby violating three separate provisions of the North Carolina State Constitution."[71] On the surface, both the question presented to the court and the opinion it rendered were relatively straightforward. The court was asked to determine "whether plaintiff's common law negligence claim, which will ultimately be defeated by governmental immunity . . . provides an adequate remedy at state law."[72] More subtly, however, the case also presented two different questions. First, whether common law negligence is an adequate remedy; and second, whether governmental immunity would render that remedy inadequate.[73] The apparent holding of *Craig* is straight *Corum* doctrine: because sovereign immunity would bar the plaintiff's common law negligence claim, he can instead bring claims directly under the state constitution.[74] However, there are two parts of the *Craig* decision that muddy the waters.

67. Louis D. Bilionis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1806 (1992).

68. *Id.* at 1803 ("The flow of state constitutional law these days comes at a time when judicial protection of individual liberties under the Federal Constitution is unmistakably ebbing. No one should think the two phenomena are unrelated.").

69. 363 N.C. 334, 678 S.E.2d 351 (2009).

70. *Id.* at 335–36, 678 S.E.2d at 352–53.

71. *Id*. at 335, 678 S.E.2d at 352 (citing N.C. CONST. art. I, §§ 15, 19; *id.* art. IX, § 1).

72. *Id.* While this case was the first to assess the availability of an adequate state remedy in light of *governmental* immunity, the distinction between sovereign immunity and governmental immunity "is immaterial." *Id.* at 335 n.3, 678 S.E.2d at 353 n.3. Sovereign immunity "applies to the State and its agencies," *id.*, while governmental immunity applies to counties and their agencies, Meyer v. Walls, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). Governmental immunity, like sovereign immunity, is different from some affirmative defenses in that "it shields a defendant entirely from having to answer for its conduct at all in a civil suit for damages." *Craig*, 363 N.C. at 337, 678 S.E.2d at 354. Consequently, it would not be unreasonable to question *Craig*'s significance, if any, within the broader doctrinal development.

73. *Craig*, 363 N.C. at 336, 678 S.E.2d at 353.

74. *Id.* at 338, 678 S.E.2d at 354.

First, the *Craig* court stated that "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim."[75] Read in context, the court's statement appears to mean that a defense, such as governmental immunity, cannot prevent plaintiffs from redressing constitutional wrongs.[76] What is unclear, however, is how far such a statement extends and, specifically, whether it extends to doctrines such as immunities, time bars, doctrines of finality, or procedural requirements.[77] The court did not clearly elaborate on whether the guarantee of the opportunity to present a claim would overcome these various barriers to litigation. Consequently, the scope of this statement is ambiguous. Absent further clarification, the court's statement that "a plaintiff must have at least the opportunity to enter the courthouse doors"[78] could make way for a new breed of claims—claims otherwise barred by numerous defenses and procedural hurdles, but now given new life under *Corum*.

In the next paragraph, the court attempted to limit the scope of its previous sentence. "This holding," it said, "does not predetermine the likelihood that plaintiff will win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits."[79] This statement seems to make clear that an adequate remedy is not rendered inadequate by such defenses. Nevertheless, the opinion reaffirmed the need for an adequate remedy that "provid[es] the possibility of relief under the circumstances."[80] Does being time-barred by a statute of repose preclude the possibility of relief?[81] What about qualified immunity?[82] In *Craig*, a direct constitutional claim was

75. *Id.* at 339–40, 678 S.E.2d at 355.

76. As subsequently explained by the court, an adequate defense cannot "stand[] as an absolute bar" to a plaintiff's common law cause of action." *Id.* at 340, 678 S.E.2d at 355.

77. This ambiguity arises from the language of the *Craig* opinion. The guarantee of access to the courthouse is not on its face limited to a specific scenario. *Id.* However, the next sentence of the opinion applies the guarantee to the doctrine of sovereign immunity. What is unclear is whether the application of the "opportunity to enter the courthouse," *id.*, is limited to overcoming sovereign immunity or exemplified by overcoming sovereign immunity. *See id.*

78. *Id.*

79. *Id.*

80. *Id*.

81. As noted several years later by the same court, "[s]tatutes of repose function as 'unyielding and absolute barriers' to litigation." Christie v. Hartley Const., Inc., 367 N.C. 534, 539, 766 S.E.2d 283, 287 (2014) (quoting Black v. Littlejohn, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985)).

82. While the U.S. Supreme Court has clarified that "[q]ualified immunity is an immunity from suit rather than a mere defense to liability," Plumhoff v. Rickard, 134 S. Ct. 2012, 2019 (2014) (internal quotations omitted) (quoting Pearson v. Callahan, 555 U.S.

allowed because Craig's claim was precluded by governmental immunity, "regardless of his ability to prove his case."[83] What was left unclear, however, is whether any other procedural bar or well-pled defense would be treated differently.

The second unclear portion of the *Craig* opinion is presented in the following quotation:

> [T]he facts presented [in *Craig*] are distinguishable from a case in which a plaintiff has lost his ability to pursue a common law claim due to expiration of the statute of limitations, for example. Sovereign immunity entirely precludes this plaintiff from moving forward with his common law claim; without being permitted to pursue his direct colorable constitutional claims, he will be left with no remedy for his alleged constitutional injuries.[84]

There is a strong argument to be made that this statement is largely dicta,[85] since the statute of limitations was simply not at issue in *Craig*. It is, in fact, discussed nowhere else in the opinion. It was similarly not discussed in the opinion of the North Carolina Court of Appeals[86] or in the order of the superior court.[87] While perhaps an illustrative example, this first statement as to statutes of limitations should therefore not be read as binding precedent. Even if this language were not dicta, it still misses the main point. While the operation of sovereign immunity and a statute of limitations may be different, they are not so readily distinguishable. Both preclude a plaintiff from moving forward with claims, and both can leave the plaintiff, absent direct constitutional claims, without remedies. As will be seen below, however, this language still raises questions for new plaintiffs attempting to invoke their *Corum* and *Craig* rights.

223, 231 (2009)), and thus presumably would preclude the possibility of relief under North Carolina law, the Supreme Court of North Carolina has not yet squarely addressed this issue.

83. *Craig*, 363 N.C. at 340, 678 S.E.2d at 355.

84. *Id.* at 340, 678 S.E.2d at 355–56.

85. *Cf.* 21 C.J.S. *Courts* § 226 (2016) ("Judicial dictum is a statement the court expressly uses to guide parties in their future conduct . . . . [A] court is not bound to follow dicta in a prior case that did not fully debate the point currently at issue.") (internal quotations omitted); *see also id.* § 224 (discussing the persuasive force of dicta).

86. *See* Craig *ex rel.* Craig v. New Hanover Cty. Bd. of Educ., 185 N.C. App. 651–57, 648 S.E.2d 923, 923–27 (2007).

87. *See* Order, Craig *ex rel.* Craig v. New Hanover Cty. Bd. of Educ., No. 06 CVS 4033, 2006 WL 4386451 (N.C. Super. Dec. 15, 2006).

D. Recent Developments in the Corum *Doctrine*

Despite these lingering questions, the *Corum* doctrine has enjoyed application and consideration in both the North Carolina state courts and the federal court system.[88] For example, in 2012, in *Wilcox v. City of Asheville*,[89] a panel of the North Carolina Court of Appeals focused on the distinction between possible and impossible relief discussed in *Craig*.[90] *Craig*, the *Wilcox* court said, focused on the "absolute bar" created by sovereign immunity which makes relief "impossible."[91] The panel further seemed to recognize a dichotomy between the adequateness of factual and legal conclusions: claims barred as a matter of law would render a remedy inadequate, the opinion suggests, while claims that could or could not fail based on defenses presented at trial would be considered adequate.[92]

But this dichotomy blurs the analysis presented in *Craig*. For example, under this analytical structure, a direct constitutional claim could be brought when there is no material issue of fact as to a defendant's role as a government official at the time of the events giving rise to the claim. In this scenario, a defendant would either be protected as a matter of law by governmental immunity or not. Logically, such a case should not be different from a separate case in which the question of whether a defendant was a government official to be covered by governmental immunity at the time of the events is a factual determination for trial. The legal operation of governmental immunity is the same in both scenarios; yet based on the *Wilcox* panel's analysis, the debate over the direct constitutional claim would turn out very differently.

A few years after *Wilcox*, a separate panel of the North Carolina Court of Appeals interpreted *Craig* yet again in *Delgado v. Petruck*.[93] While the question presented was not one of direct constitutional claims, this unpublished decision is noteworthy in how it interpreted *Craig*.[94] The court of appeals read *Craig* as differentiating statutory grants of immunity, such as immunity granted by the legislature to those who report crime or abuse,[95] from common law immunity

88. For more discussion of federal cases, see *infra* Part II.

89. 222 N.C. App. 285, 730 S.E.2d 226 (2012).

90. *Id.* at 299–301, 730 S.E.2d at 236–38.

91. *Id.* at 300, 730 S.E.2d at 237 (quoting Craig *ex rel.* Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 340–41, 678 S.E.2d 351, 355–56 (2009)).

92. *Id.* at 299, 730 S.E.2d at 237.

93. No. COA15-34, 2015 WL 5834278 (N.C. Ct. App. Oct. 6, 2015).

94. *Id.* at *4.

95. *Id.* (citing N.C. GEN. STAT. § 7B-309 (2015)).

doctrines, such as governmental immunity.[96] As the question of immunities has become more relevant when analyzing direct constitutional claims,[97] the fact that one appellate panel has interpreted *Craig* as strictly differentiating between statutory and common law defenses and immunities might become important as the doctrine progresses. *Delgado* shows that the court of appeals is still attempting to find practical ways to apply *Craig*, even if it is unwilling to go so far as to publish an opinion on the matter.

From these cases, it is clear that North Carolina has developed a doctrine that allows for direct constitutional claims. As has been shown, this doctrine emerged from what looked like a judicial fluke into a powerful body of law, ultimately allowing plaintiffs to overcome various well-established defenses in an effort to protect their constitutional rights. While North Carolina courts have shown no signs of retreating from *Corum* and *Craig*, many unanswered questions still linger and deserve further exploration.

II. *CORUM* VERSUS ALREADY-ESTABLISHED DOCTRINES

This doctrine of case law, from *Sale* to *Craig*, has the potential to vastly expand constitutional claims brought in North Carolina courts. The effect of these decisions "could sweep [in] . . . an unlimited host of court-construed individual rights which may fall under *Corum*'s umbrella of protection."[98] If *Corum* was a "call to arms,"[99] and *Craig* extended that call, the question for today's jurisprudence is the status of the *Corum* doctrine. The potential scope of this doctrine will become clearer through an analysis of novel attempts to use these cases to overcome a variety of substantive and procedural obstacles to such claims.

Before discussing the development of the applicability of defenses to *Corum* and *Craig* claims, it should first be noted that, contrary to what will be discussed below, there has been at least one case where similar questions have been posed and where federal district court judges have rendered clear decisions.[100] Notably, these holdings do not have precedential effect on state courts[101] and do not

96. *Id.*

97. *See supra* Section I.C.

98. Boutwell, *supra* note 19, at 1913–14.

99. *Id.* at 1915.

100. *See, e.g.*, Wilkins v. Good, No. Civ. 4:98CV233, 1999 WL 33320960, at *6–7 (W.D.N.C. July 29, 1999).

101. *See* Time Warner Entm't–Advance/Newhouse P'ship v. Carteret–Craven Elec. Membership Corp., 506 F.3d 304, 314 (4th Cir. 2007) ("[A] federal court should not create

completely answer the questions posed by this Comment. Nevertheless, persuasive federal cases present a particularly illuminating exposition of the modern *Corum* doctrine not only because they illustrate novel applications of the case law, but also because they demonstrate the difficulties some courts have had in grappling with this tenuous body of case law. Moreover, it is of note that there has been more litigation of *Corum* and *Craig* issues in federal courts lately than in North Carolina courts.[102] While the exact motivations of individual plaintiffs or defendants are not presumed here, one potential explanation is that parties seeking to bring claims under the North Carolina Constitution are likely to also bring claims under the U.S. Constitution and thus have access to federal courts.[103]

Litigants have attempted to extend the *Corum* and *Craig* guarantee of relief to new defenses, including the expiration of time bars, such as statutes of limitations and repose. This extension is premised upon the assertion that a claim time-barred by repose precludes an adequate remedy.[104] In one case, plaintiffs brought federal civil rights claims and state causes of actions for alleged constitutional violations which arose when police arrested the plaintiff for possession of what ended up being sugar.[105] In analyzing the state law direct constitutional claims, the federal court noted that the expiration of the statute of limitations does not render a remedy

or expand a State's public policy [or] . . . elbow its way into [a] controversy to render what may be an uncertain and ephemeral interpretation of state law.") (internal quotation marks omitted) (first quoting St. Paul Fire & Marine Ins. Co. v. Jacobson, 48 F.3d 778, 783 (4th Cir. 1995); and then quoting Mitcheson v. Harris, 955 F.2d 235, 238 (4th Cir. 1992))).

102. *See, e.g.*, Grimes' Mem. in Opp'n, *supra* note 1, at 22–23.

103. *See* 42 U.S.C. § 1983 (2012) (allowing for the recovery of damages for violations of federal constitutional rights); *see also* 28 U.S.C. § 1441 (2012) (listing removal provisions for U.S. Constitution claims from state to federal court).

104. *See* Grimes' Mem. in Opp'n, *supra* note 1, at 22–23; CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2182 (2014) ("A statute of repose 'bar[s] any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury.' ") (quoting *Statute of Repose*, BLACK'S LAW DICTIONARY (9th ed. 2009)). Specifically in North Carolina, "[a] statute of repose creates an additional element of the claim itself . . . .'If the action is not brought within the specified period, the plaintiff literally has *no* cause of action.' " Hargett v. Holland, 337 N.C. 651, 654–55, 447 S.E.2d 784, 787 (1994) (quoting Boudreau v. Baughman, 322 N.C. 331, 340–41, 368 S.E.2d 849, 857 (1988)). It should be noted here that in the federal system, "[i]n defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts" and "[i]n applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." Manuel v. City of Joliet, 137 S. Ct. 911, 920–21 (2017). While this does not help resolve the state law question at issue, it does show that federal courts might have more leeway in adjudicating rules of accrual in similar federal claims.

105. *See* Haynes v. City of Durham, N.C., No. 1:12cv1090, 2016 WL 469608, at *2 (M.D.N.C. Feb. 5, 2016).

inadequate under *Craig*.[106] In a separate case, a teacher reported accusations that a teaching aide had sexually assaulted a student; the teacher who reported the accusations was subsequently not rehired and proceeded to bring a wrongful discharge claim against school officials and the board of education.[107] In assessing the teacher's claim, a federal court found the teacher could have initiated an administrative appeal; therefore, the plaintiff's failure to timely file a statutory administrative appeal, thus barring her claim, "d[id] not render the statutory remedy inadequate."[108] Still other courts have discovered ways to avoid these unresolved *Corum* questions, dismissing plaintiffs' claims on any alternative grounds they can find.[109]

106. *See id.* at *7 n.17 ("[S]tate-law remedies are not rendered inadequate merely because Plaintiffs failed to pursue them within the applicable statute of limitations.").

107. J.W. v. Johnston Cty. Bd. of Educ., No. 5:11-CV-707-D, 2012 WL 4425439, at *3 (E.D.N.C. Sept. 24, 2012).

108. *Id.* at *17.

109. *See* Randleman v. Johnson, 162 F. Supp. 3d 482, 490 (M.D.N.C. Feb. 17, 2016) (denying defendant's motion to dismiss for "fail[ing] to articulate the contours of North Carolina case law"); Perry v. Pamlico Cty., 88 F. Supp. 3d 518, 536–37 (E.D.N.C. Feb. 18, 2015) (granting summary judgment against plaintiff for her failure to "raise a genuine issue of material fact regarding whether defendants violated the law of the land clause in the North Carolina Constitution" rather than "predict[ing] how the Supreme Court of North Carolina would resolve this issue"). In general, "a federal court may, and ordinarily should, refrain from deciding a case in which state action is challenged in federal court as contrary to the federal constitution if there are unsettled questions of state law that may be dispositive of the case and avoid the need for deciding the constitutional question." 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4242, at 320–21 (3d. ed. 2007). Such abstention in the circumstances discussed in this Comment could, theoretically, allow a federal court to abstain from deciding a case involving both state and federal constitutional issues when the state law is unclear, as it is in the *Corum* doctrine. Moreover, there are other abstention doctrines that could similarly help federal courts struggling with a vague *Corum* doctrine. *See id*. § 4241, at 298 ("Burford [abstention] established that there are circumstances in which a federal court should decline to hear at all a case of which it has jurisdiction in order to avoid needless conflict with the states, but did not define what those circumstances are."). Such decisions are generally viewed as prudential and within the discretion of the court. *Cf.* Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1908 (2004) ("In the case of *Pullman* abstention, the district courts have been given a measure of allocative discretion . . . the clear weight of authority establishes abuse of discretion as the basic standard of review."). Any orphic prognostications as to whether federal abstention would preclude a plaintiff's opportunity for relief implicates broad questions of federalism that are beyond the scope of this Comment. Moreover, in cases brought in federal court alleging state and federal law claims, an unanswered question remains as to whether a federal claim that can proceed to the merits would constitute an adequate remedy. Presumably the answer to this question is no, as *Corum* specifically discusses an "adequate *state* remedy," Corum v. Univ. of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (emphasis added), however it does not appear that the Supreme Court of North Carolina has squarely addressed this issue.

Absent clear guidance from the Supreme Court of North Carolina, federal courts in North Carolina must still address parties litigating at the edges of the *Corum* doctrine. As recently as 2016, parties contested aspects of *Corum* and *Craig* including the role of a statute of repose as a barrier to recovery, the meaning of *Craig*'s guarantee of access to the courthouse, whether *Craig* interacted differently with substantive, rather than procedural, rights,[110] and how *Corum* extends to claims against defendants in their individual, rather than governmental, capacities.[111] As this recent litigation has shown, the exact relationship between *Corum* and *Craig* and shielding doctrines such as statues of limitations or repose is unclear. However, the intersections between the *Corum* doctrine and traditional shielding or defensive doctrines nonetheless provide an opportunity to highlight differences in doctrinal strength, even if a "winner" is, as of yet, unknown. It is therefore worthwhile to briefly analyze a recent case, *Grimes v. City of Hickory*,[112] as an example of how litigants have argued that *Corum* and *Craig* can be used to sustain a claim which would have otherwise been barred by the statute of repose.[113]

The point of contention in *Grimes* was, on the surface, relatively straightforward: Grimes sought to recover damages for the years he spent wrongfully imprisoned,[114] while the defendants, the City of Hickory, two police chiefs, and two detectives, argued that Grimes' claim was time-barred by the statute of repose.[115] Grimes, however, argued that *Corum* and *Craig* guaranteed him the opportunity to present his claim before a court.[116] Specifically, he argued that "[i]f [his] claims [were] barred by North Carolina's statute of repose, he 'literally [would have had] no cause of action' " and therefore would have been afforded no adequate remedies for state constitutional

110. *See* Grimes' Mem. in Opp'n, *supra* note 1, at 22–23; Defendants' Reply Brief in Support of Motion for Judgment on the Pleadings at 14, Grimes v. City of Hickory, No. 5:14-CV-00160-RLV (W.D.N.C. Mar. 14, 2016), ECF No. 79 [hereinafter Defs.' Reply Br.]. The district court in *Grimes* never decided the *Corum* and *Craig* issue, as the parties settled prior to the district court ruling on the motion for judgment on the pleadings. *See* Notice of Settlement, *Grimes*, No. 5:14-CV-00160-RLV (Aug. 24, 2016), ECF No. 90.

111. Complaint, *Grimes*, No. 5:14-CV-00160-RLV (Oct. 8, 2014), ECF No. 1. *See, e.g.*, Grimes Mem. in Opp'n, *supra* note 1, at 1. They also raise unique statutes of limitation and repose issues because of the potentially very long time periods between any law enforcement activity and civil cases arising from a finding of actual innocence. *Id.* at 22–23.

112. No. 5:14-cv-00160-RLV (W.D.N.C. Oct. 8, 2014).

113. Grimes' Mem. in Opp'n, *supra* note 1, at 22–23.

114. *Id*. at 1–2

115. Defs.' Reply Br., *supra* note 110, at 9–10.

116. Grimes' Mem. in Opp'n, *supra* note 1, at 22–23; *see also* Defs.' Reply Br., *supra* note 110, at 14.

violations.[117] The question thus became: in analyzing North Carolina law, if a statute of repose bars a plaintiff's claim regardless of when she discovered her injury,[118] can she subsequently be said to have had an "opportunity to enter the courthouse doors"?[119] And if she did not have that opportunity, as guaranteed in *Craig*,[120] can she be said to have had the chance to exercise her rights to bring direct constitutional claims as guaranteed by *Corum*?[121]

The Supreme Court of North Carolina's unequivocal statements regarding both statutes of repose and direct constitutional claims are thus forced into opposition in situations like that of *Grimes*. Once the time period of the statute of repose expires, "the plaintiff 'literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.' "[122] Moreover, "repose serves as an unyielding and absolute barrier."[123] Such statutes are a "substantive definition of rights rather than a procedural limitation,"[124] which reflect a long-standing policy of encouraging diligence in litigation.[125] These strong statements seem to indicate that repose would prevail over the guarantee of the opportunity of a plaintiff to present direct constitutional claims. Nevertheless, *Corum* guaranteed plaintiffs an absolute opportunity to bring claims against the state for constitutional violations, and *Craig* further guaranteed

117. Grimes' Mem. in Opp'n, *supra* note 1, at 22 (first quoting Boudreau v. Baughman, 322 N.C. 331, 341, 368 S.E.2d 849, 857 (1988); and then quoting Craig *ex rel.* Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009)).

118. Hargett v. Holland, 337 N.C. 651, 655, 447 S.E.2d 784, 788 (1994) ("Regardless of when plaintiffs' claim might have accrued, or when plaintiffs might have discovered their injury . . . their claim is not maintainable unless it was brought within [the time period of the statute of repose]."); *see also* Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc., 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276–77 n.3 (1985) ("Statutes of repose . . . create time limitations which are not measured from the date of injury. These time limitations often run from defendant's last act giving rise to the claim."). This distinction from statutes of limitations is important. Where a party was aware of the injury but did not promptly litigate their claim, it is much easier to say that that party had the opportunity to enter the courthouse doors and simply neglected to take advantage of that opportunity. Where the party was never aware of their claim, on the other hand, it is much less straightforward to say that the party had their opportunity in court.

119. *Craig*, 363 N.C. at 340, 678 S.E.2d at 355.

120. *See id.*

121. *See* Corum v. Univ. of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992).

122. *Hargett*, 337 N.C. at 655, 447 S.E.2d at 787 (quoting Rosenberg v. Town of N. Bergen, 293 A.2d 662, 667 (N.J. 1972)).

123. Black v. Littlejohn, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985).

124. Boudreau v. Baughman, 322 N.C. 331, 341, 368 S.E.2d 849, 857 (1988).

125. *See* Ingram v. Smith, 41 N.C. (6 Ired. Eq.) 97, 102 (1849) ("[T]he obvious purpose of our law is to insist peremptorily on diligence . . . not only in point of policy for the sake of repose, but as an act of good faith.").

them the possibility of relief.[126] As a result, a lower state court or federal court facing such a dispute would be caught between the proverbial rock and hard place. As has already been noted, such a dispute is far from hypothetical: courts are already facing this challenge and, as a result, are unable to clearly rule on matters of constitutional rights.[127]

This friction demonstrates two things. First, that the *Corum* line of cases has become a fairly ponderous doctrine, since it cannot be definitively said that a supposedly "unyielding and absolute barrier" would defeat a *Corum* claim, absent further guidance from the Supreme Court of North Carolina.[128] Second, the lack of a discernable outcome—and its resulting uncertainty—highlights the increasing necessity for the law to identify and provide a path forward.

III. HOW *CORUM* SHOULD BE UPDATED FOR THE MODERN DAY

On the one hand, like any developing doctrine, the status of direct constitutional claims under the North Carolina Constitution leaves much to be desired. Lower state and federal courts have been left without clear guidance for too long. This Comment takes the position that while "problematic" is perhaps too strong a word to describe this doctrine, it is at the very least a precarious one. However, the current state of the doctrine provides an opportunity to reshape direct constitutional claims in North Carolina for the modern era. The remainder of this Comment urges the Supreme Court of North Carolina to refine this doctrine, within some delineated contours. Specifically, the court should recognize the dichotomy between substantive barriers, such as statutes of repose, and procedural barriers, such as statutes of limitation, when analyzing *Corum* claims. In doing so, North Carolina courts will have the opportunity to extricate themselves from the morass that has become this quasi-constitutional doctrine.

As previously described, the *Corum* doctrine has perhaps raised more questions than it has answered. Although the constitution does not directly impose upon the court a duty of legal clarity, unclear or vague legal doctrines nonetheless interfere with an individual's ability to follow or utilize the law.[129] It is therefore now appropriate for the Supreme Court of North Carolina to reenter the fray and re-construe

126. *See supra* Sections I.B–C.

127. *See supra* Section I.D & Part II.

128. *Black*, 312 N.C. at 633, 325 S.E.2d at 475.

129. *Cf. In re* Burrus, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969) ("It is well settled law that a statute may be void for vagueness and uncertainty.").

the laws and constitution of North Carolina.[130] In attempting to recommend a path forward for this doctrine, it is helpful to break the analysis down into two parts: the prerequisites for a direct constitutional claim and the guarantee of the possibility of relief.

A. Prerequisites for a Direct Constitutional Claim

In North Carolina, direct claims under the constitution can only be brought when there is no adequate alternative remedy.[131] As discussed above, the doctrine of sovereign immunity means that such an alternative remedy must generally be a statutorily created right of action.[132] This limitation is logical, in accord with traditional principles of deference to statutory regimes,[133] and similar to comparable doctrines in other states.[134] The Supreme Court of North Carolina has long recognized the policymaking discretion of the General Assembly.[135] The requirement of no adequate alternative strikes a just balance with that policy of deference. When the legislature has allowed plaintiffs to recover through statutory enactments, such

130. The Supreme Court of North Carolina has explicitly acknowledged its authority in this context, noting that "issues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with finality by this Court." State *ex rel.* Martin v. Preston, 325 N.C. 438, 449–50, 385 S.E.2d 473, 479 (1989); *see also* N.C. GEN. STAT. § 7A-31 (2016) (listing the grounds for Supreme Court of North Carolina grants of discretionary review). This final judicial authority is even binding upon the U.S. Supreme Court, which lacks ultimate interpretive power over state laws and constitutions. *Cf.* Lea Co. v. N.C. Bd. of Transp., 308 N.C. 603, 610, 304 S.E.2d 164, 170 (1983).

131. Corum v. Univ. of N.C., 330 N.C. 761, 784–85, 413 S.E.2d 276, 290–91 (1992).

132. *See supra* note 3 and accompanying text.

133. *See, e.g.*, Rhyne v. K-Mart Corp., 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004) ("[T]his Court gives acts of the General Assembly great deference." (quoting *In re* Spivey, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997))).

134. *See* Jefferson, *supra* note 50, at 1543–44 nn.107–17 (collecting cases where "courts have refused to create a direct cause of action for damage awards under a state constitution because of the availability of alternative remedies"). Notably, some state courts have allowed direct constitutional claims even where there are adequate non-constitutional remedies. *See, e.g.*, Widgeon v. E. Shore Hosp. Ctr., 479 A.2d 921, 928–29 (Md. 1984) ("Thus, the existence of other available remedies, or lack thereof, is not a persuasive basis for the resolution of the issue [of the existence of a direct constitutional remedy].").

135. *See* City of Asheville v. State, 369 N.C. 80, 105, 794 S.E.2d 759, 777 (2016) ("[O]ur constitution . . . gives the General Assembly exceedingly broad authority."); *id.* at 778–85 (Newby, J., dissenting) (chronicling and detailing the General Assembly's "legislative discretion" in policy decisions); McMichael v. Proctor, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956) ("[T]he General Assembly is the policy-making agency of our government, and when it elects to legislate . . . the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter.").

enactments represent policy decisions of the state.[136] In such cases, the legislature has created a presumably adequate scheme for plaintiffs to recover for injuries; allowing plaintiffs to circumvent that scheme would be to, in effect, nullify an act of the legislature.[137] Finally, deferring to adequate alternative remedies furthers another longstanding judicial canon: "the courts of [North Carolina] will avoid constitutional questions . . . where a case may be resolved on other grounds."[138] This canon serves, when possible, to give full effect to acts of the people.[139] As a result, such deference should be continued. Furthermore, this deference will help to strike a delicate balance with the judicial activism advocated for in the following section.

B. The Possibility of Relief

As the above section shows, the first half of the *Corum* doctrine is strong enough to survive a second look, but trouble arises in the *Craig* guarantee of the "possibility of relief under the circumstances."[140] More specifically, while *Craig* guaranteed plaintiffs a right to bring direct constitutional claims,[141] neither *Craig* nor subsequent cases have clarified what exactly the possibility of relief

136. *Cf. McMichael*, 243 N.C. at 483, 91 S.E.2d at 234; *see also* D & W, Inc. v. City of Charlotte, 268 N.C. 577, 591, 151 S.E.2d 241, 251 (1966) ("Only the General Assembly, therefore, can establish the public policy of this State."); Brown v. Brown, 213 N.C. 347, 349, 196 S.E. 333, 334–35 (1938) ("[W]henever permissible, the courts will assume that the Legislature intended its acts to be consonant with, and not violative of, existing public policy and good morals."); State v. Revis, 193 N.C. 192, 195, 136 S.E. 346, 347–48 (1927) ("It can make no difference whether the judges, as individuals, think ill or well of the manner in which the Legislature has dealt with a given subject, for, so long as the law-making body stays within the bounds of the Constitution, its acts are free from judicial interference.").

137. *Cf.* Greene v. Owen, 125 N.C. 212, 222, 34 S.E. 424, 427 (1899) ("[I]t is . . . our duty to give full force and effect to [constitutional acts of the legislature]."); *see also* State v. Berger, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016) ("[Violations of the separation of powers clause occur] when the actions of one branch prevent another branch from performing its constitutional duties.").

138. Anderson v. Assimos, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam). The Supreme Court of North Carolina's authority to rule on constitutional questions is incident to its authority to determine legal disputes between parties; therefore, as a general matter, it resolves constitutional questions only when there is a need to determine the superiority between conflicting rules of law (such as constitutional versus statutory regimes). Nicholson v. State Educ. Assistance Auth., 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969).

139. *See* 27 JOHN KIMPFLEN, STRONG'S N.C. INDEX § 20, at 246 (4th ed. 2016) ("An act of the people's elected representatives is an act of the people and is presumed valid unless it conflicts with the Constitution.").

140. Craig *ex rel.* Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009).

141. *Id.*

looks like. The lingering question therefore involves what constitutes such a possibility.

The answer to this question is informed by comparable doctrines in other states.[142] The fact that other states have been able to create clear parameters around direct constitutional claims shows that there is logical space for the Supreme Court of North Carolina to maneuver in and examples to learn from or potentially follow. Maryland's highest court, for example, has recognized that "where an individual is deprived [of certain state constitutional rights], he may enforce those rights by bringing a common law action for damages."[143] While slightly different from *Corum* and *Craig*, the Maryland case law is sufficiently similar as to be illuminating. Only a few years after adopting the initial reasoning, the Court of Appeals of Maryland was faced for the first time with the question of "whether a public official should be entitled to qualified immunity" against constitutional claims.[144] After reviewing Maryland case law, the court concluded that "an official who violates an individual's rights under the Maryland Constitution is not entitled to any immunity."[145]

The Maryland court felt that granting qualified immunity would render constitutional claims "an exercise in futility," in that it would simply create a right without a remedy.[146] Such an interpretation would "render nugatory the cause of action for violation of constitutional rights."[147] The court specifically distinguished between ordinary tort actions and constitutional actions by making it clear that ordinary tort actions "protect one individual against another."[148] In such situations, "governmental immunity . . . concern[s] whether, and to what extent, as a policy matter, a government official or entity is treated like an ordinary private party."[149] Constitutional actions, on the other hand, "are specifically designed to protect citizens against . . . government officials."[150] With direct constitutional claims, affording immunity would be "inconsistent" with the very purpose of

142. At one time, more than twenty states recognized constitutional claims for damages. Gail Donoghue & Jonathan I. Edelstein, *Life After* Brown*: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447, 447 n.2 (1998).

143. Widgeon v. E. Shore Hosp. Ctr., 479 A.2d 921, 930 (Md. 1984).

144. Clea v. Mayor & City Council of Baltimore, 541 A.2d 1303, 1311 (Md. 1988).

145. *Id.* at 1314.

146. *Id.* at 1312.

147. *Id.* at 1314.

148. *Id.*

149. *Id.*

150. *Id.*

those constitutional provisions.[151] This explanation is important for two reasons: first, it demonstrates that courts can and have rejected legislative limits on liability when necessary to protect the constitutional rights of citizens; second, it demonstrates that Maryland courts have not backed away from this analysis, proving that such protections can be practically workable.[152]

The Maryland analysis should guide the Supreme Court of North Carolina when assessing complete bars to litigation of constitutional claims.[153] It recognizes that when dealing with direct constitutional claims, there are different considerations to take into account when deciding to afford an immunity or defense. Maryland's strong protection of direct constitutional claims should serve as a guiding light for North Carolina. Constitutional claims are different than statutory or common law claims. Statutory claims in essence reflect the creation of a cause of action by the legislature against the state. Inherent in that legislative power is at least a limited power to curtail and proscribe such grants of rights and associated claims.[154] When the legislature chooses to allow suits against the state under a statutory or regulatory regime, it can also choose associated defenses or bars. The doctrine of sovereign immunity limits common law claims against the state as well. At common law the sovereign is only subject to suit when the sovereign consents.[155] Absent protection of constitutional claims as granted in *Corum*,[156] most suits cannot be brought without specific legislative consent.[157] As a result, sovereign immunity protects

151. *Id.*

152. *See, e.g.*, Espina v. Jackson, 112 A.3d 442, 455–56 (Md. 2015) (holding that the family and estate of a shooting victim could bring constitutional violation claims against a county officer, but that the state legislature could cap the damages amount); Prince George's Cty. v. Longtin, 19 A.3d 859, 887–88 (Md. 2011) (affirming a jury's damages reward for a "pattern or practice of unconstitutional police conduct"); *see also* Dorwart v. Caraway, 2002 MT 240, ¶¶ 53–61, 58 P.3d 128, 139–40 (Mont. 2002) (agreeing with the Maryland court's conclusion in *Clea*, but forbidding qualified immunity in constitutional claims for other reasons). Other states have adopted the *Widgeon* analysis in part or in whole. *See, e.g.*, Cantrell v. Morris, 849 N.E.2d 488, 505 (Ind. 2006) (holding that a state employee was shielded from constitutional claims to the extent a state statute provided immunity); Moresi v. State, 567 So.2d 1081, 1092–93 (La. 1990) (concluding that an individual may seek damages for state constitutional rights violations, but also recognizing a good faith immunity for state officers).

153. Not only sovereign or qualified immunity, but also substantive barriers (such as the statute of repose) may serve as a total bar to any litigation. *See supra* Part II.

154. *Cf.* Whitfield v. Gilchrist, 348 N.C. 39, 41–42, 497 S.E.2d 412, 414 (1998) ("It has long been the established law of North Carolina that the State cannot be sued except with its consent or upon its waiver of immunity.").

155. *See id.*

156. Corum v. Univ. of N.C., 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992).

157. *Whitfield*, 348 N.C. at 41–42, 497 S.E.2d at 414.

the state against common law claims, except when suit has been legislatively authorized.[158]

Furthermore, common law and legislative doctrines are a way for states to allocate resources, whereas constitutions are not. A historical justification for sovereign immunity is that such immunity protects the resources of the state.[159] The process of republican government allows the people, through their elected representatives, to choose how to allocate the resources of the state.[160] Private litigation of common law claims against the state would circumvent that process.[161] Claims brought against the state would (and do) require the judiciary to determine the allocation of some public funds; by awarding damages to plaintiffs, courts are allocating the state's resources to certain citizens and not to others.[162] When the legislature, and not the judiciary, allocates resources, majoritarian rule and the separation of powers is maintained.[163] As James Madison noted in the Federalist No. 10, "the public voice [is] pronounced by representatives of the people."[164] Sovereign immunity prevents common law claims against the state. While courts play an invaluable role in protecting the rights of the minority, sovereign immunity limits the extent to which courts can interfere with decisions of the majority.

In contrast, constitutional claims do not involve statutory authorization for suit, nor do they involve the litigation of rights and injuries between private parties. Constitutions, like Maryland's or North Carolina's, specifically protect enumerated rights of the people against acts of the government.[165] North Carolina's citizens are to be free from government intrusion in their speech, their religious beliefs, their right to assemble, and more.[166] These rights are public rights,

158. Lovelace v. City of Shelby, 351 N.C. 458, 460, 526 S.E.2d 652, 654 (2000).

159. Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 787–88 (2008).

160. N.C. CONST. art III, § 5(3) ("The Governor shall prepare and recommend to the General Assembly a comprehensive budget."); *id.* art. V, § 7(1) ("No money shall be drawn from the State treasury but in consequence of appropriations made by law.").

161. For an enlightening explanation of "sovereign immunity as a democratic safeguard," see Florey*, supra* note 159 at 790–93.

162. *See id.* at 790.

163. *Cf. id.*; *see also* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 802–03 (2007); Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1530 (1992) ("Much of sovereign immunity, however, derives . . . from a proper commitment to majoritarian rule.")

164. THE FEDERALIST NO. 10, at 53 (James Madison) (Lawrence Goldman ed. 2008).

165. N.C. CONST. art I.

166. *Id.* art. I, §§ 12–14.

given to all citizens; as a result, the justifications for limiting claims against the state in statutory or common law suits are inapposite to constitutional claims. Whereas the General Assembly can limit claims against the state to conserve resources, any restriction of constitutional rights must survive judicial scrutiny. If North Carolina is going to continue to allow direct constitutional claims, creating total bars to those claims would be, as noted by the Court of Appeals of Maryland, "inconsistent" with the very purpose of the constitutional provisions.[167] Moreover, a right without a remedy is meaningless; complete bars on litigation would render constitutional claims futile.[168]

Whereas the status quo of North Carolina direct constitutional claims is murky, the supreme court should look to examples of clear regimes (such as that of Maryland) in fashioning a better way forward. What this should mean practically for future North Carolina constitutional litigation is that in situations where immunities would act as a complete bar on litigation, or where a substantive provision such as the statute of repose would completely bar claims a plaintiff never even had the opportunity to litigate, the plaintiff should have the possibility of relief. Not only is this logically compelling (where the plaintiff never had the opportunity to bring a claim, it cannot be said she has the possibility of relief), but this conclusion is also compelled by the policies and reasons discussed above. A claim substantively barred by a statute of repose means that a plaintiff would be completely precluded from recovery. Therefore, a plaintiff should be allowed to proceed with a direct constitutional claim as a way of not only having the possibility of relief but also as a way of potentially vindicating important constitutional rights.

Quite simply, direct constitutional claims are just different. Constitutional claims are a breed of their own, and have come to serve as an important check on state and local governments.[169] In order to continue to serve an effective purpose, the guarantee of the possibility of relief should be extended to litigation which otherwise would be completely barred, allowing the plaintiff who would otherwise be left outside the courthouse door the opportunity to come in and present her claim.

167. Clea v. Mayor & City Council of Baltimore, 541 A.2d 1303, 1314 (Md. 1988).

168. Indeed, the right of injured parties to "apply[] to the courts" for a "remedy by the course of law" has been recognized since before this country and this state's independence. 1 WILLIAM BLACKSTONE, COMMENTARIES *141.

169. Brennan, *supra* note 66, at 495 (explaining that state constitutions can guarantee more protection of citizens' rights than federal constitutional provisions).

What this Comment proposes is a dichotomy between substantive and procedural (or perhaps better thought of as unyielding and yielding) barriers to recovery. Unsurprisingly, resolving situations when defenses do not serve as unyielding barriers to litigation is easier and requires less discussion. For example, statutes of limitation can bar litigation, but do not serve as complete bars. Typically, the accrual of the limitations period begins "when the plaintiff is injured or discovers he or she has been injured."[170] Unlike qualified immunity or statutes of repose, which can bar claims regardless of any action by the plaintiff, statutes of limitations allow the plaintiff the opportunity to litigate his claim.[171] They are intended not to vitiate or circumscribe liability, but instead to simply "require diligent prosecution of known claims."[172] A claim barred by the expiration of the statute of limitations does not mean that the plaintiff has *no* possibility of relief; rather, it means that the plaintiff squandered that ability. Unlike the doctrines discussed above, which per se reduce or remove entirely a plaintiff's ability to hold the state responsible for violations of their rights, doctrines such as the statute of limitations, contributory negligence, and res judicata only limit the state's liability as a result of the plaintiff's actions.

Moreover, whereas the statute of repose is a substantive limitation, statutes of limitation are procedural rules.[173] Statutes of limitation are enforced subject to equitable considerations[174] and do not define rights or injuries.[175] Statutes of repose, on the other hand, "are intended to mitigate . . . potentially limitless legal exposure."[176] While statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until

170. Christie v. Hartley Constr., Inc., 367 N.C. 534, 538, 766 S.E.2d 282, 286 (2014).

171. *Id.* (highlighting that statutes of limitations only limit those claims brought outside of the limitation period and that furthermore, the "enforceability [of statutes of limitations] is subject to equitable defenses").

172. *Id.* (quoting *Statute of Limitations*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

173. *Id.*

174. *Id.* (citing Nowell v. Great Atl. & Pac. Tea Co., 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959)).

175. *Cf.* Bolick v. Am. Barmag Corp., 306 N.C. 364, 366–67, 293 S.E.2d 415, 417–18 (1982); *see also id.* at 366 n.3, 293 S.E.2d at 417 n.3 (noting that the term "statute of repose" historically encompassed "statute of limitation" before practitioners began differentiating between the terms).

176. *Christie*, 367 N.C. at 539, 766 S.E.2d at 287.

evidence has been lost,"[177] statutes of repose "provide a fresh start or freedom from liability" entirely.[178]

This difference will ultimately prove to be a worthwhile guide for the Supreme Court of North Carolina in future litigation. Substantive bars to recovery, whether the result of duly enacted legislation by the General Assembly or a product of the common law, should in effect be subsumed by direct constitutional claims. The North Carolina Constitution is the supreme law of North Carolina, and is superior to other laws of the state.[179] At common law, the sovereign could not be sued, as the courts were mere instrumentalities of the sovereign.[180] Nevertheless, the constitution binds the sovereign[181] and it is the role of the state courts to pass on matters of constitutionality.[182] As such, constitutional claims should not be constrained by substantive doctrines which are, by definition, inferior.[183]

On the other hand, procedural rules and doctrines do not interact in the same manner; they do not purport to constrain constitutional rights, but instead guide litigation.[184] They do not preclude litigation and recovery; they simply govern the procedures

177. Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944).

178. CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2183 (2014).

179. *Cf.* S. Ry. Co. v. Cherokee Cty., 177 N.C. 87, 88, 97 S.E. 758, 759 (1919) ("[T]he courts [of North Carolina must] sustain the will of the people as expressed in the Constitution.").

180. N.C. Dept. of Transp. v. Davenport, 334 N.C. 428, 431, 432 S.E.2d 303, 305 (1993).

181. *S. Ry.*, 177 N.C. at 88, 97 S.E. at 759 ("The Constitution is the supreme law . . . . [It] is intended for the observance of the judiciary as well as the other departments of government."); State v. Patterson, 98 N.C. 660, 662, 4 S.E. 350, 351 (1887) ("[W]hen the constitution prescribes and directs . . . [the powers of government], such direction cannot be disregarded.").

182. *S. Ry.*, 177 N.C. at 88, 97 S.E. at 759 ("[I]t is not only within the power, but . . . it is the duty, of the courts in proper cases to declare an act of the Legislature unconstitutional, and this obligation arises from the duty imposed on the courts to declare what the law is.").

183. A counter-argument should be noted here. As the U.S. Supreme Court has said, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent* . . . . Unless, therefore, there is a surrender of this immunity in the plan of the [constitutional] convention, it will remain with the States." Hans v. Louisiana, 134 U.S. 1, 13 (1890) (quoting THE FEDERALIST NO. 81, at 399 (Alexander Hamilton) (Lawrence Goldman ed. 2008)). As a result, the authority of any court, even the North Carolina Supreme Court, to abrogate or limit sovereign immunity is at least open to question. However, because *Corum* purported to specifically limit sovereign immunity, *supra* text accompanying notes 47–54, the Supreme Court of North Carolina's authority is assumed in this Comment. Furthermore, while *Hans* was ostensibly premised in the Eleventh Amendment to the U.S. Constitution, 134 U.S. at 15, 18, the North Carolina Constitution (logically) does not have a corresponding provision.

184. Gardner v. Gardner, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980).

by which such litigation and recovery work. A plaintiff's own actions, not the actions of the state, ultimately trigger the bar. Therefore, in trying to identify what the contours of the *Corum* doctrine should be, where claims would be completely barred by a substantive doctrine, it should be held that the possibility of relief does not exist. In contrast, where the plaintiff has had the opportunity for relief and is barred procedurally as a result of his or her own actions, it is straightforward to say that the plaintiff had the appropriate opportunity to relief.

C. Corum*, Modified.*

The final task is to elucidate what exactly this Comment recommends to North Carolina courts in future litigation, using the points discussed above. First, a significant portion of the extant doctrine deserves to be continued. The court should defer to the legislature when doing so would be equitable; in other words, the court should yield to already established non-constitutional claims (such as a statutory right of action allowing recovery for constitutional violations), which would allow the plaintiff adequate relief. This policy of judicial restraint and discretion would allow plaintiffs the opportunity to be compensated for injuries, while also deferring to the common law or legislative judgments.

This policy of prudence is also important when it comes to the second suggestion: that the supremacy of the North Carolina Constitution dictates that direct constitutional claims prevail over traditional substantive legal hurdles, that claims substantively barred at state law are inadequate, and that plaintiffs should thus be allowed to bring direct constitutional claims. Because of the primacy of the constitution, constitutional claims should not be subject to traditional substantive barriers to recovery. True, substantive bars can bar claims at common or statutory law; however, these bars should not be allowed to completely preclude litigation. When claims at state law are substantively barred, the plaintiff is without an adequate remedy and should be allowed to bring alternative constitutional claims. The sovereign is bound by the constitution and by the court's interpretation of constitutional matters.[185] When substantive doctrines circumscribe claims at state law, plaintiffs are left without an adequate remedy and should be allowed to present direct constitutional claims against the state. Such a rule would fulfill *Craig*'s guarantee of access to the courthouse.

185. *See S. Ry.*, 177 N.C. at 88, 97 S.E. at 759.

This proposal should not be interpreted as subjecting the state to unending liability. Unlike substantive doctrines, procedural matters do not abridge or define rights.[186] Res judicata or statutes of limitation serve to encourage due diligence in litigation,[187] and not to define liability. Any resulting limitations of claims would not be due to the sovereign defining liability, but would rather be the result of the plaintiff failing to diligently vindicate his or her rights.[188] Therefore, under the *Corum* doctrine, a plaintiff whose claims are procedurally barred had an adequate remedy at state law and should not in the alternative be allowed to bring a direct constitutional claim. Moreover, *Corum* and its progeny, as well as this Comment, focus on remedies, not recovery. As judges have noted, "a remedy is not synonymous with actual recovery"—a remedy is only the "possibility of relief under the circumstances."[189] This proposal is not synonymous with increased recovery for plaintiffs; rather, it advocates for increased opportunities to present constitutional claims—recovery will still depend on the merits.

CONCLUSION

This Comment has identified the elements of a direct constitutional claim in North Carolina. Then, taking the elements in turn, it has not only identified the contours of such a claim, but it has also suggested ways in which the doctrine can be modified and strengthened. As has been demonstrated, the body of law created by the Supreme Court of North Carolina in *Midgett*, expanded in *Corum*, and modified in *Craig*, remains to this day a powerful tool of litigation. It furthers the central goal of North Carolina's Constitution—to secure the rights of all persons.[190] This powerful doctrine, however, has been obfuscated over time, dulling the once bright constitutional guarantees. Nevertheless, *Corum* and its progeny retain their value to this day, remaining the subject of litigation and

186. *Gardner*, 300 N.C. at 718, 268 S.E.2d at 471.

187. Christie v. Hartley Constr., Inc., 367 N.C. 534, 538, 766 S.E.2d 282, 286 (2014) (statute of limitations); Bockweg v. Anderson; 333 N.C. 486, 498, 428 N.C. 157, 165 (1993) (res judicata and collateral estoppel).

188. *Cf.* Nowell v. Great Atl. & Pac. Tea Co., 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959) (explaining that statutes of limitation operate as defenses not based on any "lack of merit").

189. Edwards v. City of Concord, 827 F. Supp. 2d 517, 524 (M.D.N.C. 2011) (quoting Craig *ex rel*. Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009)).

190. N.C. CONST. pmbl.; Corum v. Univ. of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 290 (1992) ("The fundamental purpose for [the constitution] was to provide citizens with protection from the State's encroachment upon [their rights].").

dispute. It is this very relevance that calls for supreme court action. By ensuring the primacy of the constitution while also recognizing the importance of procedural rules, it is possible to reshape the *Corum* doctrine for the modern era. Nearly forty years ago, Justice William Brennan recognized that state constitutions "are a font of individual liberties."[191] By readdressing this doctrine, the Supreme Court of North Carolina can ensure the protection of individual liberties in the future.

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191. Brennan, *supra* note 66, at 491.

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