Amending the NC Constitution
The People's Right
By Jeanette Doran
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North Carolina is grappling with a recent state Supreme Court order and decision throwing out redistricting maps drawn by the General Assembly and a subsequent decision forcing judicially imposed Congressional districts on us. In a 4-3 decision, the Supreme Court of North Carolina held that state legislative and Congressional maps were unconstitutional "partisan gerrymanders." The majority opinion drips with odes to its view of "fairness." To be clear, the plain language of the constitution does not prohibit partisan consideration by the legislature in the districting process. In a fierce dissent joined by two associate justices, Chief Justice Paul Newby wrote of the majority's decision:

> With this decision, unguided by the constitutional text, four members of this Court become policymakers. They wade into the political waters by mandating their approach to redistricting. They change the time-honored meaning of various portions of our constitution by inserting their interpretation to reach their desired outcome. They justify this activism because their understanding of certain constitutional provisions has "evolved over time." They lament that the people have not placed a provision in our constitution for a "citizen referendum" and use the absence of such a provision to justify their judicial activism to amend our constitution. The majority says courts must protect constitutional rights. This is true. **Courts are not, however, to judicially amend the constitution to create those rights**. As explicitly stated in our constitution, the people alone have the authority to alter our foundational document, and the people have the final say.

Harper v. Hall, 2022 NCSC-17, ¶228 (14 Feb 2022) (emphasis added).

In later orders in the same case, the Supreme Court effectively approved maps for redrawn legislative districts and upheld a lower court decision to force the use of Congressional maps created by "special masters" the judges picked.

The *Harper* decision is part of a trend of judicial activism aimed at rewriting the North Carolina Constitution. But, as the Chief Justice himself put it, courts are not to amend the constitution. That right belongs solely to the People. Courts interpret and apply the constitution; they do not write it. The process by which the constitution may be amended is clearly spelled out in the constitution itself—and the courts are not a part of that process. As explained below, three key constitutional provisions set out the context and framework for the amendment process.

Article I, Section 2 of the North Carolina State Constitution states: "All political power is vested in and derived from the people; all government of right originates from the people, is founded on their will only, and is instituted solely for the good of the whole."

Article I, Section 3 provides: "The people of this State have the inherent, sole and exclusive right … of altering … their constitution."

Article XIII, Section 4 sets forth one of only two ways[1] by which the North Carolina Constitution can be amended, stating in part: "[a]mendments to this Constitution may be initiated by the General Assembly, but only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection."

Once an amendment is drafted and approved by the requisite supermajority of the General Assembly, altering the constitution is up to the people. Even the governor is without power to block an amendment because the amendment adopted in 1996 granting the governor the power to veto legislation expressly exempts "every bill proposing a new or revised Constitution or an amendment or amendment to this Constitution or calling a convention of the people of this State." N.C. Const. art. 11, § 22.

The constitution requires that the time and manner of proposing an amendment is left to the General Assembly. The time is usually at an election for members of the General Assembly, though one notable exception was the 2012 amendment relating to marriage. The manner of presenting the amendment is set out in both the bill proposing the amendment and statutes generally applicable to the amendment process. Those statutes are described below.

At least 75 days[2] prior to an election in which an amendment to the North Carolina Constitution is to be voted on,

[1] The other method of amending the Constitution, a constitutional convention, is found at N.C. Const. art. XIII, § 3. The most recent convention in the state's history was the Convention of 1875.

[2] Prior to 2016, the time frame for this explanation was 60 days prior to the election. Session Law 2016-109, s. 10 lengthened the period to 75 days for elections held on or after July 22, 2016.

the North Carolina Constitutional Amendments Publication Commission ("the Commission") must prepare an explanation of the amendment, revision, or new Constitution in "simple and commonly used language." N.C.G.S. § 147-54.10. Although the name "North Carolina Constitutional Amendments Publication Commission" sounds bureaucratic and cumbersome, in reality, the Commission has only three members: the Secretary of State who serves as Chair, the Attorney General, and the Legislative Services Officer. All three members must be present for quorum. N.C.G.S. § 147-54.9.

The Secretary of State is required to print the summary prepared by the Commission, in a quantity determined by the Secretary of State. A copy shall be sent along with a news release to each county board of elections, and a copy shall be available to any registered voter or representative of the print or broadcast media making request to the Secretary of State. The Secretary of State may make copies available in such additional manner as he or she may determine. N.C.G.S. § 147-54.10.

The power to amend the constitution is the people's ultimate tool to preserve liberty. Understanding the amendment process is crucial for voters who seek to enforce constitutional limitations on government. North Carolinians should consider carefully any amendment put to them. History shows us they do. Consider for example, ten amendments submitted to voters in 1914, every one of which was rejected by voters. In 1982, voters consider seven amendments, ratifying three and rejecting four. See Our Constitutions: An Historical Perspective, John L. Sanders (undated). More recently, in 2018, voters faced six amendments. They voted to reject two and ratify four, including a cap on the state income tax rate and a voter identification requirement are the subject of an appeal pending at the North Carolina Supreme Court.

North Carolinians care about what is in their constitution, and they care about what *isn't*. It is not the role of the courts to rewrite, revise, or redo the People's constitution. That responsibility is the "inherent, sole, and exclusive right" of the people.

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About the Author

Jeanette Doran has served as President and General Counsel of the North Carolina Institute for Constitutional Law since returning to the Institute to reorganize and restart the organization in July 2019.

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